VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA, **Plaintiff,** **v.** **ACKERMAN MCQUEEN, INC.** **And** **MERCURY GROUP, INC.** **Defendants.**	**Case Nos. CL19001757, CL19002067**

PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER REGARDING DEPOSITIONS

Plaintiff the National Rifle Association of America (the "NRA"), by counsel, hereby moves this honorable Court for entry of a Protective Order that (1) would prohibit further questioning of a witness by two attorneys from the same firm during the remaining depositions (so-called "tag teaming") and (2) would require the parties to comply with Virginia Supreme Court Rule 4:5(a1)(i) or, in the alternative, require the parties to hold a party deposition at the law offices of counsel for the party defending the deposition. In support thereof, the NRA states the following:

A. The Court Should Prohibit Counsel From The Same Law Firm That Jointly Represent The Closely Related Defendants From Using Two Attorneys To Question A Single Witness at Deposition

1. Court intervention is justified to ensure that party depositions are conducted in a civil and professional manner and in the absence of tactics intended to abuse this important discovery device and harass the witness. *See generally Hall v. Clifton Precision*, 150 F.R.D. 525,

531 (E.D. Pa. 1993) (describing depositions as the "factual battleground" where litigation now takes place).

2. Throughout this litigation, Mr. David Dickieson and his colleagues at the law firm of Schertler & Onorato, LLP have represented to this Court that, and conducted themselves in a manner demonstrating that, his law firm jointly represented *both* of the Defendants in this case, Ackerman McQueen and its *wholly owned subsidiary*, Mercury Group, as outside counsel. *See, e.g.*, 8/28/19 Hearing Tr. at p. 3 (David Dickieson: "Good morning, your Honor. David Dickieson and Jose Gonzalez on behalf of Ackerman McQueen and the Mercury Group") (attached at Ex. 1); 6/3/19 Declaration of David Schertler ("I am counsel for Ackerman McQueen and the Mercury Group, Inc. (collectively 'Ackerman'), in the above captioned litigation") (attached at Ex. 2); 6/3/19 Declaration of David H. Dickieson ("I am counsel of record for Ackerman McQueen and the Mercury Group, Inc. (collectively 'Ackerman'), in the above captioned litigation") (attached at Ex. 3); Defendants' Answer, Plea in Bar, and Counterclaim (filed May 23, 2019); Defendants' Motion for Preliminary Injunction (filed June 19, 2019); Defendants' Responsive Pleadings: Answer, Affirmative Defenses, Plea in Bar, Demurrer, and Counterclaim (filed June 19, 2019). In short, this pattern of conduct has occurred in multiple contexts, including interactions with opposition counsel, at hearings, and in filings to the Court.

3. There is no reason to believe that Mercury Group's and Ackerman McQueen's interests are not fully aligned in this lawsuit. Indeed, if their interests did not substantially overlap, there could be serious ethical concerns with Schertler & Onorato's joint representation of the Defendants. *See* ABA Model Rules on Professional Ethics, Rule 1.7 ("Concurrent conflicts of interest can arise form a lawyer's responsibilities to another client . . . .")

4. In light of the above, there can be no real dispute that Schertler & Onorato and its lawyers jointly represent – in form and in substance – both of the closely affiliated Defendants in this case and that the Defendants should be considered one entity with a shared common interest for purposes of counting the number of attorneys allowed to question a witness at deposition.

5. However, during the recent deposition of Mr. Wayne LaPierre, the CEO and Executive Vice President of the NRA, two attorneys from Schertler & Onorato, LLP decided to "double-team" Mr. LaPierre and abuse the deposition process for the purpose of harassment, over the objection of counsel for the NRA. 9/24/16 LaPierre Dep. Tr. at 287:21-25 – 293:8 (Ex. 4). [1] At Mr. LaPierre's deposition on September 24, Mr. Schertler stated that he would be representing Ackerman McQueen, with Mr. Dickieson indicating that he would be representing Mercury Group. 9/24/16 LaPierre Dep. Tr. at 8:19 – 9:1 (Ex. 4).[2] Mr. Schertler first examined Mr. LaPierre, and after the conclusion of his examination, Mr. Dickieson began questioning the witness. *Id.* at 287:21 – 288:2 (Ex. 4). Unsurprisingly, Mr. Dickieson's questioning turned into a second round of Mr. Schertler's earlier questioning and asked only a *single* question regarding Mercury Group. *See id.* at 315:5-10 (Ex. 4).[3]

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[1] The NRA has sought an order authorizing the sealing of the excerpts of the deposition of Mr. LaPierre submitted in connection with this motion, concurrently herewith.

[2] The parties have agreed that the deposition transcript of Mr. LaPierre should be designated confidential under the proposed protective order currently pending before the Court. 9/24/16 LaPierre Dep. Tr. at 9:19-25; 332:22-25 (Ex. 4). For this reason and due to the confidential nature of information contained in Mr. LaPierre's deposition, Defendants have moved to seal these deposition excerpts as confidential, concurrently herewith. Once the Order to seal is granted, then Plaintiff will submit the deposition excerpts under seal with the Court.

[3] Mr. Dickieson refused to commit to only questioning Mr. LaPierre about Mercury Group, "No, of course [the questions] have something to do with Ackerman McQueen because you've sued both of them." *See* 9/24/16 LaPierre Dep. Tr. at 291:25 – 292:1-2 (Ex. 4).

6. At the deposition of Mr. LaPierre, Mr. Dickieson further insisted that from one deposition to the next deposition he could "switch hats" from representing solely Ackerman McQueen to representing solely Mercury Group. 9/24/16 LaPierre Dep. Tr. at 290:14-16 (Ex. 4). This remarkable and unexplained elevation of form over substance is belied by the undisputed facts that he, Mr. Schertler, and Joseph Gonzalez, all attorneys with Schertler & Onorato, have jointly represented and appeared on behalf of *both* Defendants in court filings and at depositions and hearings before the Court throughout this case, as detailed above.

7. The ongoing threat of such gamesmanship was proven beyond doubt when, less than two days later, at the September 26 deposition of Mr. Ron Carter, Mr. Dickieson abandoned his previous sole representation of Mercury Group and took the position he now represented only Ackerman McQueen. On this occasion, it would be Mr. Gonzalez who would serve as the "sole" counsel for Mercury Group, even though he had stated that he was counsel for Ackerman McQueen in the LaPierre deposition and in previous statements to the Court. *See* 9/24/16 LaPierre Dep. Tr. at 8:22-23 (Ex. 4); 9/26/19 Carter Dep. Tr. at 6:2-4 (Ex. 5).

8. The purpose and intent of the "tag teaming" engaged in at the deposition of Mr. LaPierre, the Executive Vice President and Chief Executive Officer of the NRA, is obvious. By using two examining attorneys, the second questioner has the opportunity to listen carefully to the witness testimony obtained by the first questioner, and during the second examiner's examination he or she returns to same subject matters covered previously with a fresh perspective, which facilitates, among other things, asking follow up questions that the first questioner did not cover, seeking to unwind unhelpful testimony provided by the witness previously, and harassing the witness by attempting to obtain specific admissions on issues that the witness previously had refused to provide. *See Empire Med. Review Servs, Inc., v. Compuclaim, Inc.*, No.13-CV-1382,

2016 WL3676456, at *2 (E.D. Wisc. July 6, 2016) (holding that party could not divide its questioning of witnesses among its separately-retained attorneys, explaining that "the court is sensitive to witnesses being tag-teamed by more than one lawyer for the same party. When one lawyer runs out of steam (or questions), another hops in the ring and continues the examination, bringing a fresh perspective and a new list of questions).

9. As demonstrated above, because the Defendants share the same counsel, are in a parent and wholly-owned-subsidiary relationship, and there is no evidence that their interests are not generally aligned, it would be an elevation of form over substance to conclude there is more than one real client. Accordingly, *Compuclaim* and other analogous authorities apply here and compel the conclusion that the practice of counsel for Defendants is unreasonable and abusive.

10. At both depositions, counsel for the NRA clearly objected to the unusual and inherently unfair, burdensome, and harassing conduct of counsel for Defendants. *See* 9/24/16 LaPierre Dep. Tr. at 18:41:33-18:42:59 (Ex. 4); 9/26/19 Carter Dep. Tr. at 6:16 – 7:15 (attached at Ex. 5).

11. At no time has an explanation for this sophistry been provided by Defendants. Simply put, any "tag teaming" of deposition witnesses by counsel who jointly represent closely related Defendants that have no apparent divergent interests has not been, and is not, justified.

12. Courts from across the country have routinely determine that attorney "tag-teaming" of a witnesses at deposition is unreasonable and harassing conduct in violation of the rules of discovery, including:

- *Compuclaim, Inc.*, 2016 WL3676456, at *2 (holding that the "tag-team[ing]" of witnesses was unjustified, explaining that "multiple lawyers for one party examining or cross-examining a witness is exceptional");
- *Applied Telematics, Inc. v. Sprint Corp.*, No. CIV.A. 94-CV-4603, 1995 WL 79237, at *4 (E.D. Pa. Feb. 22, 1995) ("[O]nly one attorney for each party shall be permitted to

act as counsel during a deposition. The examination and cross-examination during a deposition proceed in the same manner as at trial . . . . [I]n order to proceed in a [sic] effective manner, without harassing the witness, only one attorney at a time shall be designated as the 'voice' of counsel at a deposition." (citing 4A Moore's Federal Practice, ¶ 30.58, p. 30–131.));

- *United Nat'l Records, Inc., v. MCA, Inc.*, No.82C7589, 1985 WL 705, at *2 (N.D. Ill. Apr. 24, 1985) (concluding that counsel's objection to tag-teaming witnesses had merit and that in "future depositions, one lawyer should question the witness on behalf of the plaintiff class," as opposed to multiple class counsel);

- *In re Cummins*, 144 B.R. 426, 428 (Bankr. W.D. Ark. 1992) ("[E]xamination by multiple attorneys representing one party may be oppressive . . . . [O]nly one attorney for each party may examine or cross-examine [Plaintiff] during his deposition.");

- S.D. Fla. L.R. Appx. A, § II.A(2)) at 102 ("While more than one lawyer for each party may attend [depositions], ordinarily only one should question the witness or make objections, absent contrary agreement.");

- M.D. Fla. L.R. Appx. A, § II.A(2)) at 6 ("While more than one lawyer for each party may attend [depositions], ordinarily only one should question the witness or make objections, absent contrary agreement.");

- M.D. Ala. Guidelines for Civil Discovery Practice, § II.B at 5 ("While more than one lawyer for each party may attend [depositions], ordinarily only one should question the witness or make objections, absent contrary agreement."); and

- S.D. Ala. Guidelines for Civil Discovery Practice, § VI.B at 25 ("While more than one lawyer for each party may attend [depositions], ordinarily only one should question the witness or make objections, absent contrary agreement.").

13. For the reasons stated above, a protective order is appropriate in this case to protect the NRA from the "annoyance . . . oppression [and] undue burden" concomitant with the conduct of counsel for Defendants. *See* Va. Sup.Ct. R. 4:1(c). In substance, Defendants should be considered a single client for the reasons discussed above; however, their counsel resorts to "tag teaming" as a tactic to obtain an unfair advantage and to annoy and harass the NRA's employee-witnesses. Defendants have not indicated any intention to stop this practice, much less attempted to justify their facially unreasonable conduct to date. An appropriate protective order is warranted.

B. The Court Should Order The Parties To Comply With Va. Sup. Ct. R. 4:5(a1)(i) And That, In The Alternative, That Depositions Should Be Located At The Offices Of Counsel For The Party Defending The Deposition

14. Before a party witness deposition takes place outside "the city or county where the suit is pending" or "in an adjacent county or city" within the Commonwealth of Virginia, there must either be an "agree[ment]" by "the parties" or a directive from this Court. *See* Va. Sup. Ct. R. 4:5(a1)(i). Granting such a directive lies within the sound discretion of the Court and requires the movant to demonstrate "good cause." *Id.*

15. At no time have Defendants sought such discretionary relief from the Court or attempted to satisfy the requisite good cause showing needed to justify abandoning the default rule that party depositions must take place at a location in the Commonwealth of Virginia. Nor has the Court designated a location for any party witness depositions upon a showing of good cause made by Defendants as to why the deposition should take place outside Alexandria or in an adjacent county or city within the Commonwealth of Virginia. *See* Va. Sup. Ct. R. 4:5(a1)(i).

16. On September 24, 2019, Mr. Wayne LaPierre, Executive Vice President and Chief Executive Officer of the NRA, appeared with counsel at the law offices of Defendants' counsel, Schertler & Onorato, LLP, located at 901 New York Avenue, N.W., Suite 500, Washington, D.C., for a scheduled party witness deposition. Mr. La Pierre's attendance was made subject to counsel for the NRA's objections, which included, among other things, an objection based on Va. Sup. Ct. R. 4:5(a1)(i).

17. Prior to the deposition of Mr. LaPierre, the parties had not agreed to where the depositions of party witnesses, including specifically the deposition of Mr. LaPierre, were to take place. Nonetheless, counsel for the NRA diligently objected, in emails dated September 21 and September 23, 2019 to the deposition taking place in Washington, D.C on the ground that such a

location was non-compliant with the default location rules found in Virginia Supreme Court Rule 4:5(a1)(i) and no exception had been satisfied. *See* 9/23/19 Email from Robert H. Cox to David Schertler and 9/21/19 Email from Michael Collins to David Schertler and Joseph Gonzalez) (attached at Ex. 6).

18. It was unreasonable and unduly burdensome for party witness depositions to take place in Washington, D.C., a location that was never agreed upon by the parties, never designated by this Court as an appropriate location upon a showing of good cause, and a location that is not the city of Alexandria or Alexandria City County, an or an adjacent city or county in the Commonwealth. Mr. LaPierre resides in the Commonwealth of Virginia, and it presented an undue burden to travel to Washington, DC on the morning of September 24 to attend his deposition, which violated Virginia Supreme Court Rule 4:5(a1)(i).

19. Nonetheless, the NRA allowed Mr. LaPierre to testify at his deposition out of professional courtesy and a desire the move discovery in this case forward. However, Defendants have demanded that additional NRA witnesses in the future appear for deposition in Washington, DC. *See* Second Amended Notice of Deposition of Andrew Arulanandam (Ex. 7); Second Amended Notice of Deposition of Craig Spray (Ex. 8).

20. At this point, judicial intervention is warranted to ensure that no additional party witness depositions take place outside of either Alexandria or a county or city adjacent to Alexandria in the Commonwealth of Virginia. *See* Va. Sup. Ct. R. 4:1(c). As contemplated by the clear and unambiguous language of the controlling rule, it is presumptively and, in most cases, represents an undue burden for a party witnesses to travel outside the Commonwealth to Washington, DC to attend a morning deposition.

21. Rather, a more reasonable and less burdensome approach should be that party witnesses are presumptively deposed at a location within the Commonwealth pursuant to Virginia Supreme Court Rule 4:5(a1)(i). *See Archer Daniels Midland Co. v. Aon Risk Services, Inc. of Minnesota*, 187 F.R.D. 578, 587 (D. Minn. 1999) (ordinary employees are subject to general rule that a deponent should be deposed near his or her residence or principal place of work); *Buzzeo v. Board of Educ., Hempstead*, 178 F.R.D. 390, 392 (E.D. N.Y. 1998) (where corporation is involved as party to litigation there is general presumption in favor of conducting deposition of corporation in its principal place of business).

22. Alternatively, the parties should hold a party deposition at the law offices of counsel for the party defending the deposition (e.g., holding the deposition of a party witness from AMc at the law offices of Schertler & Onorato, LLP). Holding a party deposition at the law offices of the party defending the deposition is often the most convenient location for the witness, is typically the standard practice for the location of depositions in complex, civil litigation, and trumps any potential inconvenience of counsel. *Cf. Yaskawa Elec. Corp. v. Kollmorgen Corp.*, 201 F.R.D. 443, 445 (N.D. Ill. 2001) (holding that "the inconvenience of counsel was less burdensome than hardship to non-party witness" located outside of United States in rejected plaintiffs' proposed location of Chicago, Illinois) (relying on *Devlin v. Transp. Communic. Int'l Union*, Nos. 95 Civ. 0752 JFK JCF, 95 Civ. 10838 JFK JC., 2000 WL 28173, at *4 (S.D.N.Y. Jan.14, 2000), for the general proposition that "[o]ne attorney or the other will be discommoded, depending upon the choice of site. In any event, the convenience of counsel is less compelling than any hardship to the witness").

WHEREFORE the NRA requests that the Court enter a Protective Order (1) ordering that there shall be no further questioning of a witness by two attorneys from the same firm during the

remaining depositions, absent agreement by the parties, (2) ordering that the parties comply with Va. Sup. Ct. R. 4:5(a1)(i) and hold depositions within the Commonwealth or, in the alternative, that a party deposition should occur at the law offices of counsel for the party defending the deposition, and (3) granting the NRA all other appropriate relief.

Dated: October 1, 2019

Respectfully submitted,

NATIONAL RIFLE ASSOCIATION
OF AMERICA
By counsel

[redacted]

James W. Hundley (VSB No. 30723)
Robert H. Cox (VSB No. 33118)
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Counsel for the National Rifle Association of America

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2019, I caused the foregoing Plaintiff's Motion for Protective Order in CL19001757/CL19002067 (Consolidated) to be served via electronic mail and first-class mail upon:

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James W. Hundley (VSB No. 30723)
Robert H. Cox (VSB No. 33118)
Amy L. Bradley (VSB No. 80155)

EXHIBIT 1

COMMONWEALTH OF VIRGINIA

IN THE ALEXANDRIA CIRCUIT COURT

NATIONAL RIFLE ASSOCIATION OF AMERICA,

Plaintiff,

-vs- Case Nos. CL 19001757 and CL 19002067

ACKERMAN MCQUEEN, INC.

and

MERCURY GROUP, INC.

Defendants.

HEARING in the above-entitled matter, held in Alexandria Circuit Court in Alexandria, Virginia, on August 28, 2019, before the HON. NOLAN DAWKINS, Presiding Circuit Court Judge.

Reported by:

Jacqueline N. Hagen

A P P E A R A N C E S

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AND: JOSEPH A. GONZÁLEZ, Esq.

P R O C E E D I N G S

(Whereupon the proceedings commenced at 11:20 a.m.)

MR. HUNDLEY: Good morning, your Honor.

THE COURT: Good morning.

MR. HUNDLEY: Jim Hundley on behalf of the National Rifle Association of America. This is Michael Collins.

MR. DICKIESON: Good morning, your Honor. David Dickieson and Jose Gonzalez on behalf of Ackerman McQueen and the Mercury Group.

THE COURT: All right. Let's see.

MR. HUNDLEY: Your Honor, there's -- there's one that there's an Agreed Order, motion to amend our answers. I just hand up the Agreed Order to resolve that matter.

THE COURT: All right.

MR. HUNDLEY: Your Honor, I call -- your law clerk had suggested that the Court might find useful a transcript from the earlier pro hac vice motion that's cited in the

EXHIBIT 2

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA, Plaintiff, v. ACKERMAN MCQUEEN, INC. and MERCURY GROUP, INC. Defendants.	Civil Case No. CL19001757

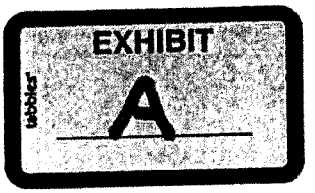
DECLARATION OF DAVID SCHERTLER

I, David Schertler, do declare under penalty of perjury that the following is true and correct.:

1. My name is David Schertler and I am an attorney licensed to practice law in the District of Columbia. I am a partner in the law firm of Schertler & Onorato, LLP ("S&O"). I am counsel for Ackerman McQueen and the Mercury Group, Inc. (collectively "Ackerman"), in the above captioned litigation.

2. My law firm, Schertler & Onorato, LLP, was retained on or about April 25, 2019 to represent Ackerman in connection with this litigation. Prior to that time, S&O had no involvement in any matters with Ackerman.

3. I do not recall the precise date, but during the week of April 29, 2019, I was informed that employees of Ackerman were in possession of a document, which appeared as though it was prepared by lawyers representing the NRA and, upon hearing that, I was concerned the document



might be privileged or confidential, although at the time I did not know enough about the document or the circumstances surrounding its disclosure to the Ackerman employees, to make a conclusion on that question.

4. I advised the client that it should not discuss nor reveal the contents of the document to anyone, including other employees of Ackerman, third-parties, or any of the lawyers involved in this case. I never had any discussion with anyone regarding the contents of the document nor have I ever viewed the document.

5. I mistakenly believed that the document was on a lap-top computer and asked the client to deliver the lap-top computer to my offices for safe-keeping. That same week, a thumb drive was delivered to another attorney in my office, David H. Dickieson, who is also working on this matter. Mr. Dickieson was unaware of the contents contained on the thumb drive. My understanding is that Mr. Dickieson could not open that thumb drive to view the contents because it was formatted for an Apple computer product.

6. I understand that early in the week of May 6, 2019, a second thumb drive was delivered to our Offices by an Ackerman employee. I understand that when Mr. Dickieson opened this thumb drive, he viewed the cover page of the document and recognized that it was marked privileged and/or confidential. He immediately closed the document and advised me of what had occurred.

7. We understood that this document was contained only on the two thumb drives. We asked the client to deliver the initial thumb drive back to our Offices, where we then secured both thumb drives in a safe in our Office.

8. Subsequently, S&O attorneys conducted an investigation as to the circumstances surrounding the disclosure of the document to Ackerman employees. We submit the result of that investigation is protected by the attorney client and work product privilege. We also consulted

with outside counsel with expertise in ethical rules of conduct for attorneys, specifically in Virginia, as to the appropriate and ethical manner to address the situation. Also, as required by the ethical rules, we consulted closely with the client regarding the matter.

9. Based on the information available to us at the time, we decided to notify counsel for the NRA of the fact that Ackerman had the document in its possession. We understood from the client that the only copies of the document were on the two thumb drives. On May 15, 2019, I sent the attached letter to James W. Hundley, counsel for the NRA, explaining the situation and offering to return or destroy the thumb drives. I was later asked to deliver the thumb drives to Mr. Hundley and those thumb drives were picked up by a representative of Mr. Hundley's Office.

10. At no time did I ever see or review the document nor have I ever been informed of the contents of the document. My understanding is that no other employee of S&O has ever seen or reviewed the document nor been informed of the contents of the document.

Executed this 3rd day of June , 2019

[redacted]

David Schertler

EXHIBIT 3

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA, Plaintiff, v. ACKERMAN MCQUEEN, INC. and MERCURY GROUP, INC. Defendants.	Civil Case No. CL19001757

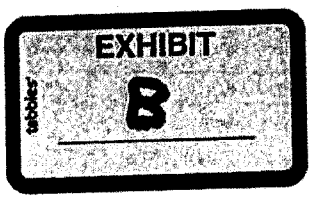
DECLARATION OF DAVID H. DICKIESON

I, David H. Dickieson, do declare under penalty of perjury that the following is true and correct:

1. I am an attorney licensed to practice law in Virginia, Maryland, Pennsylvania, and the District of Columbia. I have been practicing law for 39 years. I am a partner in the law firm of Schertler & Onorato, LLP.

2. For 15 years at my prior law firm, I was the designated ethics counselor routinely providing in-house advice on scores of ethical situations and questions. I have taught continuing legal education courses in ethics. I have extensive experience in dealing with instances of "inadvertent disclosure" of confidential information.

3. I am counsel of record for Ackerman McQueen and the Mercury Group, Inc. (collectively "Ackerman"), in the above captioned litigation.



4. I was the primary person receiving evidence and documents from the client relating to the case. Previously, I received other documents from prior counsel and I had received background documents from various client representatives.

5. On or about May 3, 2019, I received a call from an employee of our client who had evidence on a thumb drive that he wanted my law firm to preserve. I learned only that the evidence was a presentation made at the NRA Annual Meeting in Indianapolis, but did not gain any further information about the contents of the presentation

6. It is my recollection that the employee first brought the thumb drive to my office the same day as his phone call. I tried to load the thumb drive on my computer, but my Windows-based desktop computer was incompatible with the Apple formatting on the thumb drive and I could not see or open any documents on the thumb drive, so I returned the thumb drive to him.

7. On either May 6 or 7, 2019, the employee delivered another thumb drive that he believed would be compatible with my Windows-based computer. I did not have time to review the thumb drive at that time. At about 3 p.m. on May 7, 2019, I opened up the document file on my computer.

8. I opened the document file and saw only the cover page. I saw that the cover page indicated the document was from the Brewer Law Firm. I knew that the Brewer Law Firm was adversarial to our client in this litigation. The first page stated that the document was privileged and confidential. Based on my past experience in dealing with confidential disclosure issues, I immediately closed the file and reported the matter to my law partners.

9. I do not know what is contained on the thumb drive beyond that first cover page. I did not review the contents of the document nor have I ever discussed the contents with anyone.

10. I recognized the first page as something that looked like a power point presentation.

11. Subsequently, I participated in an investigation into the circumstances surrounding the disclosure of the document to Ackerman employees. We also consulted with outside counsel with expertise in ethical rules of conduct for attorneys as to the appropriate and ethical manner to address the situation.

12. We notified counsel for the NRA, James Hundley, that we had the confidential document in our possession on two thumb drives and that those thumb drives had been quarantined in the firm safe.

13. At no time did I ever see or review the contents of the document nor have I ever been informed of the contents of the document.

14. All of my law firm's actions were wholly consistent with my understanding of the ethical rules based on my long experience in handling ethical matters.

Executed this 3rd day of June, 2019

[redacted]

David H. Dickieson

EXHIBIT 4

EXHIBIT 4

REDACTED

(Filed Under Seal)

EXHIBIT 5

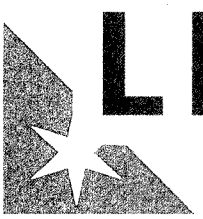
In The Matter Of:

NRA v.

Ackerman McQueen

Ron Daniel Carter

September 26, 2019



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IN THE CIRCUIT COURT FOR THE
CITY OF ALEXANDRIA

Case No. CL19002067 & CL19001757

VIDEO-RECORDED DEPOSITION OF: RON DANIEL CARTER - September 26, 2019

NATIONAL RIFLE ASSOCIATION OF AMERICA,

Plaintiffs,

v.

ACKERMAN MCQUEEN, INC.,
and
MERCURY GROUP, INC.,

Defendants.

PURSUANT TO NOTICE AND AGREEMENT, the video-recorded deposition of RON DANIEL CARTER was taken on behalf of the Plaintiffs at 1530 North Newport Road, Colorado Springs, Colorado, 80916, on September 26, 2019, at 9:05 a.m., before Sundae A. Stoa, Registered Professional Reporter, Federal Certified Realtime Reporter, and Notary Public within Colorado.

A P P E A R A N C E S

For the Plaintiffs:	MICHAEL J. COLLINS, ESQ. BREWER ATTORNEYS & COUNSELORS 1717 Main Street Suite 5900 Dallas, TX 75201 (214) 653-4875 mjc@brewerattorneys.com
And:	ROBERT H. COX, ESQ. BRIGLIA HUNDLEY 1921 Gallows Road Suite 750 Tysons Corner, VA 22182 (703) 883-9105 rcox@brigliahundley.com
For the Defendants:	DAVID H. DICKIESON, ESQ DAVID SCHERTLIER, ESQ. JOSEPH GONZALES, ESQ. SCHERTLER & ONORATO, LLP 901 New York Avenue, NW Suite 500 Washington, DC 20001 (202) 628-4199 ddickieson@schertlerlaw.com dschertler@schertlerlaw.com jgonzales@schertlerlaw.com
Also Present:	Krystal Hughes Mark Rogers, Videographer

today Ackerman McQueen.

I have with me Joseph Gonzales, who will be coming in and out. And he's representing Mercury Group today.

MR. COLLINS: Okay. And my name is Michael Collins. I am one of the counsel for the National Rifle Association.

And, Bob?

MR. COX: Bob Cox. I'm another counsel for the National Rifle Association of America.

THE VIDEOGRAPHER: The court reporter is Sundae Stoa, and will now swear in the witness.

RON DANIEL CARTER,

having been first duly sworn to state the whole truth, testified as follows:

MR. COLLINS: Before we start up with any questions of, Mr. Carter, I want to object on the record that we object to two lawyers from the -- for the lack of a better term -- Schertler firm being involved in this deposition.

The Schertler firm represents both defendants, Ackerman McQueen and Mercury Group, and we object to any effort to try to split that up such that one lawyer from the Schertler firm represents one of the defendants and another lawyer from the Schertler

firm represents the other defendant.

So for purposes of this deposition, we're objecting. If that -- I think we anticipate trying to get this issue presented to the Court on October 8th.

Can we get an agreement that, if we're going forward here, that's not a waiver of our objection?

MR. DICKIESON: Yeah, I haven't seen any authority that says each party can't have their own attorney. But we look forward to receiving that from you, and we understand that's not a waiver of going forward today.

MR. COLLINS: Okay. Thank you.

Although, we may object as we go along if another person besides yourself does get involved in the deposition, but we'll see how it goes.

MR. DICKIESON: All right.

EXAMINATION

BY MR. COLLINS:

Q. Now, Mr. Carter, can you tell us your name for us?

A. My name is Ron Daniel Carter.

Q. And, sir, where do you reside?

A. I reside at 12118 Azuma Heights, which is in Peyton, Colorado, 80831.

Q. And how long have you lived in Colorado?

EXHIBIT 6

Robert H. Cox

From: Robert H. Cox
Sent: Monday, September 23, 2019 1:52 PM
To: David Schertler
Cc: Joseph Gonzalez; Jim Hundley; Beth Landes; David H. Dickieson; Michael Collins; Jason McKenney
Subject: Objection to Deposition Location

Dave,

This email responds to your emails of September 22 and 23 with regard to Mr. LaPierre's deposition. To be clear, we have never "agreed on [your] office in DC" as the location for Mr. LaPierre's deposition or any other NRA party witness. In fact, we objected in our call on September 11, 2019 and restated our objection in Mr. Collins' email on September 21, 2019 to the location of the deposition of Mr. LaPierre at your office in Washington, D.C. We believe that Virginia Rule 4:5(a1) requires that the deposition of party witnesses be in the City of Alexandria, Virginia where the case is pending or an adjacent county or city within the Commonwealth of Virginia. Washington, D.C. is not an adjacent city or county in Virginia. We continue to object to this deposition and any other party witness, such as Andrew Arulanandam and Craig Spray, taking place in Washington, D.C.

However, with respect to Mr. LaPierre, as a professional courtesy in this instance only, we will appear for the deposition tomorrow at your office in Washington, D.C. We reserve our right to seek the Court's clarification on the location of depositions for future party witnesses.

As an accommodation, we request that the start time of the deposition be 10:00 a.m. instead of the noticed time of 9:30 a.m. Please advise whether you agree to a start time of 10:00 a.m.

Regards,

Bob

Robert H. Cox
Partner
Briglia Hundley, P.C.
1921 Gallows Rd, Suite 750
Tysons Corner, VA 22182
703.883.0880
703.883.9105 [direct]
703.883.0899 [facsimile]
rcox@brigliahundley.com
www.BrigliaHundley.com

BRIGLIAHUNDLEY.

From: David Schertler <DSchertler@schertlerlaw.com>
Sent: Monday, September 23, 2019 12:15 PM
To: Michael Collins <MJC@brewerattorneys.com>
Cc: Robert H. Cox <rcox@brigliahundley.com>; Joseph Gonzalez <JGonzalez@schertlerlaw.com>; Jim Hundley <jhundley@brigliahundley.com>; Beth Landes <bal@brewerattorneys.com>; David H. Dickieson <DDickieson@schertlerlaw.com>
Subject: RE: Third NRA Complaint - Answer Date

[This message originated from outside of your organization.]

SCHERTLER & ONORATO, L.L.P.

I did not get any response. We will see you in our offices with Mr. LaPierre at 9:30 am tomorrow.

Thanks, Dave

David Schertler
Schertler & Onorato, LLP
901 New York Avenue, N.W.
Suite 500
Washington, D.C. 20001
Phone: (202) 628-4155
Mobile: (202) 905-4118
Fax: (202) 628-4177
Email: dschertler@schertlerlaw.com
Website: www.schertlerlaw.com

From: David Schertler
Sent: Sunday, September 22, 2019 8:26 AM
To: Michael Collins <MJC@brewerattorneys.com>
Cc: Robert H. Cox <rcox@brigliahundley.com>; Joseph Gonzalez <JGonzalez@schertlerlaw.com>; Jim Hundley <jhundley@brigliahundley.com>; Beth Landes <bal@brewerattorneys.com>; David H. Dickieson <DDickieson@schertlerlaw.com>
Subject: Re: Third NRA Complaint - Answer Date

Thanks, Mike. We agreed on our office in DC and that is the location designated in the Amended Notice of Deposition. We'll keep it at our offices in DC.

David Schertler
Schertler & Onorato, LLP
901 New York Avenue, N.W.
Suite 500 West
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Office: (202) 628-4155
Cell: (202) 905-4118
Email: dschertler@schertlerlaw.com
Website: www.schertlerlaw.com

On Sep 21, 2019, at 7:47 PM, Michael Collins <MJC@brewerattorneys.com> wrote:

> Dave, Joseph –
>
> We confirm that Mr. LaPierre will be available for deposition on Tuesday, September 24, 2019. However, we restate our position that the deposition of Mr. LaPierre should be conducted in the Commonwealth of Virginia, pursuant to Rule 4:5(a1). We again invite you to select a suitable space for Mr. LaPierre's deposition in the Commonwealth of Virginia. If you wish, we can accommodate the deposition at the offices of Briglia Hundley in Tysons Corner, Virginia.
>
> Thank you,
>
> Mike

From: David Schertler <DSchertler@schertlerlaw.com>
Sent: Saturday, September 21, 2019 3:12 PM
To: Robert H. Cox; Joseph Gonzalez; Jim Hundley; Michael Collins; Beth Landes
Cc: David H. Dickieson
Subject: RE: Third NRA Complaint - Answer Date

SCHERTLER & ONORATO, L.L.P.

Simple request from below email: Please confirmMr. LaPierre's appearance for his deposition at our offices on Tuesday (September 24th) morning?

David Schertler

Schertler & Onorato, LLP
901 New York Avenue, N.W.
Suite 500
Washington, D.C. 20001
Phone: (202) 628-4155
Mobile: (202) 905-4118
Fax: (202) 628-4177
Email: dschertler@schertlerlaw.com
Website: www.schertlerlaw.com

From: David Schertler
Sent: Saturday, September 21, 2019 12:25 PM
To: Robert H. Cox <rcox@brigliahundley.com>; Joseph Gonzalez <JGonzalez@schertlerlaw.com>; Jim Hundley <jhundley@brigliahundley.com>
Cc: David H. Dickieson <DDickieson@schertlerlaw.com>
Subject: RE: Third NRA Complaint - Answer Date

Thanks, Rob. Could we also confirm Mr. LaPierre's appearance for his deposition at our offices on Tuesday morning?

David Schertler
Schertler & Onorato, LLP
901 New York Avenue, N.W.
Suite 500
Washington, D.C. 20001
Phone: (202) 628-4155
Mobile: (202) 905-4118
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Website: www.schertlerlaw.com

From: Robert H. Cox <rcox@brigliahundley.com>
Sent: Saturday, September 21, 2019 12:24 PM
To: Joseph Gonzalez <JGonzalez@schertlerlaw.com>; Jim Hundley <jhundley@brigliahundley.com>
Cc: David Schertler <DSchertler@schertlerlaw.com>; David H. Dickieson <DDickieson@schertlerlaw.com>
Subject: RE: Third NRA Complaint - Answer Date

Joseph,

That is my calculation as well.

Regards,

Bob

Robert H. Cox
Partner
Briglia Hundley, P.C.
1921 Gallows Rd, Suite 750
Tysons Corner, VA 22182
703.883.0880
703.883.9105 [direct]
703.883.0899 [facsimile]
rcox@brigliahundley.com
www.BrigliaHundley.com

<image005.jpg>
Privileged & Confidential Communication

From: Joseph Gonzalez <JGonzalez@schertlerlaw.com>
Sent: Wednesday, September 18, 2019 6:24 PM
To: Jim Hundley <jhundley@brigliahundley.com>; Robert H. Cox <rcox@brigliahundley.com>
Cc: David Schertler <DSchertler@schertlerlaw.com>; David H. Dickieson <DDickieson@schertlerlaw.com>
Subject: Third NRA Complaint - Answer Date

[This message originated from outside of your organization.]
Jim and Bob,

On September 12 we received service of the third NRA Complaint (CL19002886) via overnight mail. Therefore, by our calculation the Defendants' response is due on October 3, 2019. Would you mind confirming that we are in agreement on this response date? Thanks in advance.

- Joseph

JOSEPH A. GONZALEZ
Of Counsel | Schertler & Onorato, LLP
901 New York Avenue, N.W.
Suite 500

Washington, DC 20001
jgonzalez@schertlerlaw.com
202.628-4199 |www.schertlerlaw.com

EXHIBIT 7

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CL19001757**
	)	**CL19002067**
ACKERMAN MCQUEEN, INC.,	)	
	)	
and	)	
	)	
MERCURY GROUP, INC.,	)	
	)	
Defendants.	)	

Second Amended Notice of Deposition of Andrew Arulanandam

TO: Plaintiff, by and through its counsel, James Hundley of Briglia Hundley, P.C., 1921 Gallows Road, Suite 750, Tysons Corner, Virginia 22182.

PLEASE TAKE NOTICE that pursuant to Rule 4:5 of the Rules of the Supreme Court of Virginia, Defendants, Ackerman McQueen, Inc. and Mercury Group, Inc., by and through their counsel of record,

shall take the deposition of: Andrew Arulanandam

upon oral examination on: October 2, 2019 at 9:30 a.m.

at the offices of: Schertler & Onorato, LLP
901 New York Avenue, N.W.
Suite 500
Washington, D.C. 20001

The deposition shall be taken before a notary public or other official authorized by law to administer oaths, and may be recorded by sound, videotape, and or stenographic means for use as evidence, and for all other purposes allowable by law.

Dated: September 27, 2019

Respectfully submitted,

[redacted]

David H. Dickieson (VA Bar #31768)

SCHERTLER & ONORATO, LLP
901 New York Avenue, NW, Suite 500
Washington, DC 20001
Telephone: 202-628-4199
Facsimile: 202-628-4177
ddickieson@schertlerlaw.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on September 27, 2019, on the following counsel for Plaintiff by agreement via email addressed to:

James W. Hundley
Robert H. Cox
BRIGLIA HUNDLEY, PC
1921 Gallows Road, Suite 750
Tysons Corner, VA 22182
jhundley@brigliahundley.com
rcox@brigliahundley.com

Michael J. Collins
Brewer Attorneys & Counselors
1717 Main Street, Suite 5900
Dallas, Texas 75201
MJC@brewerattorneys.com

[redacted]
David H. Dickieson

EXHIBIT 8

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CL19001757**
	)	**CL19002067**
ACKERMAN MCQUEEN, INC.,	)	
	)	
and	)	
	)	
MERCURY GROUP, INC.,	)	
	)	
Defendants.	)	

Second Amended Notice of Deposition of Craig Spray

TO: Plaintiff, by and through its counsel, James Hundley of Briglia Hundley, P.C., 1921 Gallows Road, Suite 750, Tysons Corner, Virginia 22182.

PLEASE TAKE NOTICE that pursuant to Rule 4:5 of the Rules of the Supreme Court of Virginia, Defendants, Ackerman McQueen, Inc. and Mercury Group, Inc., by and through their counsel of record,

shall take the deposition of: Craig Spray

upon oral examination on: October 3, 2019 at 9:30 a.m.

at the offices of: Schertler & Onorato, LLP
901 New York Avenue, N.W.
Suite 500
Washington, D.C. 20001

The deposition shall be taken before a notary public or other official authorized by law to administer oaths, and may be recorded by sound, videotape, and or stenographic means for use as evidence, and for all other purposes allowable by law.

Dated: September 27, 2019

Respectfully submitted,

[redacted]

David H. Dickieson (VA Bar #31768)

SCHERTLER & ONORATO, LLP
901 New York Avenue, NW, Suite 500
Washington, DC 20001
Telephone: 202-628-4199
Facsimile: 202-628-4177
ddickieson@schertlerlaw.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on September 27, 2019, on the following counsel for Plaintiff by agreement via email addressed to:

James W. Hundley
Robert H. Cox
BRIGLIA HUNDLEY, PC
1921 Gallows Road, Suite 750
Tysons Corner, VA 22182
jhundley@brigliahundley.com
rcox@brigliahundley.com

Michael J. Collins
Brewer Attorneys & Counselors
1717 Main Street, Suite 5900
Dallas, Texas 75201
MJC@brewerattorneys.com

[redacted]
David H. Dickieson

EXHIBIT 9

2012 WL 4470782
Only the Westlaw citation is currently available.
United States District Court, D. Idaho.

Abdullah AL–KIDD, Plaintiff,
v.
Alberto GONZALES, Attorney General of the United States; et al., Defendants.

No. 1:05–CV–093–EJL–MHW.
|
Sept. 27, 2012.

Attorneys and Law Firms

Cynthia Jane Woolley, Law Offices of Cynthia J. Woolley PLLC, Ketchum, ID, Lee Gelernt, Michael K.T. Tan, American Civil Liberties Union Foundation, Esha Bhandari, ACLU Immigrants' Rights Project, New York, NY, Michael J. Wishnie, ACLU Cooperating Attorney, New Haven, CT, R.Z Keith Roark, Roark Law Firm, Hailey, ID, Robin L. Goldfaden, Katherine K. Desormeau, ACLU Immigrants' Rights Project, San Francisco, CA, Richard Alan Eppink, American Civil Liberties Union of Idaho Foundation, Boise, ID, for Plaintiff.

Brant S. Levine, J. Marcus Meeks, United States Department of Justice, Washington, DC, for Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION

EDWARD J. LODGE, District Judge.

***1** On June 26, 2012, United States Magistrate Judge Mikel H. Williams issued a Report and Recommendation concerning the Plaintiff's Federal Tort Claims Act claim, recommending that Plaintiff's Motion for Summary Judgment be granted in part and denied in part and that Defendants' Motion for Summary Judgment be denied. Any party may challenge a Magistrate Judge's proposed recommendation by filing written objections within fourteen days after being served with a copy of the Magistrate Judge's Report and Recommendation. 28 U.S.C. § 636(b)(1)(C). [1] The district court must then "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.* The district court may accept, reject, or modify in whole or in part, the findings and recommendations made by the Magistrate Judge. *Id.; see also* Fed.R.Civ.P. 72(b). Both sides filed objections to the Report and Recommendation which the Court has considered *de novo* and finds as follows.

DISCUSSION

The factual and procedural background in this matter has been thoroughly and properly set forth in the Report and Recommendation ("Report"). (Dkt.337.) As such, this Court incorporates that discussion in this Order and will restate the same only as necessary to this Court's discussion of the matter in this Order. In the Report, the Magistrate Judge considered the Cross–Motions for Summary Judgment on Plaintiff's Federal Tort Claims Act ("FTCA") claim. (Dkt.337.) Plaintiff's FTCA claim raises two arguments: abuse of process and false imprisonment. The Report concludes that Plaintiff's Motion for Summary Judgment should be granted in part and denied in part and that the Defendants' Motion should be denied. (Dkt. 337 at 29.) Essentially that Plaintiff be granted summary judgment on the false imprisonment claim and that the abuse of process claim proceed to trial. The Defendants object to this conclusion and ask for a *de novo* review of the issues presented; arguing they are entitled to summary judgment on the Plaintiff's FTCA claim. (Dkt.343.) Defendant's maintain the Plaintiff failed to meet his burden to show a genuine issue of material fact exists on either of his FTCA claim arguments. (Dkt.344.) The Plaintiff does not object to the Report but notes that in the event this Court does not adopt the Report's conclusions then Plaintiff requests entry of summary judgment in his favor on the reserved claim that there was an abuse of process because the material witness statue is unconstitutional as applied to a cooperating witness. (Dkt.341.)

ANALYSIS

1. Discretionary Function Exception

While generally agreeing with the Report's discussion of the law relevant to the discretionary function exception, Defendants object to the Report's conclusion arguing the Plaintiff's FTCA claim arguments are barred by the discretionary function exception because Agent Gneckow did not violate a clearly established constitutional right. (Dkt. 343 at 4.) This exception, Defendants argue, entitles them to summary judgment on both the false imprisonment and abuse of process arguments. In response, the Plaintiff points

out that the discretionary function exception is inapplicable where, as here, the agents violated a mandatory duty; i.e. the requirement of probable cause for an arrest. (Dkt. 346 at 3.)

*2 The discretionary function exception states that the FTCA does not permit recovery for claims arising from the "exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The Government bears the burden of showing that the discretionary function exception applies. *Reed v. U.S. Dept. of Interior,* 231 F.3d 501, 504 (9th Cir.2000).The United States Supreme Court has established a two-part test to determine whether the discretionary function applies. *Berkovitz by Berkovitz v. United States,* 486 U.S. 531, 536, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988).

First, the court must determine whether the action is a matter of choice for the employee, such that it involves an element of judgement or choice. *Id.* Second, the exception only applies to actions based on considerations of public policy. *Id.* at 537. Therefore, the government is shielded from liability when the challenged action "involves the permissible exercise of policy judgement." *Id.* The purpose of the discretionary function exception is to prevent judicial second-guessing of administrative decisions based in social, economic, and political policy. *United States v. Gaubert,* 499 U.S. 315, 323, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). When determining whether the discretionary function applies, the court should examine the conduct in question, not the status of the actor. *Berkovitz,* 123 F.3d at 536.

Generally, police investigations are protected by the discretionary function exception because they involve policy considerations. *See* *A lfrey v. United States,* 276 F.3d 557 (9th Cir.2002). The Ninth Circuit has held that "the discretionary function exception protects agency decisions concerning the scope and manner in which it conducts an investigation so long as the agency does not violate a mandatory directive." *Vickers v. United States,* 228 F.3d 944, 951 (9th Cir.2000). This protection is afforded because federal investigations often require the officers to consider relevant political and social circumstances. *Alfrey,* 276 F.3d at 565. The discretionary function exception does not apply, however, if the investigators violated a legal mandate. *Galvin v. Hay,* 374 F.3d 739, 758 (9th Cir.2004). The discretionary function only applies if the "decision made is a permissible exercise of policy judgement. *Conrad v. United States,* 447 F.3d 760, 765 (9th Cir.2006) (emphasis added). Thus, if an officer violates the constitution or a statute during his or her investigation, that action is not protected by the discretionary function exception.

The statute at issue on the abuse of process argument is the material witness statute. (Dkt. No. 40, ¶ 56, 111–14). The purpose of the material witness statute is to secure a material witness when it would be impractical to secure that witness through a subpoena. 18 U.S.C. § 3144. "It would be improper for the government to use [the material witness statute] for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established." *United States v. Awadallah,* 349 F.3d 42, 59 (2d Cir.2003). The false imprisonment argument asks whether probable cause actually existed based on all of the facts available to Agent Gneckow such that those available facts would have led a reasonable person to believe that probable cause existed to arrest the Plaintiff under the material witness statute. *See* *State v. Julian,* 129 Idaho 133, 922 P.2d 1059, 1062 (Idaho 1996).

*3 The Government's objection on this point is essentially that there was no violation of any mandatory duty in this case. As the Court determined in it's Order adopting the Report concerning the Motions for Summary Judgment as to the individual Defendants, Agent Gneckow did violate a mandatory duty in this case and, therefore, the discretionary function exception is inapplicable here to overcome the FTCA claim for both abuse of process and false imprisonment.[2]

2. Prosecutorial Immunity

Defendants argue the Report improperly relied upon conduct covered by prosecutorial immunity in denying them summary judgment on the FTCA claims; specifically AUSA Lindquist's conduct. (Dkt. 343 at 5.) Plaintiff responds to the objection asserting there is no authority for the proposition that a law enforcement officer is entitled to absolute prosecutorial immunity under the facts here; the mere involvement of the prosecutor does not immunize law enforcement from liability for a defective factual affidavit. (Dkt. 346 at 1.) Further, Plaintiff points out that AUSA Lindquist's role in securing the material witness arrest warrant

in this case was minimal such that it could not serve as a basis for granting Agent Gneckow immunity in this case.

A. False Imprisonment

Because Agent Gneckow did not provide incorrect or misleading information to AUSA Lindquist, the Defendants argue the Court should conclude that the claim is barred by prosecutorial immunity as it was AUSA Lindquist who made the final decision to request the warrant. (Dkt. 343 at 5–6.) Defendants make clear that this claim challenges the Plaintiff's arrest, not any investigative conduct by Agent Gneckow.

In Idaho, false imprisonment is the unlawful restraint by one person of the physical liberty of another without adequate legal justification or without probable cause. *Clark v. Alloway,* 67 Idaho 32, 170 P.2d 425 (Idaho 1946). Probable cause exists when, under the totality of the circumstances known to the arresting officers (or within the knowledge of the other officers at the scene), a prudent person would believe the individual is subject to arrest. *Dubner v. City and County of San Francisco,* 266 F.3d 959, 966 (9th Cir.2001) (citation omitted). Thus, as claimed here, the false imprisonment argument raises a tort action asking whether probable cause actually existed based on all of the facts available to Agent Gneckow such that those available facts would have led a reasonable person to believe that probable cause existed to arrest the Plaintiff under the material witness statute. *See State v. Julian,* 129 Idaho 133, 922 P.2d 1059, 1062 (Idaho 1996). The facts making up the probable cause determination are viewed from an objective perspective; the officer's subjective beliefs are immaterial. *Id.* at 1062–63.

In this case, Agent Gneckow supplied the information contained in the warrant application. Some of the information was later discovered to be in error; such as the information concerning the price, class, and type of plane ticket the Plaintiff had for his March of 2003 flight to Saudi Arabia. As this Court stated in the Order on the related Report, the Court does not fault Agent Gneckow for not having further investigated the details concerning the ticket in and of itself. On the same note, the Court does not find the fact that law enforcement did not investigate the purpose of the Plaintiff's travel, to further his course of study in Arabic language and Islamic law, prior to seeking the warrant to be the basis for finding a lack of probable cause. Certainly it would have been a good practice to have verified these details, but the Court does not find liability on this Motion solely because the agent failed to do so in this case. The telling information upon which this claim turns is the information known to Agent Gneckow that was omitted from the warrant application even though it was clearly relevant and, more importantly, went against a finding of probable cause. Specifically, the fact that the Plaintiff is a United States citizen, had a wife and children living in the United States, he had previously cooperated with law enforcement concerning its investigation, and he had never been told by law enforcement that he could not travel outside of the United States or asked to notify law enforcement prior to any such travel. These facts were known and available to Agent Gneckow and, just as this Court found in its Order on the related Report, it was reckless for these facts to not have been included as they would lead an ordinary reasonable person to not find probable cause to issue an arrest warrant in this case. Knowing those omitted facts, probable cause did not exist and law enforcement was required to pursue further investigation before submitting the warrant application because they did not yet have a basis for finding probable cause. *See Ewing v. City of Stockton,* 588 F.3d 1218, 1227 (9th Cir.2009) (stating that once an officer has probable cause, he or she is not required to continue to investigate or seek further corroboration).

***4** To be clear, the Court recognizes it need not conclude that Agent Gneckow acted recklessly in order to grant Plaintiff summary judgment on this claim. The reference in this Order as well as the related Order and both Reports to the finding that Agent Gneckow's actions were reckless is relevant on this claim because the same actions go to the determination at issue here: whether a reasonable and ordinary person would believe probable cause to issue an arrest warrant for the Plaintiff existed here based on the facts available. In recklessly omitting relevant facts from the warrant application, Agent Gneckow did not act reasonably. Furthermore, as discussed herein and in the Order on the related Report, the involvement of AUSA Lindquist does not cure the errors of law enforcement in this case.

B. Abuse of Process

Defendants argue Plaintiff has failed to produce any admissible evidence to proceed on his abuse of process argument. (Dkt. 343 at 10.) In particular, Defendants contend that the Report improperly relied upon conduct by persons not involved with the decision to arrest Plaintiff, the Report's factual determinations do not support the recommendation, and the Report improperly considered inadmissible evidence. (Dkt. 343 at 10–15.) The Report, the Defendants assert,

relies upon the conduct of AUSA Lindquist, not that of Agent Gneckow, to conclude that the claim should proceed to trial. (Dkt. 343 at 6.) Because AUSA Lindquist's conduct is covered by prosecutorial immunity, Defendants argue, it cannot serve as a basis for proceeding with the claim against Agent Gneckow. Plaintiff counters that the Report correctly denies the Defendants' Motion because "there is extensive evidence suggesting (and from which a reasonable juror could infer) that plaintiff was arrested for a purpose other than to secure testimony" and, therefore, a question of fact exists that must be determined by a jury. (Dkt. 346 at 6.)

This Court has reviewed the record *de novo* and is in agreement with the Report's conclusion that genuine issues of material fact exist that preclude entry of summary judgment on this claim. Plaintiff has come forward with evidence, albeit much of it circumstantial, that could lead a jury to find in favor of the Plaintiff on the claim at trial. Defendants question any reliance upon AUSA Lindquist's conduct and object to not focusing solely upon that of Agent Gneckow in making this determination. Agent Gneckow's conduct cannot, however, be evaluated in a vacuum blind to any influences that others may have had on Agent Gneckow's actions related to the arrest warrant. Prosecutorial immunity may protect AUSA Lindquist from liability but it does not obliterate the actions he and other officials took as they may be relevant to Agent Gneckow's conduct. The Court makes no determination at this stage as to whether and what evidence will be admissible at trial. The ruling here is only that Plaintiff has pointed to sufficient evidence to over come the Motion for Summary Judgment. What happens at trial remains to be seen.

***5** Finally, this Court finds that the Magistrate Judge applied the appropriate legal standard to this claim. (Dkt. 337 at 25.) Under Idaho law, the elements of an abuse of process claim are "(1) an ulterior, improper purpose; and (2) a willful act in the use of process not proper in the regular conduct of the proceeding." *Beco Constr. Co., Inc. v. City of Idaho Falls,* 124 Idaho 859, 865 P.2d 950, 954 (Idaho 1993). Contrary to what Defendants' argue, Plaintiff need not establish that the improper purpose was the Defendants' primary purpose. (Dkt. 343 at 13–14.) Abuse of process is a tort action where, in order to recover, the defendant's conduct must be a proximate cause of the harm, not merely an incidental motive or collateral effect. Such a claim may allege there is one sole cause of the damages or there may be multiple causes of the damages. Where there is alleged to be more than one cause, the jury is instructed that the improper purpose must have been a "substantial factor" in bringing about the damage complained of. *See Garcia v. Windley,* 144 Idaho 539, 164 P.3d 819, 823–25 (Idaho 2007). The abuse of process claim here appears to allege multiple causes for the harm and, therefore, the Defendants' argument that the improper purpose must be the primary purpose is denied.

3. Probable Cause Defeats False Imprisonment

Defendants challenge the Report's conclusion that Plaintiff is entitled to summary judgment on the false imprisonment claim because there is no substantive analysis of whether probable cause to arrest actually existed. (Dkt. 343 at 6.) Contending the Report only considered its conclusion that Agent Gneckow acted recklessly by not conducting a sufficient follow-up investigation before seeking the warrant. Defendants argue the Report is in error on this point as the false imprisonment claim turns on whether or not probable cause existed; not on whether Agent Gneckow should have conducted further investigation. In addition, the Defendants maintain that Agent Gneckow's conduct was not reckless. (Dkt. 343 at 7.) Plaintiff counters that the Magistrate Judge did resolve the probable cause question as the false imprisonment claim and *Bivens* claims are overlapping. (Dkt. 346 at 3 n. 1.)

"To be liable for false imprisonment in Idaho, a person must unlawfully restrain the physical liberty of another without adequate legal justification or without probable cause." *Clark,* 170 P.2d at 428. Probable cause is a complete defense to a false imprisonment claim. *See Sprague v. City of Burley,* 109 Idaho 656, 710 P.2d 566, 574 (Idaho 1985). The probable cause determination is made from an objective standpoint. *Julian,* 922 P.2d at 1062–1063 ("Because the facts making up a probable cause determination are viewed from an objective standpoint, the officer's subjective beliefs concerning that determination are not material.").

Here, both this Court and the Magistrate Judge considered the probable cause question both on these Motions and in the related Order and Report. Both determined that legal probable cause to issue the arrest warrant did not exist based upon the information known to Agent Gneckow at the time the warrant was sought. Further, this Court has clarified that its probable cause determination does not turn solely upon any failure by Agent Gneckow to conduct a further investigation.

4. Constitutionality of the Material Witness Statute

***6** In the event the Court were to grant summary judgment in favor of the Defendants on either claim, the Plaintiff

objects and requests that the Court rule on his alternative theory as to the abuse of process argument asserting the material witness statute is unconstitutional as applied to a cooperative witness. (Dkt. 341 at 3.) Defendants oppose this alternative argument on the ground that it is without merit because: 1) the FTCA does not waive the United States's sovereign immunity from damages for constitutional torts, 2) the Supreme Court has recognized that the material witness statute will invariably lead to the arrest of those who committed no wrongdoing, and 3) no court has ever held that an arrest that satisfies the elements of the material witness statute could be unconstitutional, or even a common law tort. (Dkt.344.) Because the Court has adopted the Report it does not address the Plaintiff's alternative theory on the abuse of process claim.

ORDER

Having conducted a *de novo* review of the Report and Recommendation, this Court finds that Magistrate Judge Williams' Report and Recommendation is well founded in law and consistent with this Court's own view of the evidence in the record. Acting on the recommendation of Magistrate Judge Williams, and this Court being fully advised in the premises, **IT IS HEREBY ORDERED** that the Report and Recommendation entered on June 26, 2012 (Dkt.337), should be, and is hereby, **INCORPORATED** by reference and **ADOPTED** in its entirety.

NOW THEREFORE IT IS HEREBY ORDERED as follows:

1) Plaintiff's Motion for Summary Judgment Against the United States (Dkt.308) is **GRANTED IN PART AND DENIED IN PART.**

2) Defendants' Motion for Summary Judgment (Dkt.307) is **DENIED.**

All Citations

Not Reported in F.Supp.2d, 2012 WL 4470782

Footnotes

1 In this case, the Court granted the parties' request for extension of time to file objections and responses thereto. (Dkt.339.) The parties objections and responses have been timely filed in this matter.

2 The Court expressly refers to its prior Order on the related Report and incorporates it herein to this Order as is relevant to its discussion on these cross-motions for summary judgment.

End of Document

1995 WL 79237
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

APPLIED TELEMATICS, INC.,

v.

SPRINT CORPORATION.

Civ. A. No. 94–CV–4603.

Feb. 22, 1995.

Attorneys and Law Firms

Martin G. Belisario, Panitch, Schwarze, Jacobs, & Nadel, David S. Shrager, William A. Loftus, Shrager, McDaid, Loftus, Flum & Spivey, Philadelphia, PA, for Applied Telematics, Inc.

Thomas J. Fullam, Morgan, Lewis & Bockius, Manny D. Pokotilow, Caesar, Rivise, Bernsttein, Cohen & Pokotilow, Ltd. Philadelphia, PA, for Sprint Corp., Sprint Communications Co., L.P.

MEMORANDUM AND ORDER

NAYTHONS, United States Magistrate Judge.

*1 Presently before this Court is Defendant's Motion to Compel Deponent Patentee, Bernard N. Riskin, to Answer Deposition Questions and Motion for a Protective Order to preclude plaintiff's counsel from improperly obstructing discovery. Plaintiff, ATI, has replied to Defendant's Motion and further Motions this Court for a Protective Order to preclude Defendant's counsel from asking Deponent Patentee hypothetical questions.

This is an action for patent infringement of ■ U.S. Patent No. 4,757,267 ("the '267 patent") which names Bernard N. Riskin as the inventor of ■ the '267 patent. Mr. Riskin assigned his rights to ■ the '267 patent to plaintiff, Applied Telematics, Inc. ("ATI"). The patent relates to a telephone system that automatically connects a potential customer for a product or service with a dealer which is geographically close to the potential customer.

At issue are numerous questions asked by defendant, Sprint Corporation, and subsequent objections made by plaintiff during the deposition of Bernard N. Riskin, inventor of ■ patent '267. Defendant moves this Court, pursuant to Rule 37(a), Federal Rules Civil Procedure, and Local Rules 20 and 24, for an Order compelling Riskin to answer certain deposition questions which plaintiff's counsel instructed him not to answer. Plaintiff's, in turn request this Court to order defendant's from asking Riskin, a lay witness, hypothetical questions during the continued deposition of Riskin or at trial.

DISCUSSION

The issues presented in these motions concern the conduct of lawyers at depositions. As recently stated by United States District Judge Robert S. Gawthrop in *Hall v. Clifton Precision,* 150 F.R.D. 525 (E.D.Pa.1993), "[t]he underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks." *Id.* at 528. The witness' lawyer is not to act as "an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers." *Id.* Nor should counsel repeatedly interrupt the deposition to make objections regarding "competency, relevancy, or materiality" since they are preserved for trial. *Id.* at 528 n. 3. The only proper objections at a deposition are for answers protected by a privilege and to make objections that would be waived if not raised immediately pursuant to Fed.R.Civ.P. 32(d)(3)(B). [1] *Id.* at 528 n. 3.

This Court is bound by the decision in *Hall v. Clifton Precision.* Therefore, using its holding not only as guidance, but as controlling directive, this Court finds that plaintiff's counsel's behavior at the deposition of Riskin was obstructive and improper.

First, plaintiff's counsel shall not partake in "speaking objections". *See e.g.,* Objections at pages 150, 155, 163, 165–66, 182–85 of Deposition. Speaking objections occur when the defending attorney actually engages in coaching the witness, attempting in the course of articulating the objection to direct the witness' attention to what the "right" or "correct" answer should be. *See* The Federal Bar Council Committee on Second Circuit Courts, *A Report on the Conduct of Depositions, reprinted in* 131 F.R.D. 613, 617 (1990), *quoted by* Virginia E. Hench, Temple Law Review, *Discovery Rules Amendments,* Vol. 67, p. 218 n. 182 (1994).

Such suggestive objections should be prohibited, limiting responses by counsel to the statement "objection to form". *Id.* "Objection to form" should be sufficient explanation to notify the interrogator of the ground for the objection, and thereby allow revision of the question. *See* 8A Wright, Miller & Marcus, *Federal Practice and Procedure:* Civil 2d § 2156, p. 206 (1994).

***2** Defendant requests that plaintiff's refrain from consultation during the deposition is also granted. *See e.g.,* Deposition at 165. Private conferences are barred during the deposition. *Hall,* 150 F.R.D. at 529. Judge Gawthrop held in *Hall,* that once a deposition begins, the right to counsel is somewhat tempered by the goal of getting to the truth. *Id.* at 528. The court concluded that a lawyer and client do not have an absolute right to confer during the course of the client's deposition. *Id.* Therefore, once the deposition has begun, the preparation period is over and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness' counsel. *Id.* at 529.

Plaintiff argues that counsel for ATI did not seek consultation with the witness while a question was pending. However, the transcript shows that plaintiff's counsel asked to "have a chat with [the witness]" while there was a question pending. *See* Deposition at 165. I do note for the record that plaintiff's counsel, Mr. Belisario, did *not* testify in place of the witness at that particular time in the deposition, as defendant alleges. The transcript incorrectly identified Mr. Belisario as the witness. That error was later corrected, and defendant should have been aware of that correction. *See* Plaintiff's Reply Brief at 2.

In addition, plaintiff's attorney may not object to a question that the attorney does not understand. *See e.g.,* objections at pages 168, 169, 171, 174, 175, 177, 193–94, 195, 204, 206–07, 209 of the Deposition. As stated in *Hall,* "a lawyer's purported lack of understanding is not a proper reason to interrupt a deposition." 150 F.R.D. at 530 n. 10. Nor may the lawyer state for the record what his understanding of the question is. *Id.* These types of responses by an attorney are irrelevant and suggestive of a particularly desired answer. *Id.* If the witness does not understand the question, or needs some language further defined or some documents further explained, the witness can ask the deposing lawyer to clarify or further explain the question. *Hall,* 150 F.R.D. at 528–29. However, the deposing lawyer should explain to the witness that he or she may ask for clarification at any time during the deposition. *Id.* at 529 n. 6. Therefore, plaintiff's attorney is to refrain from "coaching" the deponent in his objections. "The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness' words to mold a legally convenient record. It is the witness—not the lawyer—who is the witness." *Id.* at 528.

Plaintiff argues that several of his objections are proper since the questions were asked and answered previously in the deposition. *See* Plaintiff's Reply Brief at 4. If the questions asked by counsel for defendant become unreasonable or harassing then plaintiff's counsel may object under Rule 30(d)(3). However, in a complex case, such as this one, questions asked of the witnesses may overlap or be slightly repetitive. Therefore, plaintiff's attorney must refrain from adding to the length of these depositions by frustrating them with frequent and lengthy objections.

***3** Defendant also requests this Court to require patentee, Mr. Riskin, to answer questions about the technical substance of his patent. *See* Defendant's Brief at 19. As discussed below, defendant's request will be granted. Plaintiff's counsel objected to the questions, arguing that they were improper speculative and hypothetical questions. *See e.g.,* Objections at pages 135, 171–72, 180, 185 of the Deposition. Plaintiff's counsel states that Mr. Riskin is not an expert witness, and therefore, his testimony in the form of opinions is limited to his personal knowledge.

Plaintiff further moves this Court pursuant to Federal Rule 26(c) for a protective order to prevent Sprint from asking deponent, Bernard N. Riskin, hypothetical questions. Plaintiff argues that under Fed.R.Civ.P.Rule 30(d)(3), a party may motion the court to cease or limit the scope of the deposition, upon a showing that the examination is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the deponent or party. *See* Plaintiff's Reply Brief at 18. In this litigation, plaintiff argues that Mr. Riskin is not an expert witness and will not be so designated. Therefore, Mr. Riskin's testimony in the form of opinions or inferences is limited to "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *See* Plaintiff's Brief at 19, Fed.R.Evid. 701.

This Court finds that the questions propounded by defendant's counsel did not go beyond what was enumerated by

Fed.R.Evid. 701. In order to gain expert testimony from a witness, the interrogator must ask the witness, "assuming the set of facts to be true," could he answer "within a reasonable degree of scientific or technical certainty". *See* Fed.R.Evid. 702; *Lanza v. Poretti,* 537 F.Supp. 777, 785–86 (E.D.Pa.1982). None of the questions put to Mr. Riskin asked for his answer to be "within a reasonable degree of scientific certainty." Therefore, defendant's counsel was not asking for expert witness testimony from Riskin. As cited by both parties, the court in *De Graffenried v. United States,* held that questions eliciting a patentee's opinions regarding his patent, its prior art, and its infringement, are proper deposition questions for a patentee that is a *lay witness.* 224 U.S.P.Q. 787, 788–89 (Ct.Cl.1983) (emphasis added). Defendant's questions did not ask for expert opinions, but simply asked for Riskin's personal opinions regarding his patent, its prior art, and its infringement.

The style adopted by plaintiff's counsel has become known as "Rambo Litigation."[2] It does not promote the "just, speedy and inexpensive determination of every action" as is required by Fed.R.Civ.P. 1. This style, which may prove effective out of the presence of the court, and may be impressive to clients, as well as gratifying to those who practice it, will not be tolerated by this Court. Merely because depositions do not take place in the presence of a judge does not mean lawyers can forget their responsibilities as officers of the court.

*4 Finally, only one attorney for each party shall be permitted to act as counsel during a deposition. The examination and cross-examination during a deposition proceed in the same manner as at trial. *See* Fed.R.Civ.P. 30(c); 4A Moore's Federal Practice, ¶ 30.58, p. 30–131. Under Rule 611 of the Federal Rules of Evidence, the mode and order of interrogating witnesses and presenting evidence must be to ascertain the truth, avoid needless consumption of time, and protect witnesses from harassment or undue embarrassment. *See* Fed.R.Evid. 611(a). Therefore, in order to proceed in a effective manner, without harassing the witness, only one attorney at a time shall be designated as the "voice" of counsel at a deposition. Defendant's motion will be granted, and plaintiff's motion for a protective order will be denied.

An appropriate Order follows.

ORDER

AND NOW, this 22nd day of FEBRUARY, 1995, after careful consideration of Defendant's Motion to Compel Deponent Patentee, Bernard N. Riskin to Answer Deposition Questions and Motion for Protective Order, and Plaintiff's Reply and its own Motion for Protective Order, IT IS HEREBY ORDERED that:

1. Defendant's Motion is GRANTED.

2. Plaintiff's Motion is DENIED.

IT IS FURTHER ORDERED that the following guidelines for discovery depositions are hereby imposed:

1. At the beginning of all depositions, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness' own counsel, for clarifications, definitions, or explanations of any words, questions, or documents presented during the course of the deposition. The witness shall abide by these instructions. Counsel for the witness shall not object to a question that counsel does not understand.

2. All objections, except those which would be waived if not made at the deposition under Federal Rules of Civil Procedure 32(d)(3)(B), and those necessary to assert a privilege, to enforce a limitation on evidence directed by the court, or to present a motion pursuant to Federal Rules of Civil Procedure 30(d), shall be preserved. Therefore, those objections need not and shall not be made during the course of depositions.

3. Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court.

4. Counsel shall not make objections or statements which might suggest an answer to a witness. Counsels' statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more.

5. Counsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege.

6. Any conferences which occur pursuant to, or in violation of, guideline (5) are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what.

*5 7. Any conferences which occur pursuant to, or in violation of, guideline (5) shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record.

8. Only one attorney for each party shall be permitted to act as counsel during a deposition.

9. Depositions shall otherwise be conducted in compliance with the Opinion which accompanies this Order.

All Citations

Not Reported in F.Supp., 1995 WL 79237

Footnotes

1 Rule 32(d)(3)(B) states that:

> Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

2 *See* Judicial Conference, Federal Circuit, 146 F.R.D. 205, 216–32 (1992), for a discussion of the causes and solutions to this syndrome. *See also* Interim Report of the Commission on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 371 (1990); Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441 (1992).

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2016 WL 3676456
Only the Westlaw citation is currently available.
United States District Court, E.D. Wisconsin.

EMPIRE MEDICAL REVIEW SERVICES, INC., Plaintiff,

v.

COMPUCLAIM, INC., Defendant.

Case No. 13-CV-1283

Signed 07/06/2016

Attorneys and Law Firms

Christopher R. Liro, Aaron T. Olejniczak, Andrus Intellectual Property Law LLP, Casey M. Kaiser, Dustin T. Woehl, Michael J. Cerjak, Robert J. Lauer, Kasdorf Lewis & Swietlik, James F. Boyle, Boyle Fredrickson, Alexander T. Pendleton, Pendleton Legal, Milwaukee, WI, for Plaintiff.

Joseph D. Newbold, John R. Schreiber, O'Neil Cannon Hollman Dejong & Laing, Milwaukee, WI, Timothy D. Wenger, Christopher C. Cassara, Partridge Snow & Hahn LLP, New Bedford, MA, for Defendant.

ORDER

WILLIAM E. DUFFIN, U.S. Magistrate Judge

***1** Currently before the court is plaintiff Empire Medical Review Services, Inc.'s ("EMRS") Civil L.R. 7(h) Expedited Non-Dispositive Motion for an order allowing EMRS to divide its questioning of witnesses among its separately-retained attorneys. (ECF No. 91). Defendant CompuClaim, Inc. opposes the motion. (ECF No. 96).

EMRS views this case as a complex intersection of contract, tort, and intellectual property law. It has retained separate counsel to specialize on certain issues. Pendleton Legal S.C. represents EMRS on the claims in its amended complaint. Andrus Intellectual Property Law, LLP represents EMRS on the intellectual property aspects of its amended claims. Once counterclaims were asserted against EMRS, its insurers hired Kasdorf, Lewis, & Swietlik S.C. and Boyle Fredrickson S.C. to represent EMRS in defense of the counterclaims only.

The parties initially agreed that multiple attorneys representing EMRS would be allowed to ask questions at depositions of the defendant's witnesses. Specifically, they agreed that attorneys Robert Lauer, Alexander Pendleton, *and* James F. Boyle would be allowed to question Jeffrey Berg at his deposition, with the understanding that the lawyers would not ask overlapping questions. (ECF No. 92-1, pg. 2, Ex. 1).

Later, during the deposition of Scott Strommen, counsel for CompuClaim expressed his view that the EMRS attorneys were, indeed, asking overlapping questions. CompuClaim withdrew its consent to EMRS dividing its questioning among multiple attorneys. The parties have since conferred on the issue but have been unable to reach an agreement regarding the questioning of future CompuClaim witnesses at depositions, resulting in EMRS filing the motion now before the court.

EMRS argues that, without the relief it seeks, one EMRS attorney would have to cover issues that fall under other attorneys' scope of representation. It argues that the attorneys may have different objectives, giving rise to the potential for a conflict. It also argues that scripted questions from another lawyer handling a separate aspect of the case are "highly ineffective for obtaining clear testimony." (ECF No. 91 at pg. 3).

CompuClaim points to General Local Rule 43, which sets the standard practice in this district: "[u]nless otherwise ordered, one attorney for each party may examine or cross examine a witness." It then cites seven instances from the Strommen and Berg depositions in which the attorneys asked overlapping questions. It identifies what it characterizes as several "significant advantages" that arise from giving multiple lawyers an opportunity to examine witnesses. Finally, it argues that examination by more than one attorney is both oppressive and harassing.

General Local Rule 43 places discretion squarely on the shoulders of the presiding court. ("*Unless otherwise ordered*, one attorney for each party may examine or cross examine a witness.") (emphasis added). This case, though at bottom a contract dispute, involves software coding and allegations on both sides of copyright infringement and Digital Millennium Copyright Act violations. Such claims can have complex contours. EMRS has found the need to retain separate counsel to tackle such issues.

*2 CompuClaim's examples of overlapping questioning do not show egregious conduct on the part of EMRS's attorneys. Cleanly splicing certain topics from others can be difficult even when one attorney is asking all of the questions. Some degree of overlap in questioning is often unavoidable. It appears that EMRS's lawyers genuinely tried to do as promised and avoid asking overlapping questions.

Having said that, General Local Rule 43 establishes the normal practice in this district, which is that one attorney per side will be allowed to examine or cross-examine a witness. Multiple lawyers for one party examining or cross-examining a witness is exceptional. Whereas CompuClaim has cited several cases where courts have denied relief similar to that sought by EMRS, EMRS has not directed this court to any decision where a court granted a party the relief EMRS seeks.

Moreover, EMRS's explanations for why such relief is necessary here are not particularly compelling. Many cases filed in federal court are complicated, involving a variety of claims and counterclaims consisting of assorted legal issues, including intellectual property issues. EMRS does not explain why this case is so different as to warrant straying from the normal practice of one lawyer per witness. Certainly the fact that its insurer has chosen to hire separate counsel to represent it on the counterclaims is not sufficient. Although EMRS argues that there is the potential for a conflict between the attorneys' objectives, it does not point to any here.

In addition, the court is sensitive to witnesses being tag-teamed at a deposition by more than one lawyer for the same party. When one lawyer runs out of steam (or questions), another hops in the ring and continues the examination, bringing a fresh perspective and a new list of questions. While circumstances necessitating such a proceeding could arise, EMRS has not demonstrated that this case is the unusual one that would warrant permitting multiple lawyers to question witnesses at their depositions.

IT IS THEREFORE ORDERED that plaintiff's Civil L.R. 7(h) motion is **denied.**

Dated at Milwaukee, Wisconsin this 6th day of July, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 3676456

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150 F.R.D. 525
United States District Court,
E.D. Pennsylvania.

Arthur J. HALL, Plaintiff,
v.
CLIFTON PRECISION, A DIVISION OF LITTON SYSTEMS, INC.

Civ. A. No. 92–5947.
|
July 29, 1993.

Synopsis
Civil action was commenced. During discovery, dispute arose regarding conduct of deposition. The District Court, Gawthrop, J., held that: (1) witness being deposed and his or her attorney may not confer during course of deposition unless conference is for purpose of determining whether privilege should be asserted, and (2) witness and counsel are not entitled to confer about document shown to witness during deposition before witness answers questions about it.

Ordered accordingly.

West Headnotes (11)

[1] **Federal Civil Procedure**
Examination in General

Lawyer and client did not have absolute right to confer during course of client's deposition. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

6 Cases that cite this headnote

[2] **Federal Civil Procedure**
Examination in General

Lawyer, of course, has right, if not duty, to prepare client for deposition, but does not have right to confer with client once deposition begins. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

9 Cases that cite this headnote

[3] **Federal Civil Procedure**
Examination in General

Witness does not have absolute right to initiate private conference with his or her attorney during course of deposition; if witness does not understand question, or needs some language further defined or some documents further explained, witness can ask deposing lawyer to clarify or further explain question. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

24 Cases that cite this headnote

[4] **Federal Civil Procedure**
Examination in General

Conferences between witness and his or her lawyer are prohibited both during deposition and during recesses; fortuitous occurrence of coffee break, lunch break, or even a recess is no reason to change rule barring conferences. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

16 Cases that cite this headnote

[5] **Federal Civil Procedure**
Examination in General

When deposing attorney presents document to witness at deposition, lawyer for witness should be given copy of document for his or her own inspection, but witness and attorney are not entitled to confer off the record about document before witness answers questions about it; if witness does not recall having seen document before or does not understand document, witness may ask deposing lawyer for some additional information, or witness may simply testify to lack of knowledge or understanding. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

37 Cases that cite this headnote

[6] **Federal Civil Procedure**
Examination in General

Private conference between witness and attorney during deposition is permissible if purpose of conference is to decide whether to assert privilege; however, when such conference occurs, conferring attorney should place on record fact that conference occurred, subject of

conference, and decision reached as to whether to assert privilege. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

19 Cases that cite this headnote

[7] **Federal Civil Procedure**
Examination in General

At deposition, counsel for witness may not make objection that suggests answer to witness. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

15 Cases that cite this headnote

[8] **Federal Civil Procedure**
Examination in General

Objections that would nevertheless be preserved for trial should not be made at deposition, and those that must be made to be preserved should be stated pithily so as not to suggest an answer. Fed.Rules Civ.Proc.Rule 32(d)(3), 28 U.S.C.A.

2 Cases that cite this headnote

[9] **Federal Civil Procedure**
Examination in General

Lawyer's purported inability to understand question asked at deposition is not proper objection that would justify interrupting deposition; if witness needs clarification, witness may ask deposing lawyer for clarification. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

15 Cases that cite this headnote

[10] **Federal Civil Procedure**
Examination in General

Counsel for witness at deposition is not permitted to state on record his or her interpretation of question asked by deposing lawyer, since those interpretations are irrelevant and often suggestive of particular desired result. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

11 Cases that cite this headnote

[11] **Federal Civil Procedure**
Examination in General

Lawyers are strictly prohibited from making any comments during deposition, either on or off the record, which might suggest or limit witness' answer to unobjectionable question. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

11 Cases that cite this headnote

Attorneys and Law Firms

***526** Robert F. Stewart, Philadelphia, PA, for defendant.

Joel W. Todd, Philadelphia, PA, for plaintiff.

OPINION

GAWTHROP, District Judge.

Currently at bar is an issue on which, despite its presence in nearly every case brought under the Federal Rules of Civil Procedure, there is not a lot of caselaw: the conduct of lawyers at depositions. More specifically, the questions before the court are (1) to what extent may a lawyer confer with a client, off the record and outside earshot of the other lawyers, during a deposition of the client, and (2) does a lawyer have the right to inspect, before the deposition of a client begins, all documents which opposing counsel intends to show the client during the deposition, so that the lawyer can review them with the client before the deposition?

In this case, Robert F. Stewart, Esquire, counsel for defendant, noticed the deposition of the plaintiff, Arthur J. Hall. Before the deposition began, Mr. Hall's counsel, Joel W. Todd, Esquire, asked Mr. Stewart for a copy of each document which Mr. Stewart intended to show Mr. Hall during the deposition so that he could review the documents with Mr. Hall before the deposition began. Mr. Stewart declined to produce the documents.

At the beginning of the deposition, Mr. Stewart described the deposition process to Mr. Hall. During that description, he told Mr. Hall, "[c]ertainly ask me to clarify any question that you do not understand. Or if you have any difficulty understanding my questions, I'll be happy to try to rephrase them to make it possible for you to be able to answer them." Deposition of Arthur J. Hall, at 5–6. Mr. Todd then interjected,

"Mr. Hall, at any time if you want to stop and talk to me, all you have to do is indicate that to me." *Id.* at 6. Mr. Stewart then stated his position: "[t]his witness is here to give testimony, to be answering my questions, and not to have conferences with counsel in order to aid him in developing his responses to my questions." *Id.*

During the brief, unfinished deposition, there were two interruptions. The first occurred when, according to Mr. Todd, Mr. Hall wished to confer with him about the meaning of the word "document." Nevertheless, when the deposition resumed, Mr. Hall asked Mr. Stewart about the meaning of "document." *Id.* at 9–10. The second interruption occurred when Mr. Stewart showed a document to Mr. Hall and began to ask him a question about it. Before Mr. Stewart finished his question about the document, Mr. Todd said, "I've got to review it with my client." *Id.* at 18. Mr. Stewart stated his objection "to Mr. Todd reviewing with his client documents that Mr. Hall is about to be questioned on in this deposition." *Id.* The parties then contacted the court, which ordered that the deposition be adjourned until the question of attorney-client discussion during the deposition could be resolved. That afternoon, the court held a conference with both counsel about their conduct at the deposition. At the conference, Mr. Todd asserted that an attorney and client have the right to confer with one another at any time during the taking of the client's deposition. At the end of the conference, the court requested counsel to submit letter briefs on the issue, which they have done.

The Federal Rules of Civil Procedure give the court control over the discovery process. ***527** Rule 26(f) authorizes the court, after a discovery conference, to enter an order "setting limitations on discovery" and "determining other such matters ... as are necessary for the proper management of discovery." Such a conference may be called by the court itself or upon a motion by one of the parties. The Advisory Committee Notes point out that Subdivision (f) was added to Rule 26 in 1980 because the Committee believed that discovery "abuse can best be prevented by intervention by the court as soon as abuse is threatened."

Rule 30 governs oral depositions. Rule 30(c) states: "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial." Rule 30(d) gives the court the power to terminate or limit the scope of a deposition "on motion of a party" if the court finds that the deposition is being conducted in "bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party." All phases of the examination are subject to the control of the court, which has discretion to make any orders necessary to prevent the abuse of the discovery and deposition process. *See,* 8 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §§ 2113, 2116 (1971).

Rules 37(a)(2) and 37(a)(3) permit a party to seek, and the court to grant, an order which compels a deponent to respond to a question or to give a less evasive or more complete response.

Taken together, Rules 26(f), 30, and 37(a), along with Rule 16, which gives the court control over pre-trial case management, vest the court with broad authority and discretion to control discovery, including the conduct of depositions.[1] It is pursuant to that authority and discretion that I enter this Opinion and Order.

Plaintiff's counsel has submitted no citation, no caselaw, in support of his argument that an attorney and client may confer at their pleasure during the client's deposition. On the other hand, defendant has submitted orders from numerous courts holding that such conversations are not allowed.[2] Those courts have held that private conferences between deponents and their attorneys during the taking of a deposition are improper unless the conferences are for the purpose of determining whether a privilege should be asserted.

The United States District Court for the Eastern District of New York has adopted a similar view in a standing order: "[a]n attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted." *Standing Orders of the Court on Effective Discovery in Civil Cases,* 102 F.R.D. 339, 351, no. 13. In combination with another standing order which prohibits "[o]bjections in the presence of the witness which are used to suggest an answer to the witness," *id.* at 351, no. 12, the judges of that district have attempted to insure that the testimony taken during a deposition is completely that of the deponent, rather than a version of that testimony which has been edited or glossed by the deponent's lawyer.

The Eastern District of New York's standing order is silent on the question of a client-deponent's initiating a private conference with his or her attorney. However, the orders in *Braniff, RTC, Domestic Air,* and *San Juan* prohibit all conferences except those discussing a privilege, regardless of who initiates them. The *Rhode Island* and *Asbestos* courts

prohibited all conferences, regardless of their subject or initiator.

*528 One of the purposes of the discovery rules in general, and the deposition rules in particular, is to elicit the facts of a case before trial. Another purpose is to even the playing field somewhat by allowing all parties access to the same information, thereby tending to prevent trial by surprise. Depositions serve another purpose as well: the memorialization, the freezing, of a witness's testimony at an early stage of the proceedings, before that witness's recollection of the events at issue either has faded or has been altered by intervening events, other discovery, or the helpful suggestions of lawyers.

[1] The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer,[3] and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness —not the lawyer—who is the witness. As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. But the lawyer is not entitled to be creative with the facts. Rather, a lawyer must accept the facts as they develop. Therefore, I hold that a lawyer and client do not have an absolute right to confer during the course of the client's deposition.

[2] Concern has been expressed as to the client's right to counsel and to due process. A lawyer, of course, has the right, if not the duty,[4] to prepare a client for a deposition. But once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth. Under Rule 30(c), depositions generally are to be conducted under the same testimonial rules as are trials. During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony.[5] Once a witness has been prepared and has taken the stand, that witness is on his or her own.

The same is true at a deposition. The fact that there is no judge in the room to prevent private conferences does not mean that such conferences should or may occur. The underlying reason for preventing private conferences is still present: they tend, at the very least, to give the appearance of obstructing the truth.

[3] These considerations apply also to conferences initiated by the witness, as opposed to the witness's lawyer. To allow private conferences initiated by the witness would be to allow the witness to listen to the question, ask his or her lawyer for the answer, and then parrot the lawyer's response. Again, this is not what depositions are all about—or, at least, it is not what they are supposed to be all about. If the witness does not understand the question, or needs some language further defined or some documents *529 further explained, the witness can ask the deposing lawyer to clarify or further explain the question.[6] After all, the lawyer who asked the question is in a better position to explain the question than is the witness's own lawyer. There is simply no qualitative distinction between private conferences initiated by a lawyer and those initiated by a witness. Neither should occur.

[4] These rules also apply during recesses. Once the deposition has begun, the preparation period is over and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness's counsel. Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules. Otherwise, the same problems would persist. A clever lawyer or witness who finds that a deposition is going in an undesired or unanticipated direction could simply insist on a short recess to discuss the unanticipated yet desired answers, thereby circumventing the prohibition on private conferences. Therefore, I hold that conferences between witness and lawyer are prohibited both during the deposition and during recesses.[7]

[5] The same reasoning applies to conferences about documents shown to the witness during the deposition. When the deposing attorney presents a document to a witness at a deposition, that attorney is entitled to have the witness, and the witness alone, answer questions about the document. The witness's lawyer should be given a copy of the document for his or her own inspection, but there is no valid reason why the lawyer and the witness should have to confer about the document before the witness answers questions about it.[8] If the witness does not recall having seen the document before or does not understand the document, the witness may ask the deposing lawyer for some additional information, or the witness may simply testify to the lack of knowledge

or understanding. But there need not be an off-the-record conference between witness and lawyer in order to ascertain whether the witness understands the document or a pending question about the document.

[6] As mentioned above, the majority of federal courts which have issued deposition guidelines have held that a private conference between witness and attorney is permissible if the purpose of the conference is to decide whether to assert a privilege. With this exception I agree. Since the assertion of a privilege is a proper, and very important, objection during a deposition, it makes sense to allow the witness the opportunity to consult with counsel about whether to assert a privilege. Further, privileges are violated not only by the admission of privileged evidence at trial, but by the very disclosures themselves. Thus, it is important that the witness be fully informed of his or her rights before making a statement which might reveal ***530** privileged information. However, when such a conference occurs, the conferring attorney should place on the record the fact that the conference occurred, the subject of the conference, and the decision reached as to whether to assert a privilege.

[7] [8] Having discussed off-the-record witness-coaching, I now turn to a related concern: on-the-record witness-coaching through suggestive objections. Without guidelines on suggestive objections, the spirit of the prohibition against private conferences could be flouted by a lawyer's making of lengthy objections which contain information suggestive of an answer to a pending question. The Supreme Court has recently addressed the issue of suggestive objections in the Proposed Amendments to the Federal Rules of Civil Procedure and Forms, H.R.Doc. No. 74, 103rd Cong., 1st Sess., at 50–52 (Apr. 22, 1993). Proposed Amended Rule 30(d) reads:

> (1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion pursuant to paragraph (3). [9]
>
> (2) By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

The Committee Notes following the proposed amended rule contain the following observations:

> Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond.... [O]bjections ... should be limited to those that under Rule 32(d)(3) might be waived if not made at that time.... [O]ther objections can ... be raised for the first time at trial and therefore should be kept at a minimum during a deposition.
>
> Directions to a deponent not to answer a question can be even more disruptive than objections....
>
> In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of objections may itself constitute sanctionable conduct.

Proposed Amendments, H.R.Doc. No. 74, at 261–63.

[9] [10] The proposed amendments and committee notes aptly observe that objections and colloquy by lawyers tend to disrupt the question-and-answer rhythm of a deposition and obstruct the witness's testimony. Since most objections, such as those grounded on relevance or materiality, are preserved for trial, they need not be made. [10] As for those few objections which would be waived if not made immediately, they should be stated pithily. *See,* Fed.R.Civ.P. 32(d)(3).

[11] The Federal Rules of Evidence contain no provision allowing lawyers to interrupt the trial testimony of a witness to make a statement. Such behavior should likewise be prohibited at depositions, since it tends to obstruct the taking of the witness's testimony. ***531** It should go without saying that lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question.

In short, depositions are to be limited to what they were and are intended to be: question-and-answer sessions between a lawyer and a witness aimed at uncovering the facts in a lawsuit. When a deposition becomes something other than that because of the strategic interruptions, suggestions,

statements, and arguments of counsel, it not only becomes unnecessarily long, but it ceases to serve the purpose of the Federal Rules of Civil Procedure: to find and fix [11] the truth.

Depositions are the factual battleground where the vast majority of litigation actually takes place. It may safely be said that Rule 30 has spawned a veritable cottage industry. The significance of depositions has grown geometrically over the years to the point where their pervasiveness now dwarfs both the time spent and the facts learned at the actual trial—assuming there is a trial, which there usually is not. [12] The pretrial tail now wags the trial dog. Thus, it is particularly important that this discovery device not be abused. Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly; should they be tempted to stray, they should remember that this judge is but a phone call away.

An Order containing guidelines for the conduct of the depositions of parties and other witnesses represented by counsel in this case follows.

ORDER

AND NOW, this 29th day of July, 1993, upon consideration of the oral arguments and letter briefs of the parties regarding the dispute over the conduct of counsel at depositions, it is ORDERED that the following guidelines for discovery depositions are hereby imposed:

1. At the beginning of the deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness's own counsel, for clarifications, definitions, or explanations of any words, questions, or documents presented during the course of the deposition. The witness shall abide by these instructions.

2. All objections, except those which would be waived if not made at the deposition under Federal Rules of Civil Procedure 32(d)(3)(B), and those necessary to assert a privilege, to enforce a limitation on evidence directed by the court, or to present a motion pursuant to Federal Rules of Civil Procedure 30(d), shall be preserved. Therefore, those objections need not and shall not be made during the course of depositions.

3. Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court.

4. Counsel shall not make objections or statements which might suggest an answer to a witness. Counsels' statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more.

5. Counsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks or ***532** recesses, except for the purpose of deciding whether to assert a privilege.

6. Any conferences which occur pursuant to, or in violation of, guideline (5) are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what.

7. Any conferences which occur pursuant to, or in violation of, guideline (5) shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record.

8. Deposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and the witness's counsel do not have the right to discuss documents privately before the witness answers questions about them.

9. Depositions shall otherwise be conducted in compliance with the Opinion which accompanies this Order.

All Citations

150 F.R.D. 525, 62 USLW 2103, 27 Fed.R.Serv.3d 10

Footnotes

1 Plaintiff's counsel argues that since the Rule 30(d) says "on motion of a party," the court is powerless to act absent such a motion. This argument is specious; the Federal Rules of Civil Procedure, and their overseers, the judiciary, are not so passively impotent.

2 *See, e.g., In re Braniff, Inc.,* Nos. 89–03325–BKC–6C1, 92–911, 1992 WL 261641 (Bankr.M.D.Fla. Oct. 2, 1992); *RTC v. KPMG Peat Marwick,* Civ.A. No. 92–1373 (E.D.Pa. Sept. 19, 1992); *In re Domestic Air Transp. Antitrust Litig.,* 1992–1 Trade Cases ¶ 69,731, 1990 WL 358009 (N.D.Ga. Dec. 21, 1990); *In re San Juan DuPont Plaza Hotel Fire Litig.,* No. MDL 721, 1989 WL 168401 (D.P.R. Dec. 2, 1989); *In re Rhode Island Asbestos Cases;* R.I.M.L. No. 1 (D.R.I. March 15, 1982); *In re Asbestos–Related Litig.,* No. CP–81–1 (E.D.N.C. Sept. 15, 1981).

3 I note that under Rule 32(d)(3)(A), objections to the competency, relevancy, or materiality of deposition testimony generally are preserved for trial. Therefore, counsel should not repeatedly interrupt the deposition to make these objections. Of course, the witness's counsel is free to object on the ground that a question asks for an answer which is protected by a privilege, and to make objections which would be waived if not raised immediately. *See,* Fed.R.Civ.P. 32(d)(3)(B).

4 "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation." Pennsylvania Rule of Professional Conduct 1.1.

5 Lawyers, of course, do not often attempt to interrupt the questioning of their clients at trial to have private conferences, probably because they think that doing so would tend to diminish the witness-client's credibility. Some district courts have ordered lawyers and witness-clients not to confer even during lunch and overnight breaks in the witness-client's testimony. In *Aiello v. City of Wilmington,* 623 F.2d 845, 858–59 (3d Cir.1980), the district court, because of its concern over "witness coaching," ordered the plaintiff and his counsel not to communicate during breaks in the plaintiff's cross-examination. The Third Circuit did not decide, and to this court's knowledge still has not decided, whether such an order might violate the right to counsel.

6 At the beginning of the deposition, the deposing lawyer should explain to the witness, as did Mr. Stewart here, that the witness should feel free to ask for clarification at any time during the deposition.

7 To the extent that such conferences do occur, in violation of this Opinion and Order, I am of the view that these conferences are not covered by the attorney-client privilege, at least as to what is said by the lawyer to the witness. Therefore, any such conferences are fair game for inquiry by the deposing attorney to ascertain whether there has been any coaching and, if so, what.

8 This approach is consistent with Federal Rule of Evidence 613(a), which provides: "[i]n examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel." The Advisory Committee Notes observe that "[t]he provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary." Thus, the requirement that counsel be shown the document exists only to assure counsel that the document actually exists, not to allow counsel to prepare the witness to testify about it.

Rule 613(a) is contrary to the rule in *Queen Caroline's Case,* 129 Eng.Rep. 976 (1820). In that case, English judges advised that, before being cross-examined about a document, a witness must be shown the document and given the opportunity to read the relevant portion. The rule proved so obstructive that it was abolished by Parliament in 1854. 17 & 18 Vict., ch. 125, § 24 (1854) (Eng.). *See,* John W. Strong et al., 1 McCormick on Evidence § 28 (4th ed. 1992).

9 Paragraph (3) is substantially similar to the current Rule 30(d), which governs motions to terminate or limit examination because of bad faith, unreasonableness, annoyance, embarrassment, or oppression.

10 I also note that a favorite objection or interjection of lawyers is, "I don't understand the question; therefore the witness doesn't understand the question." This is not a proper objection. If the witness needs clarification, the witness may ask the deposing lawyer for clarification. A lawyer's purported lack of understanding is not a proper reason to interrupt a deposition. In addition, counsel are not permitted to state on the record their interpretations of questions, since those interpretations are irrelevant and often suggestive of a particularly desired answer.

11 "Fix" in the sense of firmly stabilizing (such as a photographic image), rather than bending or muting the record to make it more factually comfy—as in to "fix" a prize fight, or a jury.

12 From October 1, 1991, to September 30, 1992, 8,771 civil cases terminated in this judicial district. Of those, only 337, or 3.8%, actually went to trial. Annual Report of the Director of the Administrative Office of the United States Courts—1992, at Table C 4A. The reality is that what is learned at depositions becomes the factual basis upon which most cases are disposed of—not by trial, but by settlement. Thus, if those "facts" get skewed, the risk is grave that so also will the quality of justice.

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144 B.R. 426
United States Bankruptcy Court,
W.D. Arkansas,
Hot Springs Division.

In re Larry CUMMINS.
Thomas E. HAYS, Jr.; Larry Cummins Chevrolet, Inc.; Cummins Chevrolet & Geo, Inc.; and Coke Chevrolet Company, Plaintiffs,
v.
Larry CUMMINS, Defendant.
Larry CUMMINS, Counterclaimant,
v.
Thomas E. HAYS, Jr.; Larry Cummins Chevrolet, Inc.; Cummins Chevrolet & Geo, Inc.; and Coke Chevrolet Company, Counterclaim Defendants.

Bankruptcy Nos. 91–16453 S, HS 91–453 S.
|
Adv. No. 92–6508.
|
July 9, 1992.

Synopsis
Complaint objecting to discharge of Chapter 7 debtor was filed. Debtor counterclaimed against plaintiffs for tortious interference with business or employment relationship. Plaintiff moved for protective order regarding two discovery issues. The Bankruptcy Court, Mary D. Scott, J., held that: (1) plaintiff's personal finances were not in issue in adversary proceeding so as to make plaintiff's personal income tax returns discoverable, and (2) only one attorney for defendant-debtor was entitled to question plaintiff at deposition.

Motion granted.

West Headnotes (2)

[1] Federal Civil Procedure
⇐ Taxes, matters relating to

Plaintiff's personal finances were not in issue so as to make personal income tax returns discoverable by defendant-debtor in debtor's counterclaim for tortious interference with business relations in adversary proceeding brought by plaintiff seeking denial of debtor's discharge on ground of fraud. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

3 Cases that cite this headnote

[2] Bankruptcy
⇐ Conduct of Examination

Only one attorney for defendant-debtor was entitled to question plaintiff at deposition in adversary proceeding objecting to debtor's discharge in bankruptcy. Fed.Rules Civ.Proc.Rule 30(c), 28 U.S.C.A.; Fed.Rules Evid. Rule 611(a), 28 U.S.C.A.

3 Cases that cite this headnote

Attorneys and Law Firms

***426** William Waddell, Little Rock, Ark., for plaintiffs.

C. Richard Crockett, Little Rock, Ark., for debtor/defendant.

James Dowden, Little Rock, Ark., trustee.

John Belew, Batesville, Ark., U.S. Trust.

ORDER GRANTING MOTION FOR PROTECTIVE ORDER

MARY D. SCOTT, Bankruptcy Judge.

This cause is before the Court upon the plaintiff Thomas E. Hays, Jr.'s Motion for Protective Order, filed on June 24, 1992. Hays seeks protection from the Court regarding two discovery issues. First, Hays seeks protection from a discovery request which requires production of his income tax returns. Secondly, Hays seeks an Order stating that only one attorney for Cummins may examine him. The defendant has responded to the motion.

Nature of the Action

This action was instituted by the plaintiffs, including Hays, by a complaint objecting to the debtor Larry Cummins' discharge

in bankruptcy. All of the allegations of the complaint pertain to Cummins' actions in business relations with the plaintiffs. The personal finances of the plaintiff Hays are in no way implicated by the complaint. The debtor filed a counterclaim against the plaintiffs. The cause of action against Hays appears to be for tortious interference with a business or employment relationship, specifically, Cummins' employment relationship with the dealership plaintiffs. The counterclaim does not implicate the personal finances of Hays.

*427 *The Income Tax Returns*

Cummins makes three contradictory and conclusory statements with regard to this issue. Cummins would:

(1) limit the request for production of returns to the year of the first contract between Hays and Cummins and all subsequent years;

(2) assert that the tax returns "are relevant, or may well lead to the discovery of evidence relating to issues raised by the Complaint or Counterclaim, and Defendant believes that information contained in such returns is not otherwise readily obtainable by Defendant"; and

(3) withdraw his request for production of the tax returns. Since the Court is unable to conclude with any certainty that the request for tax returns is in fact withdrawn, rendering the matter moot, the Court will address the issues raised.

[1] It is well settled that income tax returns are not immune from civil discovery. *See St. Regis Paper Co. v. United States,* 368 U.S. 208, 218–19, 82 S.Ct. 289, 295, 7 L.Ed.2d 240 (1961); *United States v. Bonanno Organized Crime Family,* 119 F.R.D. 625, 627 (E.D.N.Y.1988). While some courts hold that income tax returns are protected by a qualified privilege, *Eastern Auto Distributorship, Inc. v. Peugeot Motors of America, Inc.,* 96 F.R.D. 147, 148 (E.D.Va.1982), other courts hold that returns are merely protected by federal policies of encouraging complete and accurate returns and protection of privacy interests, *see, e.g., Lemanik, S.A. v. McKinley Allsopp, Inc.,* 125 F.R.D. 602, 609 (S.D.N.Y.1989); *Bonanno,* 119 F.R.D. at 627.

In order to obtain a party's income tax returns, courts have generally questioned whether (1) the return is relevant to the proceeding; and (2) the information sought in the return is not readily available from other sources. *See, e.g., Eastern Auto,* 96 F.R.D. at 148–49. Other courts hold that the issue is whether the returns are relevant. *See, e.g., Halperin v. Berlandi,* 114 F.R.D. 8, 11 (D.Mass.1986). Although this Court believes that the better view is that expressed by *Halperin,* it need not expressly decide the issue because the returns in this case are not relevant to the subject matter, nor likely to lead to the discovery of admissible evidence.

As in any discovery issue, the threshold issue is whether the information is relevant to the subject matter or will lead to the discovery of admissible evidence. *See* Fed.R.Civ.Proc. 26(b)(1).[1] Cummins has stated no reason why the tax returns are relevant. Cummins' bare assertion that the returns are relevant or may lead to the discovery of admissible evidence is insufficient to carry his burden in demonstrating that the protective order is inappropriate. *See Lemanik, S.A. v. McKinley Allsopp, Inc.,* 125 F.R.D. 602 (burden of proof is upon party seeking production of tax returns); *Bonanno,* 119 F.R.D. at 627.

In the instant case, Hays has requested that the court determine that Cummins' actions in dealings with him are sufficiently fraudulent so as to deny Cummins a discharge in bankruptcy. The focus of this action is upon the actions of Cummins in his dealings with the car dealerships and representations made by Cummins. The counterclaim against Hays is for tortious interference with business relations. The focus of this cause of action is upon Hays' particular actions in relation to Cummins and the car dealerships. In no way are the personal finances of Hays in issue in the adversary proceeding. Accordingly, the income tax returns of Hays are not discoverable. *See Henderson v. Zurn Industries, Inc.,* 131 F.R.D. 560, 562 (S.D.Ind.1990) (returns of doctor not discoverable in personal injury tort action); *Payne v. Howard,* 75 F.R.D. 465 (D.D.C.1977).

Examination of Hays

[2] Hays requests that the Court direct that only one attorney for the defendant be allowed to question Hays at the deposition. *428 Rule 30(c), Federal Rules of Civil Procedure, provides that "Examination and cross-

examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence." Rule 611(a), Federal Rules of Evidence, provide for the exercise of reasonable control by the court over the mode and order of interrogating witnesses. The Court agrees that examination by multiple attorneys representing one party may be oppressive. Cummins states that he "never intended that more than one lawyer for Defendant actually question" Hays at the deposition. Accordingly, the Court will direct that only one attorney for each party may examine or cross-examine Hays during his deposition.

ORDERED that the Motion for Protective Order, filed June 24, 1992, by Thomas E. Hays, Jr., is GRANTED.

IT IS SO ORDERED.

All Citations

144 B.R. 426

Footnotes

1 Rule 26 is made applicable to this proceeding by Rule 7026, Federal Rules of Bankruptcy Procedure.

End of Document

31 F.3d 169
United States Court of Appeals,
Fourth Circuit.

RUM CREEK COAL SALES, INCORPORATED, Plaintiff–Appellant,
v.
Honorable W. Gaston CAPERTON; Colonel J.R. Buckalew; Captain A.W. (Gene) Bumgardner; Sergeant Glen A. Ables; Sergeant David L. Belcher; Sergeant B.R. Chafin; Sergeant P.D. Clemons; Corporal W.E. McGraw, II; Trooper C.E. Akers; Trooper K.W. Cordial; Trooper W.R. Gibson; Trooper C.P. Miller; Trooper J.B. Schoolcraft; Trooper B.A. Sloan; Trooper Gary R. Tincher, and other officers of the West Virginia State Police whose identity is presently unknown to Plaintiff, Defendants–Appellees,
and
West Virginia State Federation, AFL–CIO, Defendant.

No. 93–1540.
|
Argued Dec. 10, 1993.
|
Decided July 25, 1994.

Synopsis

Employer sought injunctive relief against state police who allegedly failed to protect employer in labor strike and sought judgment declaring that West Virginia's trespass statute and neutrality statute were unconstitutional. The United States District Court for the Southern District of West Virginia denied employer's motion for preliminary injunction. Employer appealed. The Court of Appeals, 926 F.2d 353, reversed and remanded. The District Court, Dennis R. Knapp, Senior District Judge, held that neutrality statute was constitutionally valid. Employer appealed. The Court of Appeals, Murnaghan, Circuit Judge, 971 F.2d 1148, reversed and remanded. After the District Court awarded attorney fees, employer appealed. The Court of Appeals, Niemeyer, Circuit Judge, held that: (1) employer was prevailing party entitled to recover attorney fees under Civil Rights Attorney Fee Act; (2) employer could not recover media and public relations expenses; (3) employer could not recover expenses incurred in opposing intervention of party; (4) district court's reduction of attorney fee award for attorneys located in Richmond, Virginia was an abuse of discretion; and (5) 30 percent across-the-board reduction in attorney fees was an abuse of discretion.

Affirmed in part, reversed in part and remanded.

Widener, Circuit Judge, filed a concurring opinion.

Murnaghan, Circuit Judge, filed a concurring and dissenting opinion.

Procedural Posture(s): On Appeal.

West Headnotes (18)

[1] **Federal Courts**
Costs and attorney fees

While Court of Appeals' review of district court's decision in awarding attorney fees in civil rights case is for abuse of discretion, deferential review ordinarily inherent in that standard is modified by closer review when appropriate criteria that are established for fee award are in question.

42 U.S.C.A. § 1988.

9 Cases that cite this headnote

[2] **Civil Rights**
Amount and computation

Starting point for establishing proper amount of attorney fee award under civil rights attorney fees statute is number of hours reasonably expended, multiplied by reasonable hourly rate.

42 U.S.C.A. § 1988.

68 Cases that cite this headnote

[3] **Civil Rights**
Results of litigation; prevailing parties

Civil Rights
Amount and computation

When civil rights plaintiff prevails on only some of claims made, number of hours may be adjusted downward for purposes of determining attorney

fees; but where full relief is obtained, plaintiff's attorney should receive a fully compensatory fee, and in cases of exceptional success, even an enhancement. 42 U.S.C.A. § 1988.

21 Cases that cite this headnote

[4] **Civil Rights**
Time expended; hourly rates

In calculating attorney fees in civil rights case, number of hours must obviously be adjusted to delete duplicative or unrelated hours; at bottom, number of hours must be reasonable and must represent product of billing judgment. 42 U.S.C.A. § 1988.

46 Cases that cite this headnote

[5] **Civil Rights**
Amount and computation

Factors to consider in determining reasonableness of number of hours, and consequently, attorney fee award in civil rights action are time and labor required; novelty and difficulty of questions; level of skill required to perform legal service properly; preclusion of employment by attorney due to acceptance of case; customary fee; whether fee is fixed or contingent; time limitations imposed by client or circumstances; amount involved and results obtained; experience, reputation, and ability of attorneys; undesirability of case; nature and length of professional relationship with clients; and awards in similar cases. 42 U.S.C.A. § 1988.

106 Cases that cite this headnote

[6] **Civil Rights**
Time expended; hourly rates

Hourly rate included in attorney's fee in civil rights case must be reasonable, and this requirement is met by compensating attorneys at prevailing market rates in dwelling community which is a fact intensive determination best guided by what attorneys earn from paying clients for similar services in similar circumstances. 42 U.S.C.A. § 1988.

94 Cases that cite this headnote

[7] **Civil Rights**
Time expended; hourly rates

While evidence of fees paid to attorneys of comparable skill in similar circumstances is relevant in determining fees in civil rights action, so too is rate actually charged by petitioning attorneys when it is shown that they have collected those rates in the past from clients. 42 U.S.C.A. § 1988.

15 Cases that cite this headnote

[8] **Federal Civil Procedure**
Amount and elements

Relevant market for determining prevailing rate for attorneys is ordinarily community in which court where action was prosecuted sits; however, in circumstances where it is reasonable to retain attorneys from other communities, rates in those communities may also be considered.

158 Cases that cite this headnote

[9] **Civil Rights**
Time expended; hourly rates

A fully compensatory attorney fee in civil rights action will include compensation for all hours reasonably expended at market rates in relevant community, and market rates may be proved by rate which clients normally and willingly pay petitioning attorneys. 42 U.S.C.A. § 1988.

129 Cases that cite this headnote

[10] **Civil Rights**
Results of litigation; prevailing parties

Employer which prevailed on every claim asserted in action seeking declaratory judgment that West Virginia neutrality statute and West Virginia trespass statute were unconstitutional was a "prevailing party" entitled to be fully

compensated under civil rights attorney fee statute for its legal expenses. 42 U.S.C.A. § 1988; W.Va.Code, 15–2–13, 61–3B–3(d).

1 Cases that cite this headnote

[11] **Civil Rights**
Services or activities for which fees may be awarded

Civil rights plaintiffs could not recover attorney fees for media public relations efforts; legitimate goals of litigation are almost always obtained in courtroom, not in the media. 42 U.S.C.A. § 1988.

20 Cases that cite this headnote

[12] **Civil Rights**
Services or activities for which fees may be awarded

Attorney fees and expenses related to civil rights plaintiff's opposing intervention of a party were not recoverable under civil rights attorney fees statute by prevailing plaintiff against losing defendant. 42 U.S.C.A. § 1988.

12 Cases that cite this headnote

[13] **Civil Rights**
Services or activities for which fees may be awarded

District court acted well within its discretion in civil rights action in disallowing prevailing plaintiff's request for attorney fees for work done on amicus brief for clients who were not prevailing parties in litigation, disallowing attorney fees for work done on matters unrelated to litigation, and disallowing attorney fees for general assistants which were found to be without basis. 42 U.S.C.A. § 1988.

8 Cases that cite this headnote

[14] **Civil Rights**
Time expended; hourly rates

Evidence that civil rights plaintiff's attorneys who were located in another state charged rates predominantly in the range of $115 to $230 per hour, that the rates were charged to and actually paid by plaintiff, and that persons involved in charging and paying rates believed them to be reasonable was sufficient to establish prevailing market rate for services charged by attorneys accordingly, district court's downward adjustments of those attorneys' hourly rates to $80 to $160 per hour were improper. 42 U.S.C.A. § 1988.

16 Cases that cite this headnote

[15] **Civil Rights**
Time expended; hourly rates

Magistrate judge's adjustment for rates of Charleston, West Virginia lawyers for civil rights plaintiff from a range of $120 to $200 per hour to a range of $100 to $150 per hour, based on magistrate judge's own personal knowledge of prevailing rates in the area, was not an abuse of discretion. 42 U.S.C.A. § 1988.

6 Cases that cite this headnote

[16] **Civil Rights**
Amount and computation

District court abused its discretion in imposing 30 percent across-the-board reduction of civil rights plaintiff's attorney fee request; district court was concerned about some of details of attorney fee petition but those deficiencies did not detract from difficulty and complexity of case or hours necessary to prosecute it, and while district court recognized novelty of legal theories and competency of counsel, which tended to justify "full compensation," it did not address significant other factors such as amount involved, results obtained and undesirability of case, all of which tended to weigh in favor of full compensation. 42 U.S.C.A. § 1988.

13 Cases that cite this headnote

[17] **Civil Rights**

Amount and computation

Mere fact that verdicts of $2.1 to $2.4 million may have been infrequent did not require that attorney fee award in civil rights action be reduced by 30 percent. 42 U.S.C.A. § 1988.

1 Cases that cite this headnote

[18] **Civil Rights**

Proceedings, grounds, and objections in general

Civil Rights

Amount and computation

To the extent that district court, in awarding attorney fees to prevailing party in civil rights action, may have considered fact that taxpayers would have been required ultimately to pay fees, district court employed improper ground for denying or reducing attorney fees to prevailing party. 42 U.S.C.A. § 1988.

7 Cases that cite this headnote

Attorneys and Law Firms

***172 ARGUED:** Paul Michael Thompson, Hunton & Williams, Richmond, VA, for appellant. Jan L. Fox, Sp. Asst. Atty. Gen., Steptoe & Johnson, Charleston, WV, for appellees. **ON BRIEF:** James P. Naughton, Bruin S. Richardson, III, Hunton & Williams, Richmond, VA; Forrest H. Roles, Donna C. Kelly, Smith, Heenan & Althen, Charleston, WV, for appellant. Teresa L. Sage, Asst. Atty. Gen., South Charleston, WV, for appellees.

Before WIDENER, MURNAGHAN, and NIEMEYER, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge NIEMEYER wrote the opinion for the court, in which Judge WIDENER and Judge MURNAGHAN concurred in part. Judge WIDENER wrote a concurring opinion and Judge MURNAGHAN wrote an opinion concurring in part and dissenting in part.

OPINION

NIEMEYER, Circuit Judge:

This case, now here for the third time, presents issues relating to the proper allowance of attorneys fees to be awarded under 42 U.S.C. § 1988. As the prevailing party under 42 U.S.C. § 1983, Rum Creek Coal Sales, Inc., petitioned the district court for an award of $802,389 for fees and expenses incurred by its attorneys through January 1993. The district court awarded $406,857. Contending that the district court's reduction was the product of legal error and constituted an abuse of discretion, Rum Creek Coal seeks an award of the full amount requested in its petition, together with (1) $72,373 for the post-petition period between January 1993 and May 31, 1993, before this appeal; (2) $20,000 for this appeal; and (3) a 5% overall enhancement for extraordinary success, for a total award of $939,501. To avoid further litigation, a possible fourth appeal, and attendant expenses, it requests that we determine the amount of the award, rather than remanding the case on the issue of attorney's fees.

On review of the district court's award, we affirm in part and reverse in part, allowing Rum Creek Coal $709,234.31 for fees and expenses through January 1993. To cover the fees and expenses incurred after that date, on which we have inadequate data on which to make an award, we remand the case to the district court for entry of an additional award.

I

This litigation arose from a coal strike in 1989 by the United Mine Workers of America against Rum Creek Coal Sales, Inc. and other companies. Picketing strikers formed picket lines and barricades across Rum Creek Coal's private access roads with fallen trees, logs, and scrap appliances, and they threw rocks and other projectiles at Rum Creek's trucks in an effort to close down the coal mines. During the course of the strike, trucks were damaged and disabled and people were injured. The district court, when considering a preliminary injunction, characterized the conduct as "savagery" and called ***173** it "uncivilized." The company contended that millions of dollars' worth of damages were caused.

Rum Creek Coal's efforts to enlist the police to establish order met with little success. While the police would maintain patrols on public property at some distance from the violent

barricades, they refused to enforce trespass laws on company property during a labor dispute. The policy of the West Virginia Department of Public Safety, based on West Virginia statutes, was that arrests may be made on private property for all criminal acts *except trespass* during a labor dispute. The Department deliberately refrained from "interfering in matters involving labor demonstrations or trespass on private roads or lands in connection therewith." As a consequence, the police were ineffective in preventing the violence.

Two West Virginia statutes underlying the policy of the Department of Public Safety required police to remain neutral during labor disputes and limited the enforcement of trespass laws. The "Neutrality Statute" provided that no police officer may "aid or assist either party" to a labor dispute, W. Va.Code § 15–2–13, and the "Trespass Statute Proviso" stated that statutory trespass provisions "shall not apply in a labor dispute," W. Va.Code § 61–3B–3.

Rum Creek Coal filed this action under 42 U.S.C. § 1983 in November 1989, contending that these state statutes interfered with federal labor policy by changing the balance between employer and employee established by the National Labor Relations Act ("NLRA"). It contended that West Virginia's policy was preempted by the national labor policy and that the state statutes denied Rum Creek Coal rights guaranteed by the Equal Protection Clause and the Due Process Clause of the United States Constitution. Rum Creek Coal sought a declaratory judgment that the statutes were unconstitutional, and preliminary and permanent injunctions prohibiting enforcement of the statutes.

Following a four-day hearing in January 1990 on the motion for a preliminary injunction to bar enforcement of the Trespass Statute Proviso, the district court refused to order the preliminary injunction. On appeal, we reversed, concluding that the state's policy of withdrawing the general protection of the trespass statutes during a labor dispute conflicted with and was preempted by the NLRA. *See Rum Creek Coal Sales, Inc. v. Caperton* ("Rum Creek Coal I"), 926 F.2d 353 (4th Cir.1991). The Neutrality Statute was not addressed at that time.

On remand, Rum Creek Coal filed a motion for summary judgment on the merits of its claims, seeking a declaratory judgment that both the Trespass Statute Proviso and the Neutrality Statute were unconstitutional and a permanent injunction prohibiting their enforcement. At the same time, the district court granted the motion of the AFL–CIO to intervene and participate on behalf of the West Virginia defendants. Following discovery and briefing by all parties, the district court granted Rum Creek Coal's motion to declare the Trespass Statute Proviso unconstitutional, but it denied the motion with respect to the Neutrality Statute. On appeal, we again reversed, concluding that the Neutrality Statute likewise violated the federal policy governing labor relations and was therefore preempted. *Rum Creek Coal Sales, Inc. v. Caperton* ("Rum Creek Coal II"), 971 F.2d 1148 (4th Cir.1992).

Thereafter, Rum Creek Coal Company filed a petition for attorney's fees and costs incurred through January 1993 in the amount of $802,388.85, which it had paid to its two law firms, Hunton & Williams of Richmond, Virginia, and Smith, Heenan & Althen of Charleston, West Virginia. The matter was referred to a magistrate judge who disallowed $221,161 and approved the figure of $581,228, leaving open for the district court the possibility of a further across-the-board reduction. In making the reductions, the magistrate judge disallowed $11,008.75 in fees and expenses relating to media communications and public relations regarding the case; $1,203.75 in fees and expenses relating to an unsuccessful amicus brief; $33,839.54 in fees and expenses relating to an unsuccessful opposition to the AFL–CIO's motion to intervene; and $2,831.50 requested by Smith, Heenan & Althen for "general assistants." In addition to these specific reductions, the ***174** magistrate judge reduced the hourly rates charged by both law firms because he found them to be excessive. He relied on his own knowledge of the prevailing community rates in Charleston and on the attorneys' failure, when billing, to distinguish between in-court and out-of-court time. The magistrate judge acknowledged that the fee petition he was considering was one that had been recently revised by Rum Creek Coal to remove duplicate billings of about $8,800 which had been objected to by the defendants. Accordingly, he concluded that for those duplications "no reduction is necessary." Finally, the magistrate judge left for the district court a ruling on defendant's motion for an additional 20–30% reduction for "the excessive nature and unreasonable redundancy of plaintiff's billing procedures."

The district court conducted a *de novo* review of the magistrate judge's recommendations and adopted them *in toto*. Addressing the defendants' request that the fees requested should be reduced further by 20–30%, the district court stated that it was "of the opinion that because of the excessive nature and unreasonable redundancy of Plaintiff's

work, this Court should make a thirty percent (30%) reduction on the fee application submitted." The court thus reduced Rum Creek Coal's fee request by another $174,370, allowing a total of $406,857 on Rum Creek Coal's petition for fees and expenses.

No further petition was submitted to the district court for fees and expenses incurred after January 1993, but in its brief for this appeal Rum Creek Coal states that it has incurred additional fees and expenses during the period from January 1993 through May 31, 1993, in the amount of $72,373.56. It also requests "approximately $20,000" for this appeal and an overall enhancement of 5% based on success. The total amount requested by Rum Creek Coal for fees and expenses is thus $939,500.53.

Rum Creek Coal urges what it acknowledges is unusual relief in requesting that we calculate the final award for attorney's fees and expenses because any remand order would only prolong the litigation and increase the attorney's fees. It contends that twice it has requested the district court to award fees in accordance with the criteria imposed by the Fourth Circuit and twice the district court has refused to do so. It suggests the possibility therefore of yet a fourth appeal if the case is remanded.

II

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides that in federal civil rights actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Although the text of the provision does not guide the district court's discretion in whether to allow fees, the Supreme Court, relying on the purposes of the civil rights laws and equitable considerations, has concluded that a plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *See* *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983) (quoting S.Rep. No. 94–1011, 94th Cong., 2d Sess. 4 (1976) U.S.Code Cong. & Admin.News pp. 5908, 5912 (internal citation omitted)).

[1] While our review of a district court's decision in awarding fees is for an abuse of discretion, *see* *Hensley*, 461 U.S. at 437, 103 S.Ct. at 1941, the deferential review ordinarily inherent in that standard is modified by a closer review when the appropriate criteria that are established for a fee award are in question. *See* *Cooper v. Dyke*, 814 F.2d 941, 950 (4th Cir.1987) (abuse of discretion review appropriate if district court follows proper standards); *Daly v. Hill*, 790 F.2d 1071, 1085 (4th Cir.1986) (abuse of discretion not applicable where district court applies incorrect criteria).

[2] **[3]** **[4]** The starting point for establishing the proper amount of an award is the number of hours reasonably expended, multiplied by a reasonable hourly rate. *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939; *Blum v. Stenson*, 465 U.S. 886, 888, 104 S.Ct. 1541, 1544, 79 L.Ed.2d 891 (1984). When plaintiff prevails on only some of the claims made, the number of hours may be adjusted downward; but where full relief is obtained, the plaintiff's ***175** attorney should receive "a fully compensatory fee," and in cases of exceptional success, even an enhancement. 461 U.S. at 435, 103 S.Ct. at 1940. The number of hours must obviously be adjusted to delete duplicative or unrelated hours. At bottom, the number of hours must be reasonable and must represent the product of "billing judgment." 461 U.S. at 437, 103 S.Ct. at 1941.

[5] In determining the reasonableness of the number of hours, the Supreme Court endorses the use of the factors established in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974), and recognized by this court in *Daly*, 790 F.2d at 1077. *See* *Blum*, 465 U.S. at 893, 104 S.Ct. at 1546. The twelve *Johnson* factors, which were considered favorably by Congress in enacting the Act, are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See* 488 F.2d at 717–719; *Hensley*, 461 U.S. at 430 n. 3, 103 S.Ct. at 1938 n. 3.

[6] **[7]** The hourly rate included in an attorney's fee must also be reasonable. *Hensley*, 461 U.S. at 433, 103 S.Ct.

at 1939. This requirement is met by compensating attorneys at the "prevailing market rates in the relevant community." *See* *Blum,* 465 U.S. at 895, 104 S.Ct. at 1547. This determination is fact-intensive and is best guided by what attorneys earn from paying clients for similar services in similar circumstances. *Id.* at 895 n. 11, 104 S.Ct. at 1547 n. 11. While evidence of fees paid to attorneys of comparable skill in similar circumstances is relevant, so too is the rate actually charged by the petitioning attorneys when it is shown that they have collected those rates in the past from the client. *See* *Gusman v. Unisys Corp.*, 986 F.2d 1146 (7th Cir.1993) (recognizing that attorney's actual billing rate provides a "starting point" for purposes of establishing a prevailing market rate).

[8] The relevant market for determining the prevailing rate is ordinarily the community in which the court where the action is prosecuted sits. *See* *National Wildlife Federation v. Hanson,* 859 F.2d 313 (4th Cir.1988). In circumstances where it is reasonable to retain attorneys from other communities, however, the rates in those communities may also be considered. *Id.* at 317.

[9] Thus, a fully compensatory fee will include compensation for all hours reasonably expended at market rates in the relevant community, and market rates may be proved by the rate which clients normally and willingly pay the petitioning attorneys.

With these principles at hand, we will now address the specific points raised by Rum Creek Coal Company in this appeal.

III

[10] The parties agree that Rum Creek Coal Company is the "prevailing party" as the term is used in 42 U.S.C. § 1988. Indeed, it prevailed on every claim that it asserted. In Count I of its complaint, Rum Creek Coal sought a declaratory judgment that West Virginia Code § 15–2–13 (Neutrality Statute) and § 61–3B–3(d) (the Trespass Statute Proviso) were unconstitutional, and in Count II it requested an injunction barring the statutes' enforcement. Rum Creek Coal thus assumed the role of private attorney general to vindicate not only its own civil rights but those of all other persons in West Virginia involved in labor disputes to assure that law enforcement remains unaffected by the existence of a labor dispute. *See* *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 793, 109 S.Ct. 1486, 1494, 103 L.Ed.2d 866 (1989). Having fully prevailed, Rum Creek Coal should therefore be "fully compensated" for its legal expenses. *See* *Hensley,* 461 U.S. at 435, 103 S.Ct. at 1940.

Given its complete success, Rum Creek Coal contends that it is entitled, at least, to ***176** full compensation for the fees it actually paid to its attorneys. It maintains that the district court, in reducing the fee requested in its fee petition by about one half, erred as a matter of law and abused its discretion. We will examine in order the various bases for the district court's reduction of fees requested.

Media and Public Relations Expenses

[11] Rum Creek Coal challenges the disallowance of $11,008.75 in fees for public relations efforts. In support of this claim, it directs us to *Davis v. San Francisco,* 976 F.2d 1536 (9th Cir.1992), *reh'g denied, vacated in part, and remanded,* 984 F.2d 345 (9th Cir.1993), where the court accepted the possibility of awarding fees for public relations efforts where the time so spent contributed, "directly and substantially, to the attainment of [the plaintiffs'] litigation goals." *Id.* at 1545. The *Davis* court was willing to consider an award of fees for public relations efforts because the issue in litigation, employment discrimination in the fire department, lent itself to resolution in the political arena. Rum Creek Coal argues that the circumstances here are similar to those in *Davis* because here, press coverage of the dispute was particularly hostile to Rum Creek Coal. It maintains that it "responded [through the media] in order to sway public opinion and influence State policy-makers to change the State Police's enforcement policies." It thus urges that we follow the lead of the Ninth Circuit in *Davis.*

The defendants oppose funding public relations expenses, drawing our attention to a long string of cases in which various courts have, without substantial comment, excluded fees for public relations efforts. *See, e.g.,* *Greater Los Angeles Council on Deafness v. Community Television of Southern California,* 813 F.2d 217, 221 (9th Cir.1987) (affirming denial of fees for time spent on publicity and lobbying); *Hart v. Bourque,* 798 F.2d 519, 523 (1st Cir.1986) (affirming denial of fees for time "spent on arrangements for lectures or publications about the case").

While the district court gave no explanation for its decision not to award fees and expenses incurred in connection with public relations efforts, we nevertheless agree with its decision in the circumstances of this case. The legitimate goals of litigation are almost always attained in the courtroom, not in the media. Even if we were to adopt the holding in *Davis,* which we do not do, the press efforts in this case were aimed, not at achieving litigation goals, but at minimizing the inevitable public relations damage to the company for suing the governor and the state police to alter the pro-labor police enforcement policies. Accordingly, we affirm the district court's disallowance of $11,008.75 for attorney's fees and expenses claimed in connection with public relations efforts.

Expenses in Opposing AFL–CIO Intervention

[12] Rum Creek Coal next contends that the district court erred in excluding attorney's fees and expenses, totaling $33,839.54, incurred in opposing the AFL–CIO's intervention. The amount disallowed represents $32,447 for 184.5 hours and $1,392.04 in expenses. No reason was given either by the magistrate judge or the district judge for the disallowance except to say that Rum Creek Coal was the losing party on the motion to intervene. The state defendants, however, do not rely on that ground. Instead, they contend that the Supreme Court's decision in *Independent Federation of Flight Attendants v. Zipes,* 491 U.S. 754, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989), requires the disallowance. In *Zipes,* the Court held that a prevailing plaintiff in a civil rights case can recover from an intervening party only when the intervening party's action is "frivolous, unreasonable or without foundation." *Id.* at 761, 109 S.Ct. at 2737. The Court reasoned that to shift fees to an intervenor, who has not violated anyone's civil rights, would not advance the national policy of vindicating wrongful discrimination.

Arguing to distinguish *Zipes,* Rum Creek Coal notes that the question there was whether the plaintiff could recover attorney's fees from *an intervenor,* and not whether it could include intervention-related attorney's fees in its petition against *a losing defendant.* Rum Creek Coal seeks to derive comfort from Justice Blackmun's concurring opinion where he stated, "I see nothing in the language of the statute or in our precedents to ***177** foreclose a prevailing plaintiff from turning to the Title VII defendant for reimbursement of all the costs of obtaining a remedy, including the costs of assuring that the third-party interests are dealt with fairly." 491 U.S. at 767, 109 S.Ct. at 2740 (Blackmun, J., concurring).

Rum Creek Coal also relies on *Jenkins v. Missouri,* 967 F.2d 1248, 1251 (8th Cir.1992) (holding that the State of Missouri, which was the constitutional violator, should pay the expenses incurred in connection with intervenors because of the "special nature of desegregation cases" in which "withholding from the plaintiffs the means for paying their attorneys could be devastating to the national policy of enforcing the civil rights laws").

Although the Supreme Court in *Zipes* may have left room to argue that intervention-related fees may be shifted under a fee-shifting statute to the defendants, because the only issue there related to an *intervenor's* fee liability, we nevertheless conclude that *Zipes* instructs us not to shift intervention-related expenses to the losing defendant. The *Zipes* Court repeatedly implied that in cases where there are intervention-related expenses, the prevailing party may be required to bear them. For example, it observed that Congress did not, with respect to intervention-related fees, wish to give the plaintiff an advantage, presumably by shifting that type of expense from the plaintiff. 491 U.S. at 764, 109 S.Ct. at 2738. In addition, the Court concluded that union intervention for the protection of union members, while not a disfavored activity in civil rights cases, nevertheless is not the type of conduct that fee-shifting statutes were intended to encourage. *Id.* at 765, 109 S.Ct. at 2738–39. The Court stated that a rule which left such intervention-related fees to be borne by the plaintiff under the standard American rule would not destroy the incentive to bring civil rights claims because where there is a prevailing plaintiff, there is always a losing defendant who will be responsible for at least those fees and expenses incurred in the litigation *between the plaintiff and the defendant.* The Court explicitly stated:

> Assessing fees against blameless intervenors, however, is not essential to that purpose [of vindicating the national policy against wrongful discrimination]. In every lawsuit in which there is a prevailing Title VII plaintiff there will also be a losing defendant who has committed a legal wrong. That defendant will, under *Newman [v. Piggie Park*

> *Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263], be liable for all of the fees expended by the plaintiff in litigating the claim *against him*, and that liability alone creates a substantial added incentive for victims of Title VII violations to sue.

Id. at 761, 109 S.Ct. at 2736–37 (emphasis added). That this statement by the Court is to be read to leave the burden of intervention-related fees and expenses with the plaintiff, in accordance with the general American rule, is confirmed by the statements in separate opinions of Justice Blackmun and Justice Marshall. Justice Blackmun, criticizing the majority's recognition of a rule that would leave intervention-related fees with the plaintiff, said:

> It seems to me that the first step toward solving the problem of intervenor fee liability is to recognize that it is the Title VII wrongdoer, and not the Title VII plaintiff, whose conduct has made it necessary to unsettle the expectations of a third party who itself is not responsible for the Title VII plaintiff's injuries. The Court states that the "defendant will, under *Newman*, be liable for all of the fees expended by the plaintiff in litigating the claim *against him*," *ante*, 491 U.S. at 761, 109 S.Ct. at 2737 (emphasis added)—and thereby tacitly assumes that the defendant's fee liability goes no further. I see no basis for that assumption.

Id. at 767, 109 S.Ct. at 2739–40 (Blackmun, J., concurring). Justice Marshall, also criticizing the majority's assignment of intervention-related fees to the plaintiff, said:

> The majority further states that a defendant's liability for "all of the fees expended by the plaintiff in litigating the claim *against him, ... alone* creates a substantial added incentive for victims of Title VII violations to sue." *Ante*, at 761, 109 S.Ct. at 2737 (emphasis added). The majority apparently believes that the typical victim injured by discrimination will have available ***178** discretionary income, possibly running into the hundreds of thousands of dollars, to spend to counter intervenors' claims.

Id. at 775, 109 S.Ct. at 2744 (Marshall, J., dissenting). That the majority retained the "against him" language in the face of these attacks surely implies that intervention-related fees ought normally to be borne by a plaintiff.

Under the Supreme Court decision in *Zipes*, we are required to hold that the intervention-related fees and expenses in question here are not recoverable under 42 U.S.C. § 1988 by a prevailing plaintiff against a losing defendant. Accordingly, we affirm the district court's exclusion of those amounts.

Other Miscellaneous Reductions

[13] The district court disallowed Rum Creek Coal's request for fees and expenses in connection with various items of work that the court concluded were unnecessary for the prosecution of the litigation. It disallowed $1,203.75 in fees for work done on an amicus brief for clients who were not prevailing parties in this litigation. It disallowed $11,776 incurred for work done on matters unrelated to this litigation. And it disallowed $2,831.50 for "general assistants" which the magistrate judge found to be "without basis." Our review of these matters discloses that the district court acted well within its discretion in disallowing these items, and we therefore affirm the rulings.

Adjustments to Hourly Rates

The most significant reduction recommended by the magistrate judge and approved by the district court is the finding that the hourly rates of the billing attorneys was excessive for the Charleston, West Virginia, community. Based on this finding, the district court disallowed approximately $187,000 in Hunton & Williams' fees, reducing its billing rates from the range of $115 to $230 per hour to a range of $80 to $160 per hour, and approximately $32,500 in Smith, Heenan & Althen's fees, reducing its billing rates from the range of $120 to $200 per hour to a range of $100 to $150 per hour. The district court, focusing only on Charleston, West Virginia, as the relevant community, drew upon the magistrate judge's own knowledge of the prevailing rates there. The court concluded that both law firms charged excessive rates and "made no distinction between in-court and out-of-court time."

Rum Creek Coal contends that the hourly rates it paid to its attorneys were the normal, standard rates charged by the firms in the communities in which they were practicing—Hunton & Williams in Richmond, Virginia, and Smith, Heenan & Althen in Charleston, West Virginia—and that the hourly rates for which it seeks reimbursement are those actually paid by the firms' clients. Even though the litigation was

conducted in Charleston, West Virginia, Rum Creek Coal argues that it was justified in retaining Hunton & Williams from Richmond because (1) Hunton & Williams was its regular outside counsel, (2) the case was expected to be difficult and protracted, (3) the case would ultimately end up before the Fourth Circuit in Richmond, where Hunton & Williams is based; and (4) it was suing the sitting governor and the state police superintendent, which would make it and its counsel unpopular in much of West Virginia. Rum Creek Coal contends that the fees it paid Hunton & Williams are reasonable in Richmond and that there is no other evidence in the record to the contrary. With respect to the rate charged by the Charleston attorneys, Rum Creek Coal contends that the magistrate judge's knowledge of the prevailing market rate was flawed because most of the cases to which the magistrate judge referred involved other types of matters, such as bankruptcy.

[14] Turning first to the rates charged Rum Creek Coal by Hunton & Williams, we agree that the magistrate judge had no factual basis to reduce the rate to a range of $80 to $160 per hour, as he did. The only facts in the record reveal that the rates charged by Hunton & Williams, predominantly in the range of $115 to $230 per hour, were their normal Richmond hourly rates, that the rates were charged to and actually paid by Rum Creek Coal, and that the persons involved in charging and paying those rates believed them to be reasonable. Such evidence is sufficient to establish the "prevailing market ***179** rate" for services charged by Hunton & Williams to its clients in Richmond. *See* *Gusman,* 986 F.2d at 1150.

That those rates are based on Richmond market data does not, in the circumstances of this case, make the evidence irrelevant. In *National Wildlife Federation v. Hanson,* 859 F.2d 313 (4th Cir.1988), we observed that the community in which the court sits is the first place to look to in evaluating the prevailing market rate. Rates charged by attorneys in other cities, however, may be considered when "the complexity and specialized nature of a case may mean that no attorney, with the required skills, is available locally," and the party choosing the attorney from elsewhere acted reasonably in making the choice. *Id.* at 317.

In this case both criteria are fulfilled. The litigated issues included questions of preemption and constitutional law and their complexity is demonstrated by the fact that both appeals to this court resulted in reversals of the district court. In addition Hunton & Williams is Rum Creek Coal's regular counsel located in Richmond, and its lawyers are concededly well-experienced in the type of matters involved. Rum Creek Coal makes a persuasive argument that it was necessary to use outside counsel since taking on the governor and the police of the state where the trial court is located, in the middle of a well-publicized coal miners' strike, could be a politically sensitive activity for a local West Virginia firm. Moreover, it is to be noted that a substantial portion of the fees charged by Hunton & Williams were for services rendered in Richmond in connection with the appeals to this court. With respect to these activities, the *Hanson* criteria need not even be considered.

Accordingly, because the adjustments to Hunton & Williams' hourly rates lacked any factual basis, we reverse that ruling of the district court.

[15] With respect to the rates of the Charleston lawyers, the outcome is different because of the additional knowledge contributed to the decision by the magistrate judge. While Rum Creek Coal makes a persuasive argument that the fees actually charged by its law firm in Charleston, predominantly in the range of $120 to $200 per hour, and paid by clients there should be strong evidence of the prevailing market rate, we cannot say that a contrary factual finding by the magistrate judge constitutes an abuse of discretion where the magistrate judge used his own personal knowledge of the prevailing rates in Charleston. The magistrate judge reduced the rate allowed to Rum Creek Coal's Charleston lawyers to the range of $100 to $150 per hour. Because of this evidentiary basis for his ruling, under our deferential standard of review, we affirm the ruling insofar as it adjusts the rates of the Charleston, West Virginia, lawyers.

30%-Reduction Across the Board

[16] The district court approved the specific reductions identified and recommended by the magistrate judge and imposed yet a further 30% reduction of the original fee application because of the "excessive nature and unreasonable redundancy of plaintiff's work." When reviewing the number of hours for excessiveness or reasonableness, the court properly turned to the *Johnson* factors. *See* *Daly,* 790 F.2d at 1075 n. 2. The district court observed that the plaintiff's work was "clearly novel ... [b]ut [it concluded that] attacking the constitutionality of any statute is not difficult." Moreover, it was concerned about the generalized nature of many billing entries that listed simply "telephone call to Smith," "letter to client," or "legal research." It was also concerned about

the lumping of billing entries and duplication of effort. The court acknowledged that all counsel were "highly competent and well-experienced in labor litigation," but concluded that counsels' expectation to recover its regular rates "must be clouded by everyone's general knowledge of usual contingent fee contracts" and "usual jury verdicts." The court noted that under a contingent fee arrangement, the plaintiff would have had to obtain a verdict of $2.1 to $2.4 million in order to recover the fees it seeks. Because such verdicts are "infrequent" in the Southern District of West Virginia, the court was reluctant to grant such a large fee award here. Also influencing the court was an earlier-expressed concern that the plaintiff had ***180** financial means and any fees awarded would be borne by the taxpayers. It said, in ruling on and deferring consideration of an earlier petition for fees in this case:

> The claims for fees and expenses represent a large sum of money which, if sustained, would ultimately be borne by the taxpayers of this State. That, in itself, requires that the claims be fully supported by clear and convincing proof.... Petitioners, although given the opportunity, have failed to do so.

We share the district court's concern about some of the details of Rum Creek Coal's fee petition, particularly those stating simply "research" or "letter to client." We have frequently exhorted counsel to describe specifically the tasks performed, a practice which is especially necessary when we review an award in a case where the plaintiff has not prevailed on all the claims. *See* *Daly v. Hill,* 790 F.2d 1071 (4th Cir.1986). Moreover, we have also been sensitive to the need to avoid use of multiple counsel for tasks where such use is not justified by the contributions of each attorney. *See* *Spell v. McDaniel,* 852 F.2d 762 (4th Cir.1988). Generalized billing by multiple attorneys on a large case often produces unacceptable duplication.

These deficiencies, however, do not detract from the difficulty and complexity of this case or the hours necessary to prosecute it. As Rum Creek Coal observed in its brief, the litigation was vigorously contested by the State of West Virginia at every step, and in view of the district court's rulings, Rum Creek Coal was required to appeal twice to this court, each time succeeding in its effort. As a result, Rum Creek Coal contends that it has "substantially changed law enforcement policies in West Virginia." We can find no evidence that Rum Creek Coal's attorneys heightened the conflict or in any sense applied an unreasonable effort to the task.

While the district court recognized the novelty of the legal theories and the competency of counsel, both of which tend to justify full compensation, it did not address significant *Johnson* factors such as "the amount involved," "the results obtained" and the "undesirability of the case," all of which tend to weigh in favor of full compensation. No one has argued to minimize the extensive damage caused to Rum Creek Coal or to lessen the importance of this case to its future in West Virginia. Moreover, all parties agree that Rum Creek Coal obtained all of the results which it sought. The theories of recovery were complex and not obvious, involving NLRA preemption, abstention, equal protection, and due process, all directed at long-standing state policies favoring labor unions. Nothing would have suggested at the outset that such a case, particularly one directed at the governor and the state police in a state where Rum Creek Coal needs to do business, is particularly "desirable," at least for lawyers in West Virginia.

[17] Although one of the *Johnson* factors is whether the fee is fixed or contingent, we reject the district court's contingent fee analysis that reasoned that because verdicts of $2.1 to $2.4 million are infrequent, the award here should somehow be reduced. The court never made an analysis of the value of any award in this case to Rum Creek Coal, despite the fact that Rum Creek Coal has contended that the state policy has resulted in millions of dollars in damages to the company.

[18] Finally, to the extent that the district court may have considered the fact that taxpayers would be required ultimately to pay the fees, it employed an improper ground for denying or reducing an attorney's fee to the prevailing party under 42 U.S.C. § 1988.

In short, we conclude that, by considering improper factors and failing to take into account other applicable *Johnson* factors, the district court erred. And, to the extent that it failed to recognize the difficulty of the issues, the significance of plaintiff's efforts, and the results obtained, the court abused its discretion in imposing a 30% across-the-board reduction of the fee request. Accordingly, we reverse that ruling.

We now turn to the appropriate disposition of this appeal.

IV

This case is before us for the third time. Having been commenced in November 1989, ***181** it has proceeded too long and its continuation, with the attendant burden of expense, will in and of itself implicate the ability to work justice. A request for attorney's fees should not result in "a second major litigation." *See Hensley,* 461 U.S. at 437 & n. 12, 103 S.Ct. at 1941 & n. 12. To avoid further litigation expenses that would follow a remand and the risk of yet a fourth appeal, we would be inclined to award a final fee amount on appeal. *See Sidag Aktiengesellschaft v. Smoked Foods Products Co.,* 960 F.2d 564, 566 (5th Cir.1992) (awarding fees at the appellate level because "as this case is now before us for the fourth time, no useful purpose would be served by further delaying its final disposition"). The record, however, does not permit us to do so. While data is included in the record to support the petition for fees and expenses through January 1993, nothing is included for the period thereafter. It will therefore be necessary to remand the case for a determination of the reasonable fees and expenses incurred after January 1993.

Accordingly, for the period through January 1993, we calculate an award in favor of Rum Creek Coal for its attorney's fees and expenses as follows. Beginning with Rum Creek Coal's petition that was the subject of the district court's decision, in the total amount of $802,388.85, we disallow:

(a) $11,008.75 for media and public relations;

(b) $33,839.54 in intervention-related fees;

(c) $15,811.25 for other miscellaneous fees and expenses in connection with an amicus brief, unrelated work, and amounts billed for "general assistants"; and

(d) $32,495, representing the reduction made by the magistrate judge in the hourly rate for the Charleston attorneys.

Calculating the total, we approve, as an award for fees and expenses for the period that ended January 31, 1993, the amount of $709,234.31. To that sum the district court is directed to add an additional amount for reasonable fees and expenses for the period following January 31, 1993.

For the reasons given, we affirm the district court in part, we reverse it in part, and remand this case for further proceedings consistent with this opinion.

IT IS SO ORDERED.

WIDENER, Circuit Judge, concurring:
I concur in the result.

I also concur in all of the opinion, with only small exception.

Rum Creek Coal Sales, Inc. is an affiliate of A. T. Massey, a Richmond, Virginia company. See *Coal,* June, 1992, p. 38; *Coal Week,* August 17, 1992, p. 2. I think this Massey affiliate had a right to employ Hunton and Williams, its regular outside attorneys, at Richmond rates, and that so far as an allowance for Hunton and Williams is concerned, Richmond is the relevant market for determining the prevailing rate.

I am also of opinion that this litigation was desirable, both for the West Virginia and the Virginia attorneys. That Rum Creek is solvent is shown, if by nothing else, by the fact that it has paid the better part of a million dollars in attorneys' fees. That Rum Creek was in serious difficulty cannot be doubted. Even if some attorneys might be deterred from engaging in such litigation because of the fact that the State and the Union were on the opposite side in the political climate existing, that does not mean the ordinary attorney would be so deterred, I think. I suggest this is a classic case of a solvent client in bad trouble.

Other than the small exception in reasoning, I emphasize that I concur in the entire opinion, as well as in the result.

MURNAGHAN, Circuit Judge, concurring in part and dissenting in part:
Although I readily concur in the balance of the majority opinion, in my view *Independent Federation of Flight Attendants v. Zipes,* 491 U.S. 754, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989), did not decide whether or not a prevailing plaintiff could, under certain circumstances, recover intervention-related fees from the defendant. Since it seems that there is good reason leading to a fairer result to place the burden on the defendant and not on the victorious plaintiff in a successful civil rights action, I share the view expressed by ***182** the Eighth Circuit in *Jenkins v.*

Missouri, 967 F.2d 1248 (8th Cir.1992), decided well after *Zipes.*

As the majority suggests in its opinion, at the very least, the *Zipes* court "may have left room to argue that intervention-related fees may be shifted under a fee-shifting statute to the defendants...." In parsing dictum from the majority opinion in *Zipes* and language from the concurrence and dissent, the majority attempts to make the case that *Zipes,* though not so holding, does in effect prohibit a fee recovery against the defendant by the prevailing plaintiff for services involving an intervenor. *Zipes,* however, need not be read so broadly. First, as the majority recognizes, Justice Blackmun pointed out in his concurrence in *Zipes* that he "s[aw] nothing in the language of the statute or in our precedents to foreclose a prevailing plaintiff from turning to the Title VII defendant for reimbursement of all the cost of obtaining a remedy, including the costs of assuring that the third-party interests are dealt with fairly." *Zipes,* 491 U.S. at 767, 109 S.Ct. at 2740 (Blackmun, J., concurring). While Justice Blackmun's language might be read implicitly to intend "until now," the *Zipes* majority, having failed to reach the question explicitly, left the question open.

Second, the Eighth Circuit, in coming out in *Jenkins* the other way three years after the *Zipes* case came down, appears to have rejected exactly the position advanced by the majority's opinion here. *See Jenkins,* 967 F.2d at 1251 & n. 3 (explaining that the *Jenkins* defendant advanced the argument that both "dictum" from *Zipes* and passages from the concurrence and the dissent imply that all intervention-related fees are prohibited). While an Eighth Circuit precedent is not binding on our court, it can be persuasive and here I am convinced by the Eighth Circuit's rationale. In holding that a prevailing plaintiff could collect intervention-related fees from the vanquished defendant, the *Jenkins* court observed that "this [the *Zipes*] dictum must be read in conjunction with the equitable balancing" discussed in *Zipes,* namely 1) that litigation would result in a great enough fee award without the intervention-related fees to allow the plaintiff to vindicate its rights and, 2) that the "losing intervenors ... have not been found to have violated anyone's civil rights." *Jenkins,* 967 F.2d at 1251 (internal quotations omitted).

Because of the peculiar identity of the corporate plaintiff in the instant civil rights case, the first equitable balancing identified by the *Jenkins* court simply does not here obtain. Clearly, Rum Creek Coal could no doubt have pursued the litigation with or without an award of intervention-related fees. However, I, despite that consideration, remain concerned that future plaintiffs in the Fourth Circuit, standing in the shoes of the *Jenkins* plaintiffs, could be dissuaded unfairly from bringing their action against unconstitutional actors.

The second equitable factor mentioned in *Jenkins,* moreover, should not here cause disallowance of a fee award for services against an intervenor. In *Zipes,* the intervening union's interest was dramatically different from the defendant's in the present case. In *Zipes,* the intervenor

> became a party to the lawsuit not because it bore any responsibility for the practice alleged to have violated Title VII, but because it sought to protect the bargained-for seniority rights of its employees. Awarding attorney's fees against such an intervenor would further neither the general policy that wrongdoers make whole those whom they have injured nor Title VII's aim of deterring employers from engaging in discriminatory practices.

Zipes, 491 U.S. at 762, 109 S.Ct. at 2737. Here, by contrast, the interests of the AFL–CIO and West Virginia, while distinct enough to bring about intervention, were in reality identical. West Virginia wanted in both cases to restrict its State Police from entanglement in labor disputes, and, no doubt as much or more so, the AFL–CIO wanted such a result.

We found the enforcement of those statutes improper, in other words the position advanced by *both* the State and the AFL–CIO was held unconstitutional. Although as a technical matter, as intervenor, the AFL–CIO was not a "constitutional violator," its interests were virtually the same as those of the defendant, which was a constitutional ***183** violator. Under those circumstances it would seem prudent to apply a rule which places the fee burden not exclusively on the prevailing plaintiff, but, for a reasonable share, on the constitutional violator, whose losing position was not only assisted, but indeed largely was created, by the presence of those represented by the intervenor. The contrary rule would

create the danger identified by Justice Marshall in the context of the bar on recovery of fees for services for contests with intervenors: "defendants can rely on intervenors to raise many of their defenses, thereby minimizing the fee exposure of defendants and forcing prevailing plaintiffs to litigate many, if not most, of their claims against parties from whom they have no chance of recovering fees." *Zipes*, 491 U.S. at 779–80, 109 S.Ct. at 2746 (Marshall, J., dissenting).

Since *Zipes* has not foreclosed recovery in the present case from the defendant of an intervention-related fee, the concern raised by Justice Marshall combined with the consideration that the fee-shifting statute intends to place, within certain equitable limits, the burden on the constitutional violator, where thereby an adequate fee is awarded, makes it a better rule, avoiding an inter-circuit conflict, presumptively to allow the recovery from defendants of intervention-related fees, particularly where there is a substantial alignment between the interest of the intervenor and of the defendant. Here the fee for legal services against the intervenor was not met by the award against the defendant, and was not insubstantial. The fee shifted to the defendant was therefore inadequate, and should be increased to cover intervention necessitated activities.

Accordingly, I respectfully dissent.

All Citations

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