

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

THE RUTHERFORD INSTITUTE,)	CIVIL ACTION NO. 3:00MC00004
and JOHN W. WHITEHEAD,)	
)	
Petitioners,)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
COMMUNITY ACTION PROJECT)	
OF TULSA COUNTY,)	
)	
Respondent.)	JUDGE JAMES H. MICHAEL, JR.

Before the court are the respondent’s objections to the order entered January 29, 2001, by the presiding United States Magistrate Judge. Because the Magistrate Judge’s order is neither clearly erroneous nor contrary to law, the respondent’s objections shall be overruled.

I.

Petitioner The Rutherford Institute (TRI) is a non-profit organization based in Charlottesville, Virginia, that is dedicated to the protection of civil liberties. It lends its support to various causes consistent with its purpose, including assisting in litigation.

In August 1999, Jack Dubbs and other schoolchildren filed suit against respondent Community Action Project of Tulsa County and other defendants in the Northern District of Oklahoma, alleging the children were physically examined without consent while at school, in violation of the federal constitution and related state laws. *See Barnes v. Head Start*, No. 99CV0733K(J) (N.D. Okla.); *Dubbs v. Head Start*, No. 99CV0732B(E) (N.D. Okla.) (collectively, the “underlying litigation”).

TRI and petitioner John W. Whitehead, its president, became involved in the underlying litigation upon request by TRI's affiliate law firm in Tulsa. Mr. Whitehead served as Of Counsel for the plaintiffs in the underlying litigation until April 2000, when he withdrew as an attorney of record.

On November 8, 2000, as part of its discovery in the underlying litigation, the respondent served subpoenas upon Mr. Whitehead and TRI, which subpoenas were issued from the Western District of Virginia. The respondent did so, in part, to explore comments Mr. Whitehead previously made to the media about the underlying litigation. The subpoenas commanded Mr. Whitehead and a TRI representative to appear for depositions on November 17, and to bring with them "Any and all documents regarding communications received by or sent to the Plaintiffs [Dubbs, etc.] or others regarding this lawsuit," and "Any and all documents regarding expenditures of money in connection with this litigation or any money received in connection with this litigation." (Mot. to Quash, Aden Decl. Ex. A.)

The petitioners filed a motion for a protective order and a motion to quash the subpoenas on November 17, 2000. They asserted that the information sought is protected by various privileges, and is irrelevant to the underlying litigation.

The court referred the motions the presiding United States Magistrate Judge to enter a written order setting forth the disposition of the matter. *See* 28 U.S.C.A. § 636(b)(1)(A) (West 1993 & Supp. 2000); Fed. R. Civ. P. 72(a). At the hearing, the Magistrate Judge first addressed the subpoenas *duces tecum*. Because the petitioners conceded that some of the requested documents were relevant, not privileged, and subject to discovery, the Magistrate

Judge denied the motion to quash with respect to those documents, and ordered the petitioners to produce them. The Magistrate Judge granted the motion to quash the subpoenas *duces tecum* in all other respects, but also granted the respondent leave to move to compel if it thought it was entitled to additional documents.

With respect to the deposition subpoenas, the parties revealed at the hearing that the Oklahoma district court was poised to decide whether the plaintiffs in that case had waived certain privileges pursuant to the local rules of that district. To coordinate the litigation in this court with the underlying litigation, and because the testimony sought from Mr. Whitehead appeared to be protected by various privileges, the Magistrate Judge held that he would not compel Mr. Whitehead to attend any deposition until the forum court ruled on the waiver issue. Accordingly, the Magistrate Judge “temporarily grant[ed]” the motion to quash the deposition subpoenas, “without prejudice” to the respondent to move to compel the taking of the depositions after the waiver issue was resolved in Oklahoma. (Dec. 13, 2000, Tr. at 58-59.)

On January 9, 2001, the Oklahoma court ruled that the plaintiffs in that case had waived certain privileges, and ordered them to produce various documents. In light of that ruling, the respondent filed a motion for reconsideration with the Magistrate Judge in this district, by which it sought to compel the deposition of Mr. Whitehead, “to allow Mr. Whitehead to be questioned regarding the documents set forth in Petitioners’ privilege log and all other matters as set forth in the subpoena *duces tecum*.” (Respondent’s Mot. for Reconsideration at 2-3.) The Magistrate Judge provisionally scheduled Mr. Whitehead’s deposition for

February 16, 2001, to be held under the Magistrate Judge's supervision.

Meanwhile, the forum district court had before it certain motions *in limine*, by which the plaintiffs in that case sought to exclude on relevancy grounds any evidence "concerning John Whitehead or The Rutherford Institute." (Petitioners' Opp'n to Mot. for Reconsid. Ex. F at 2.) A final pretrial conference was scheduled before the forum district court on February 5, 2001, at which it would hear, and thereafter, resolve, the motions *in limine*.

On January 29, 2001, the Magistrate Judge issued an order denying the respondent's motion for reconsideration to the extent it sought to compel the petitioners' depositions. Essentially the Magistrate Judge deferred deciding whether to compel the depositions pending the forum district court's disposition of the motions *in limine*. Specifically, the Magistrate Judge expressed the following concerns:

The undersigned has serious reservations about the propriety of ruling on questions of relevance and admissibility . . . in a manner that would be inconsistent [with] and even contradictory to decisions by the court presiding in the underlying litigation.

* * *

. . . [T]he key factor at this time revolves around the concern that by directing the deposition process, the undersigned . . . will be making determinations of relevance and admissibility that are now before the presiding [Oklahoma] trial judge who is likely to make a decision in advance of February 16, 2001, the date Whitehead is scheduled to appear before the undersigned.

(Jan. 29, 2001, Mem. Op. at 4-5.) The Magistrate Judge "essentially reaffirm[ed] [his] prior decision." (Jan. 29, 2001, Mem. Op. at 1.) In other words, he again "provisionally granted" the petitioners' motions to quash the deposition subpoenas, pending further action in the

forum court, and without prejudice to the respondent to renew its request to compel those depositions.

The respondent now objects to the Magistrate Judge's January 29, 2001 order. *See* Fed. R. Civ. P. 72(a).

II.

A Magistrate Judge has substantial discretion to dispose of non-dispositive pretrial matters. The court reviews the Magistrate Judge's order only to determine whether it is "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a).

The court does not find the Magistrate Judge's order to be clearly erroneous or contrary to law. At the time the Magistrate Judge made his decision, the forum district court was poised to rule upon motions *in limine* at a final pretrial conference on February 5, 2001, *i.e.* prior to the provisionally-scheduled deposition date, February 16. Although the final pretrial conference was continued until March 12, the fact remains that the Oklahoma district court will decide whether any evidence concerning the petitioners is relevant to the underlying litigation; because irrelevant evidence is not discoverable, the Magistrate Judge also would have to decide whether evidence concerning the petitioners is relevant to the underlying litigation. The forum district court having before it motions *in limine* that raise issues substantially similar to those that the Magistrate Judge would have to decide at the petitioners' depositions, the Magistrate Judge properly acted within his discretion in deferring his decision to compel or not to compel the depositions until the forum court makes its *in limine* rulings.

The respondent objects that the Magistrate Judge erred because the question before

him simply is one of relevance, while the question before the forum district court is one of admissibility. This argument ignores that the forum district court is deciding admissibility based on relevance grounds. Although “[r]elevance for discovery purposes is distinguishable from that which is relevant evidence at trial,” *Terwilliger v. York Intern. Corp.*, 176 F.R.D. 214, 217 (W.D. Va. 1997), the court finds no error in the Magistrate Judge’s decision to wait until the forum district court rules on substantially similar questions before proceeding with the depositions.

The respondent also argues that the Magistrate Judge erred by failing to provide any guidance to the forum district court, which now must make evidentiary rulings based upon speculation as to what the petitioners’ trial testimony could be. Because the Magistrate Judge is not required to give such guidance, this objection shall be overruled.

The respondent next objects that, because the question of admissibility is not the test for discoverability, the Magistrate Judge erred by precluding the respondent from ever taking Mr. Whitehead’s deposition. While the court agrees with the respondent’s base proposition,^{*} its objection is not persuasive because the Magistrate Judge did not preclude the respondent from ever taking Mr. Whitehead’s deposition. The Magistrate Judge simply decided to wait for further action by the forum district court before deciding whether or not to compel the taking of the deposition.

^{*} At the deposition, the Magistrate Judge would not be called upon to determine whether evidence is admissible, or even “likely admissible”; discoverable evidence “need not be admissible at the trial” at all. Fed. R. Civ. P. 26(b)(1). The Magistrate Judge only would be called upon to determine whether the evidence sought in the deposition is “relevant,” “not privileged,” and not “work product.”

Last, the respondent contends that the Magistrate Judge erred because his order does not resolve the issues. This objection also is unpersuasive, as the Magistrate Judge did not refuse to resolve the issues, but simply decided to wait for further action by the forum district court before resolving the issues.

III.

The court is aware that the Oklahoma district court rescheduled the motions *in limine* hearing for March 12, 2001, and that trial in the underlying litigation is scheduled to begin one week later, on March 19, 2001. The Magistrate Judge's ruling is not clearly erroneous simply because the respondent will be left with little time to depose the petitioners, if such depositions are warranted. That said, the court notes that the Magistrate Judge was unaware of these time constraints when he issued his decision. His decision was premised on the assumption that the forum district court would "likely" rule on the motions *in limine* prior to February 16. The forum court's subsequent decision to reschedule the hearing provides the respondent with grounds to move the Magistrate Judge, once again, for reconsideration of his decision.

The court concludes that the Magistrate Judge's January 29, 2001 order is not clearly erroneous or contrary to law. Accordingly, the respondent's objections shall be overruled.

An appropriate Order this day shall issue.

ENTERED: _____
Senior United States District Judge

Date

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By order dated November 21, 2000, this pretrial matter was referred to the presiding United States Magistrate Judge to be heard and resolved. The Magistrate Judge issued an order on January 29, 2001, to which the respondent objected. The petitioners responded to the objections. Having thoroughly reviewed the matter, and for the reasons stated in the accompanying Memorandum Opinion, it is accordingly this day

ADJUDGED, ORDERED, AND DECREED

that the respondent's objections, filed February 6, 2001, shall be, and they hereby are, OVERRULED.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record and to Magistrate Judge Crigler.

ENTERED: _____
Senior United States District Judge

Date