UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS *et al.*, **Plaintiffs,** **v.** **RINGLING BROTHERS AND BARNUM & BAILEY CIRCUS *et al.*,** **Defendants.**	**Civil Action No. 03-2006 (EGS/JMF)**

MEMORANDUM OPINION AND ORDER

As my previous opinions in this case indicate, Tom Rider is a crucial witness who will testify in support of plaintiffs' claim that the Circus elephants were mistreated. He received financial support from plaintiffs as he traveled around the country speaking about the mistreatment he claims to have seen.

His deposition understandably consumed two days. During it, he answered questions about how he saved the e-mails he sent and received, how he collected the documents from his van to comply with Judge Sullivan's discovery order, and how he sent the receipts for the payments made him by plaintiffs and others to plaintiffs' lawyers. Plaintiffs' Opposition to Defendant's Motion to Compel Deposition Testimony of Tom Eugene Rider and the Animal Protection Institute ("Opp.") at 5 (quoting Deposition of Thomas Eugene Rider, *passim*). He balked, however, at the instruction of his counsel and refused to answer questions pertaining to

(1) when he was told to save the e-mails that he was sent; (2) what kind of documents he was supposed to save; and (3) why he did not attend an inspection of two of the elephants that was held in Auburn Hills, Michigan. See Motion to Compel the Deposition Testimony of Tom Eugene Rider, the Animal Protection Institute and the Wildlife Advocacy Project and for Costs and Fees ("Circus Mot.") at 3-6.

The E-Mails

The questions and answers pertaining to the e-mails and the documents are as follows:

Q. Do you save the e-mails that come into this [i.e. Rider's e-mail] account, or delete them?

A. No, I save them.

Q. Save them all.

A. Yes.

Q. Why do you do that?

A. I think it's called "discovery."

Q. All right, when were you told to do that?

Ms. Meyer: Okay. That I object to. That would be invading an attorney/client communication.

The witness: Okay.

Mr. Simpson: So you're going to instruct him not to answer the question "when"?

Ms. Meyer: Yes.

By Mr. Simpson:

Q. You're going to follow this instruction?

A. Yes.

Circus Mot., Exhibit 1 at 220-21 (Rider Deposition).

Q. And what was your understanding about what you were supposed to save?

A. Documents.

Q. What kind of documents?

Ms. Meyer: I am going to object to the extent this will require the divulging of attorney/client communication.

The witness: Okay.

By Mr. Simpson:

Q. I am not talking about what your lawyers told you.

Ms. Meyer: You said what was your understanding about what you were supposed to save. Therefore, if his understanding is based on a conversation that he had with his attorney, it would be an attorney-client communication and I am objecting to him discussing with you our attorney/client communication.

Mr. Simpson: That is fine.

By Mr. Simpson:

Q. Are you going to answer the question?

A. No.

Q. You are going to follow your lawyer's instruction?

A. Yes.

Ms. Meyer: If, in fact your understanding comes from a conversation that you had with me, I am instructing you not to answer it.

The witness: Okay. Yes.

Id., Exhibit 1 at 509-11 (Rider Deposition).

Analysis

The parties agree and the authorities support a distinction between asking a witness what data he saved and what specific actions he took to save it and asking the witness what legal advice he received as to those two topics. The former is not privileged, while the latter most often is.[1] See, e.g., In re eBay Antitrust Litig., No. C-07-1882, 2007 U.S. Dist. LEXIS 75498, at *8 (N.D. Cal. Oct. 2, 2007); Google, Inc. v. Am. Blind & Wallpaper Factory, Inc., No. C-03-5340 (N.D. Cal. Apr. 27, 2007).[2]

But, it is not necessary to reach the privilege question for the questions founder on a more fundamental basis: they are irrelevant. There is no legitimate claim in this case that Rider has destroyed any e-mails. To the contrary, as I have explained, he testified that he saved all the e-mails that he received and sent. See Opp. at 5 (quoting Rider Deposition at 4-5). The date on which he was told to save the e-mails that came into his account and his understanding of what he was supposed to save are irrelevant and unlikely to lead to relevant evidence pertaining to the claim or the subject matter of this action: the alleged mistreatment of elephants by the Circus. See Gibson v. Ford Motor Co., 510 F. Supp. 2d 1116, 1123 (N.D. Ga. 2007) (list of kinds of documents employees were to preserve "do not necessarily bear a reasonable relationship to the issues in litigation" and are not reasonably calculated to lead to discovery of admissible evidence); India Brewing, Inc. v. Miller Brewing Co., 237 F.R.D. 190, 192 (E.D. Wis. 2006) (document retention policy is not relevant to any claim or defense); Grimm et al., 37 U. BALT. L. REV. at 427 ("Absent a preliminary showing of a failure to preserve that which should have been preserved, courts have generally refused to permit discovery of counsel's communications

[1] For a comprehensive analysis of the topic, see Paul W. Grimm, Michael D. Berman, Leslie Wharton, Jeanna Beck & Conor Crowley, *Discovery about Discovery: Does the Attorney-Client Privilege Protect All Attorney-Client Communications Relating to the Preservation of Potentially Relevant Information*, 37 U. BALT. L. REV. 413 (2008) (Hereafter "Grimm et al.,").

[2] See Circus Mot., Exhibit 2.

related to the preservation of information. Courts have permitted such discovery, however, when confronted with a showing of a failure to preserve.").

The Circus would counter that Rider admitted that he only kept 27 of the 88 cover letters that accompanied the payments to him. Reply in Support of Motion to Compel the Deposition Testimony of Tom Eugene Rider, the Animal Protection Institute and the Wildlife Advocacy Project and for Costs and Fees at 5 n.3. According to the Circus, "[p]laintiffs' motivation for asserting the attorney-client privilege on these issues is transparent: they are attempting to cloak Rider's egregious spoliation in this case." Id. at 5.

First, Judge Sullivan and I have grown tired of telling the lawyers in this case to stop impugning each others' professional integrity. That direction has once again fallen on deaf ears. Accusing one's opponent of unprofessional conduct in attempting to purposefully assist a witness's destruction of evidence is not legal argument.

Second, the "egregious" spoliation of which the Circus complains is that apparently in the period from the commencement of his receipt of such payments to March 1, 2007, Rider did not keep some of the cover letters that were sent with the payments. Id. at 5 n.3. But, his not keeping those letters has nothing to do with his preservation of e-mails, and he unequivocally testified that he kept the e-mails that he sent or received. Attempting to argue that since he did not keep some of the letters means that his testimony that he kept the e-mails and kept the documents he received is not truthful runs smack into the prohibition on propensity evidence in Rule 404(a) of the Federal Rules of Evidence. Inquiry into when and what Rider was told as to preserving e-mails and documents leads nowhere.

Moreover, even if I am wrong and there is some probative value in learning when Rider was told to preserve e-mails in his account and what kind of documents he was told to save, I

must surely exercise the discretion I have under Rule 26(b)(2)(C) to preclude further discovery on that issue. Discovery has gone on in this case for nearly *five* years and the expenditure of the resources of the parties and of the court to deal with all the problems that have arisen is staggering. For example, this Court has been forced to resolve *44* different motions pertaining to discovery.

Many of these motions pertained to payments made to Rider, and I presided over a hearing that took several days in which each witness testified as to the documents pertaining to those payments. I am firmly convinced that the Circus has had all the discovery it could possibly need as to that subject and has more than enough information to impeach Rider's credibility because of payments made him by plaintiffs and others. Any further discovery pertaining to his alleged "spoliation" of e-mails or documents in light of the production of so many e-mails and other documents pertaining to those payments would be "unreasonably cumulative or duplicative." Fed. R. Civ. P. 26(b)(2)(C)(i). Surely, the Circus has had more than an ample opportunity to obtain information pertaining to payments to Rider and what little value is to be gained from any more discovery on that topic is overwhelmed by the burden and expense in reconvening the deposition of Rider to ask him three or four more questions. Fed. R. Civ. P. 26(b)(2)(C)(iii). Indeed, given the history of this case, to permit that would not be to merely abuse my discretion; it would be sinful.

Apportionment of Costs and Media Strategy

In his opinion of August 23, 2007, Judge Sullivan ordered that plaintiffs produce "[a]ll responsive documents and information concerning payments to Tom Rider, regardless of whether such payments were made directly to him or indirectly through other means such as WAP." Order of August 23, 2007 [#178] at 6. Judge Sullivan indicated, however, that "any

documents, communications, or information concerning the media and legislative strategies of the plaintiffs are irrelevant to the claims and defenses in this case and would be over[ly] burdensome to produce." Id. at 5.

During a Rule 30(b)(6) deposition of the plaintiff Animal Protection Institute ("API"), the deponent indicated that the purpose of a certain phone call in the summer of 2006 was media strategy which included contributions to the Wildlife Advocacy Project for public relations effort. Circus Mot., Exhibit 3 at 242, 245-46 (API Deposition). The deponent indicated that Rider was discussed during the call "in terms of media strategy." Id. at 245-46. Ultimately, the deponent balked at testifying how each of the respective groups, including API was going to divide up the payments for Rider on the grounds that the question invaded the area prohibited by Judge Sullivan. Id. at 185. Hence, counsel for plaintiffs prohibited the deponent from answering the question about the apportionment among the groups that funded Rider. Counsel stated: "So, I'm not going to let her answer with regard to strategies for what groups can contribute what amounts and why they made those decisions." Id. at 187.

The Circus insists that the questions fall directly within the category permitted by Judge Sullivan of "information pertaining to payments to Tom Rider" as described in Judge Sullivan's Order of August 23, 2007. Circus Mot. at 8-9. Plaintiffs insist, and the Circus does not deny, that API has provided all the information it has about the payments, direct or indirect, that it made to Rider and that the question about apportionment among them of the payment of Rider's expenses invades the privilege Judge Sullivan provided them against disclosure of media and legislative strategies in the same Order. Opp. at 7-17. Plaintiffs also invoke a First Amendment right against disclosing such strategies. Id.

In my view, it is unnecessary to find out how many angels can dance on the head of the pin of the distinction between information concerning payments to Rider and strategic discussions of how to apportion those payments among plaintiffs. As Judge Sullivan has indicated, payments to Rider are pertinent to his credibility. Surely, at this point, it is self-evident that the Circus intends to paint Rider as the plaintiffs' paid puppet. As I have explained, I am certain that the Circus has collected more than enough information about the payments to Rider by the plaintiff organizations, and it is those payments that impeach his credibility by showing bias in favor of those who paid him. The apportionment among plaintiffs of those payments does not make Rider any more or less credible, and that apportionment fails the fundamental test of all discovery—that the discovery seek information that is admissible or likely to lead to admissible information. Fed. R. Civ. P. 26(b)(2).

Moreover, even if I am wrong and the apportionment meets that standard, I must once again fulfill my obligation to weigh cost against value by invoking the considerations specified in Rule 26(b)(2)(C). And once again, I have to find that the Circus has had more than an ample opportunity to discover information pertaining to plaintiffs' payments to Rider, that information pertaining to the apportionment of those payments is, at best, cumulative and duplicative of the discovery the Circus has had, and that the burden of re-opening the API deposition to answer the questions that API refused to answer is not justified by what little benefit the Circus would gain from it.

It is, therefore, hereby,

ORDERED that the Motion to Compel the Deposition Testimony of Tom Eugene Rider, the Animal Protection Institute and the Wildlife Advocacy Project and for Costs and Fees [#256] is **DENIED.**

SO ORDERED.

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JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated: August 5, 2008