

DEPOSING IN-HOUSE COUNSEL IN ACTIONS INVOLVING THE CORPORATE CLIENT: ISN'T LIFE COMPLICATED ENOUGH?

Defending the corporate client is tough enough these days. Everywhere you turn, there are new lawsuits and another investigation. You spend your time dealing with the press. Now, what's in the morning mail? A deposition subpoena for my testimony? No way. Can they depose me—a lawyer?

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“unique opportunity for harassment” provided by such a deposition.⁴ To deter this potential harassment, courts, in general, exercise their discretion under the discovery rules⁵ to preclude the deposition of a party's counsel, except in limited circumstances.⁶ In determining whether to permit the deposition of opposing counsel, these courts have applied the rule set forth by the Eighth Circuit in *Shelton v. American Motors Corporation*.⁷ Recently, however, in *United States v. Philip Morris, Inc.*,⁸ a federal district court in the District of Columbia declined to apply the *Shelton* analysis and, in the process, has raised significant issues, particularly for in-house counsel.

Before addressing the decision in *Philip Morris*, let's first review the *Shelton* rule. In *Shelton*, plaintiffs brought a products liability action against the manufacturer of an automobile that overturned on a highway and killed plaintiffs' daughter.⁹ During discovery, plaintiffs sought to depose one of defendant's in-house counsel, who had been assigned as supervising counsel on the case.¹⁰ After the denial of

defendant's motion to quash, the in-house counsel sat for the deposition but refused to answer certain questions on the basis that the information sought to be disclosed—specifically, the existence of certain documents—was protected by the attorney-client privilege and the work product doctrine.¹¹ Following the entry of a default judgment, imposed as a sanction for defendant's repeated refusals to comply with orders to respond, defendant appealed, arguing, among other things, that deposing in-house counsel constituted an improper means of discovering the existence of these documents.¹²

On appeal, the Eighth Circuit agreed with defendant. Although recognizing that opposing counsel was not absolutely immune from being deposed, the appeals court regarded “the increasing practice of taking opposing counsel's deposition as a negative development in the area of litigation” that “should be employed only in limited circumstances.”¹³ The appeals court held that, before such a deposition can take place, the party seeking the deposition must establish all of the following factors:

Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence have a per se prohibition that protects a lawyer—even counsel for an opposing party—from being deposed.¹ Rule 30(a) of the Federal Rules of Civil Procedure permits the deposition “of any person, including a party,” without first obtaining leave of court, providing, of course, that the matter is not privileged.²

Although lawyers are not immune from being targets of deposition subpoenas, the jurisprudence “strongly disfavors” this practice³ because of the

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- No other means exist to obtain the information than to depose opposing counsel.
- Information sought in the deposition is relevant and nonprivileged.
- Information is crucial to the preparation of the case.¹⁴

Applying these factors to the case before it, the appeals court held that circumstances did not warrant deposing defendant's in-house counsel: not only was some of the information obtainable from other sources or by other means, but also some of the information constituted protected attorney work product.¹⁵ Therefore, the appeals court reversed the trial court's entry of default judgment.¹⁶ Many courts have adopted the *Shelton* rule and require the party seeking the deposition of opposing counsel to bear the burden of establishing the propriety and need for the deposition under the factors set forth by the Eighth Circuit,¹⁷ even when the attorney has been a witness to relevant, nonprivileged events or conversations.¹⁸

This analytical road is clearly not the one that a federal court in the District of Columbia took involving Philip Morris with respect to in-house counsel whose client was engaged in litigation. *Philip Morris* is a case in which the United States had sued certain tobacco companies in order to recover health care expenses incurred in treating persons with smoking-related diseases. In connection with that suit, the government had sought to depose in-house counsel of two of the tobacco companies about matters related to public relations, corporate conduct and positions, marketing strategies, tobacco research and development, and a master settlement agreement.¹⁹ The Special Master recommended granting defendants' motion to quash the deposition notices because the government had failed to satisfy the requirements for

deposing opposing counsel as set forth in *Shelton*.²⁰ The court rejected that recommendation, sustained the government's objections to defendants' motion, and disagreed with the Special Master's interpretation of and reliance upon the decision in *Shelton*.

With respect to the meaning of *Shelton*, the court rejected the Special Master's conclusion that *Shelton* presumptively bars depositions of opposing counsel unless the party moving for the deposition first satisfies the requirements set forth in that case. Instead, the court found that the *Shelton* criteria applied to limit depositions of attorneys in only two instances: "(1) when trial and/or litigation counsel are being deposed, and (2) when such questioning would expose litigation strategy in the pending case."²¹ In support of its interpretation of *Shelton*, the court relied upon a subsequent decision of the Eighth Circuit,²² which the district court read as limiting *Shelton's* application to depositions of opposing counsel

in the pending action—that is, that it does not apply when a deposition is sought seeking nonprivileged information related to a concluded case, even though the information may be crucial to the pending action.²³

In regards to *Shelton's* application to the in-house counsel in the case at bar, the court held that the instant action was "fundamentally different" from *Shelton*. "Most significantly," the court opined, the case was distinguishable because "the deponents are employees to whom Defendants have knowingly assigned substantial non-legal, non-litigation responsibilities, including corporate, business, managerial, public relations, advertising, scientific, and research and development responsibilities,"²⁴ all of which, the court continued, are matters not subject to the protections of the attorney-client privilege or work product doctrine.²⁵ Additional factors that, in the court's view, distinguished the case before it from *Shelton* included the scope of the deposition—

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that is, that it was limited to nonprivileged, factual matters unrelated to litigation strategy—and the status of the deponents as in-house counsel who were not engaged as trial or litigation counsel.²⁶

The decision in *Philip Morris* should be troubling to in-house counsel because of its narrow reading of the protections of the *Shelton* rule. If the *Shelton* rule is limited to litigation counsel and if in-house counsel who direct the corporation's litigation affairs are not deemed litigation counsel for purposes of that rule, many in-house counsel may find themselves facing depositions. In-house counsel may also find that the corporate decision to allow them to "wear multiple hats" in order to better serve their corporate clients comes at some substantial cost. Whether a high-profile decision like *Philip Morris* will herald a wave of depositions for in-house counsel remains to be seen. It should sound a note of caution for in-house counsel who had assumed, based upon the clear trend of prior cases, that there were more substantial barriers that an opponent would need to mount to even force their deposition.

What can a corporation do to improve the chances that one of its in-house counsel will not be deposed?

- The most obvious first step is to make sure that in-house counsel who are participating in or overseeing litigation make a record of that fact. Entering an appearance in court (if appropriate) can be helpful. Even an internal designation as overseeing the litigation can be of some significance.
- Approach with caution the idea of giving in-house litigators other duties that would "dilute" their pure litigation role.
- If possible, make sure that non-lawyers are available to answer most of the questions that might be put to the lawyers. The courts face their most difficult tasks where the only

person capable of answering the questions is the lawyer.

Lawyers are not absolutely immune from deposition subpoenas, and even opposing counsel can be deposed with respect to a pending case. But depending on the court, different rules may apply in determining the propriety and need for the deposition when the deponent is in-house counsel. ■

NOTES

1. *Dunkin' Donuts, Inc. v. Mandorico, Inc.*, 181 F.R.D. 208, 209 (D. Puerto Rico 1998); *American Cas. Co. of Reading, PA v. Krieger*, 160 F.R.D. 582 (S.D. Cal. 1995).
2. The rules are also liberal in terms of what may be the subject of discovery requests, permitting discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending matter." FED. R. CIV. P. 26(b)(1).
3. *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 185 (2d Cir. 1991); *Dunkin' Donuts, Inc. v. Mandorico, Inc.*, 181 F.R.D. at 209. See also *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring) (stating that "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary").
4. *Marco Island Partners v. Oak Development Corp.*, 117 F.R.D. 418, 419–420 (N.D. Ill. 1987). As noted by another court, deposing opposing counsel "inherently constitutes an invitation to harass the attorney and parties, and to disrupt or delay the case." *West Peninsular Title Co. v. Palm Beach County*, 132 F.R.D. 301, 302 (S.D. Fla. 1990).
5. See FED. R. CIV. P. 26(c) (authorizing the court to make any order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense); see also FED. R. CIV. P. 45(c)(3)(A)(iii) and (iv) (requiring court to quash or modify a subpoena if it necessitates the disclosure of protected material or subjects a person to undue burden).
6. See *American Cas. Co. of Reading, PA v. Krieger*, 160 F.R.D. at 585, and cases cited therein.
7. 805 F.2d 1323 (8th Cir. 1986). See *Simmons Foods, Inc. v. Willis*, 191 F.R.D. 625, 630 (D. Kan. 2000) (noting how most courts follow the *Shelton* rule in determining propriety of opposing counsel's deposition); *Dunkin' Donuts, Inc. v. Mandorico, Inc.*, 181 F.R.D. at 210 (same); *American Cas. Co. of Reading, PA v. Krieger*, 160 F.R.D. at 588 (same).
8. No. Civ.A. 99-2496 (GK), 2002 WL 1950822 (D.D.C. Aug. 23, 2002).
9. *Shelton*, 805 F.2d at 1324.
10. *Id.* at 1325.
11. *Id.* at 1325–1326.
12. *Id.* at 1326–1327.
13. *Id.* at 1327. The court was strong in its disapproval of what it perceived as a trend in such depositions, noting that "[t]he harassing practice of deposing opposing counsel (unless that counsel's testimony is crucial and unique) appears to be an adversary trial tactic that does nothing for the administration of justice but rather prolongs and increases the costs of litigation, demeans the profession, and constitutes an abuse of the discovery process." *Id.* at 1330.
14. *Id.* at 1327.
15. *Id.* at 1327–1329.
16. *Id.* at 1329–1330.
17. See *Simmons Foods, Inc. v. Willis*, 191 F.R.D. at 630; *Dunkin' Donuts, Inc. v. Mandorico, Inc.*, 181 F.R.D. at 210; *American Cas. Co. of Reading, PA v. Krieger*, 160 F.R.D. at 588; *West Peninsular Title Co. v. Palm Beach County*, 132 F.R.D. at 302; see also *Boughton v. Cotter Corp.*, 65 F.3d 823, 830 (10th Cir. 1995) (court has discretion under Rule 26(c) to issue a protective order against the deposition of opposing counsel when the criteria in *Shelton* are not met).
18. *American Cas. Co. of Reading, PA v. Krieger*.
19. *United States v. Philip Morris, Inc.*, 2002 WL 1950822, at *1.
20. *Id.*
21. *Id.* at *3.
22. *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726 (8th Cir. 2002).
23. *Pamida*, 281 F.3d at 730–731 (noting, however, that the moving party must still show that there has been a waiver of the attorney-client and work product privileges).
24. *United States v. Philip Morris, Inc.*, 2002 WL 1950822, at *3.
25. *Id.*
26. *Id.* at *3–*4.