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Depositions of Attorneys in Texas

By David K. Bissinger © 2000

Current Texas case law regarding the deposition of attorneys - particularly in-house counsel - is out of step with most federal and state case law. The reported Texas decisions permit trial courts to order attorneys to appear for depositions without any limitation except the right to raise privilege objections, question by question, at the deposition. By contrast, most federal and state cases require a preliminary showing by the party seeking discovery before permitting any attorney deposition. These courts impose requirements similar to those that Texas courts impose with respect to depositions of high-level corporate executives under the so-called "apex deposition" doctrine.

The Texas Cases

Attorney as Fact Witness

One explanation for the outward difference between the Texas rule and the majority rule (and the difference between apex versus attorney depositions in Texas) could lie in the facts of the cases that have reached the appellate level. The reported Texas decisions on attorney depositions mostly involve unusual situations in which lawyers have "injected"(1) themselves into cases as fact witnesses. This typically occurs when the attorney has been involved in events leading to the lawsuit or has executed an affidavit controverting facts at issue in the case. In either circumstance, the attorney has become a witness of discoverable facts and has, by her own conduct, subjected herself to the witness stand. The decisions in most of these cases do not involve the threats of harassment that give rise to the procedural protections advocated in this article that most federal and state courts follow.

For example, in both *Hilliard v. Heard*,(2) and *Lummus v. Dean*,(3) the courts allowed the depositions of attorneys who, through affidavits, provided testimony contradicting plaintiffs' affidavits of reasonable and necessary expenses. In both cases, the attorneys claimed to have personal knowledge of the value of the opposing parties' damages claims and therefore subjected themselves to deposition.

In another case, *West v. Solito*, the Texas Supreme Court noted - in dicta - that one possible way to handle the attorney deposition problem would involve the trial court ordering the attorney to appear for deposition. The attorney would have the right to object to privileged matters. After the depositions concluded, the examining party could apply to the trial court for an order to compel answers to the contested questions, and the trial judge could determine what matters sought to be discovered were within the privilege. The court could then issue an order compelling answers to questions covering matters not within the privilege.

Although the Supreme Court in *West* recommended this procedure, its holding simply required that the trial court vacate its previous orders compelling the attorney to answer all questions regardless of privilege claims. (The trial court had ruled that the attorney could reurge privilege objections at the time of trial.) The *West* court did not characterize its recommendation as a rule of

general application. Moreover, the party resisting discovery did not oppose the depositions of her attorneys; she only opposed the trial court's ruling that would have denied her attorneys' right to object to matters of privilege.

Nonetheless, later Texas appellate decisions appear to treat the *West* court's dicta as a rule of general application.(4) Although the attorney depositions in those cases may have been appropriate, the language and reasoning of the cases steered Texas away from the path that most other federal and state courts have followed in this important area of civil discovery practice.

Borden, Inc. v. Valdez *and the Limits of the Texas Rule*

In part because of the increasing presence of in-house counsel participating in civil litigation with outside lawyers, the Texas rule invites discovery abuse.(5) Unlike the "attorney as fact witness" situations, the depositions of in-house counsel raise greater concerns about harassment and threats to privileged information and work product.

An example of this harassment occurred in *Borden, Inc. v. Valdez*.(6) In *Borden*, plaintiff Jose Delarosa sued Borden (his former employer), alleging wrongful termination in violation of the Texas Workers' Compensation Act. During the discovery process, Delarosa learned that three of Borden's employees consulted with Borden's corporate labor counsel, Keith King, before Delarosa's discharge. Delarosa noticed King's deposition at his lawyer's offices in Hildago County. King lived and worked at Borden's headquarters in Ohio.

Borden moved to quash King's deposition and subpoena duces tecum and filed an affidavit of attorney King in support of its motion. In the affidavit, King stated that he was employed as Borden's corporate labor counsel at all times relevant to the subject matter of the lawsuit. King described his duties as an in-house lawyer advising Borden in matters involving employees' work performance, discipline, and termination of employment. He stated in his affidavit that three different managers consulted him about Delarosa's work performance and termination of employment and that he rendered legal advice to these individuals in this regard. King further stated that he had retained Borden's outside counsel in the lawsuit and that he continued to oversee the pending Delarosa matter on behalf of Borden. Finally, King stated that he was not Borden's corporate representative for the case.

The trial court denied Borden's motion and ordered King's deposition in Hidalgo County, and Borden applied to the court of appeals for mandamus relief. Borden argued that the trial court abused its discretion by ordering attorney King to give deposition testimony regarding confidential communications occurring prior to the institution of the lawsuit. Borden noted that the communications involved the solicitation of legal advice by Borden representatives who were entitled both to solicit and act upon that advice.(7)

Although the court of appeals conditionally granted Borden's petition with respect to the location of King's deposition (directing the district court not to permit it in Hidalgo County), the court of appeals agreed with the trial court that Borden had to produce King for deposition. The court rejected Borden's request for a preemptive protective order on the entire deposition because (in language similar to the *Hilliard* court's) "no questions have been asked and we may only speculate as to the substance of what would be revealed should [the defendant's in-house attorney] be deposed."(8) The court concluded:

> [T]he attorney-client privilege was never intended to foreclose any opportunity to depose an attorney, but rather only precludes those questions which may somehow invade upon attorney-client confidences. An attorney may not avoid a deposition entirely merely because some matters may be privileged, but must object when those inquiries are raised during the deposition. Other matters may exist which are not privileged and which an attorney may be called to answer. For instance, the attorney-client privilege certainly does not encompass such nonconfidential matters as the terms and conditions of the attorney's employment and the purpose for which an attorney has been engaged.(9)

The *Borden* court ignored the abusive consequences of applying the old Texas rule in the circumstances of that case. Most importantly, the court failed to give any weight to at least three aspects of the case that distinguish it from cases like *West* and *Hilliard*: the availability of this information through less intrusive and less burdensome means, the satellite litigation that depositions like the one at issue in *Borden* create at the trial and mandamus levels, and the use of attorney depositions to coerce defendants into settlement. However, it was precisely these concerns that led Texas to adopt procedural hurdles to apex depositions.(10)

In addition, the *Borden* court ignored additional concerns arising out of depositions of in-house attorneys: the chilling effect that unrestricted depositions of in-house lawyers have on corporate counseling, and their subtle intrusion into the attorney-client privilege and work product of the in-house lawyer.

The Modern Rule:

Attorney Work Product and Attorney Client Privilege

The Texas rule, particularly as the Borden court expressed it, conflicts with the modern rule(11) on attorney depositions. Like the apex deposition doctrine, the modern rule on attorney depositions allows the taking of opposing counsels' depositions only when the party seeking the deposition shows that no other means exist to obtain the information and that the information sought is crucial to the preparation of the case.(12) (Borden had asked the trial and appeals courts to follow the modern rule.(13))

The leading decision applying the modern rule on depositions of opposing counsel involves facts strikingly similar to *Borden*. In *Shelton v. American Motors Corp*.,(14) the plaintiffs alleged that American Motors designed the Jeep CJ-5 with a stability defect that caused the Jeep in which their daughter was riding to roll over and cause her death. The plaintiffs noticed the depositions of more than 20 AMC employees, including Rita Burns, one of AMC's in-house attorneys supervising the case. AMC moved for protection and moved to quash the deposition, but the district court denied AMC's motions. In deposition, plaintiffs' counsel questioned Burns about the existence or nonexistence of various documents about the Jeep CJ and its alleged "propensity" to roll under various circumstances. Burns refused to answer these questions.(15)

Ultimately, the district court entered a default judgment against AMC on the issue of liability for attorney Burns' failure to respond. AMC appealed the judgment, and the U.S. Court of Appeals for the Eighth Circuit reversed. The Eighth Circuit held that when the deponent is opposing counsel and has engaged in a selective process of compiling documents from among voluminous files in preparation of litigation, even the mere acknowledgment of the existence of those documents would reveal counsel's mental impressions, which are protected as work product.(16)

The court noted that "the harassing practice" of deposing opposing counsel has become "an increasingly popular vehicle of discovery," but viewed this as a negative trend that courts should allow "only in limited circumstances."(17) The court - citing *Hickman v. Taylor* - observed that the practice of forcing trial counsel to testify as a witness has long been discouraged.(18) The *Shelton* court reasoned that depositions of opposing counsel disrupt the adversarial system, lower the standards of the profession, and add to the already burdensome time and costs of litigation.(19) Accordingly, the court concluded, the practice of deposing opposing counsel constitutes an abuse of the discovery process.(20) Finally, the court observed that the practice of deposing opposing counsel has a "chilling effect" on the attorney-client relationship because it raises the threat that a lawyer will face interrogation from an opponent.(21) This threat detracts from the quality of client representation and interferes with the lawyer's time and efforts in preparing the case for trial.(22)

However, the *Shelton* court did not hold that opposing counsel is "absolutely immune" from being deposed.(23) Indeed, the court observed that some circumstances may warrant the deposition of opposing counsel, but concluded that those circumstances should be limited to instances in which the party seeking the deposition has shown that: (1) no other means exist to obtain the information; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.(24)

Analogous Application of the Apex Deposition Doctrine

The reasoning in *Shelton* and countless cases like it shows why the Texas rule (as applied in *Borden*) is so misplaced, particularly given Texas' protection of high-level executives under the apex deposition doctrine. The concerns about harassment and burdensomeness that underlie that doctrine apply with equal force to attorney depositions.

Although most other jurisdictions follow *Shelton*, they do not provide clear guidelines on how the party resisting discovery should respond to a notice of deposition of opposing counsel, how the party seeking discovery should reply, and how the court should approach the problem. By contrast, the doctrine of apex depositions provides a specific and workable procedural framework for limiting depositions of high-ranking corporate officials. This framework can and should be applied to attorney depositions as well.

Under the apex deposition doctrine, when a party seeks to depose a high-level corporate executive, the party resisting discovery must file a motion for protective order to prohibit the deposition, accompanied by the executive's affidavit denying any knowledge of relevant facts. Once the motion and affidavit are filed, the burden of persuasion shifts to the party seeking the deposition, who must then demonstrate that the executive has "unique or superior" personal knowledge of discoverable information.(25)

If a party seeking a deposition cannot show that the executive has unique or superior personal knowledge of discoverable information, the trial court must grant the motion for protective order and require the party seeking the deposition to attempt to obtain the discovery through less intrusive methods.(26)

Depending on the circumstances of the case, these methods include the depositions of lower-level employees, the deposition of the corporation itself through a designated corporate representative,

interrogatories, requests for production and admissions, and depositions on written questions.(27) After the party seeking the apex deposition makes a good faith effort to obtain the discovery through less intrusive methods, the party may attempt to show:

> (1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and
> (2) that the less intrusive methods of discovery are unsatisfactory, insufficient, or inadequate.(28)

Upon making that showing, the trial court can order the deposition and should modify or vacate the protective order if needed. The court retains discretion to restrict the duration, scope, and location of the deposition.(29)

This approach to apex depositions provides an excellent procedural framework for attorney depositions. When the party seeking the attorney deposition properly notices the deposition of an opposing lawyer or in-house counsel, the party resisting the deposition should file a motion for protection along with an affidavit from the lawyer explaining that the lawyer's knowledge of discoverable facts stems from her rendition of legal advice to the party opposing the deposition. The affidavit should specifically state that the communications the lawyer received or made relating to the matters in issue were made with the expectation that those communications would remain confidential and would be used only in rendering legal advice to the party opposing the deposition. The affidavit should also state that the information at issue was not disclosed to any person outside the scope of the attorney-client relationship. In addition, if relevant, the affidavit or the motion for protection should describe any categories of nonprivileged information or identities of nonlawyer witnesses that contain discoverable information. Finally, the affidavit should state that the discovery of this information is less burdensome than forcing the attorney to attempt to figure out what - if any - nonprivileged information the attorney can testify about without revealing privileged or work product information.

To the extent the party seeking the discovery fails to specify with reasonable particularity the subjects about which the attorney witness is requested to testify, the party resisting the deposition should be entitled to a presumptive "good cause" for protective order without the need of filing an affidavit.(30) The party seeking discovery can overcome this presumption by providing a reasonably specific description of the matters about which the attorney witness is expected to testify.

Just as in apex depositions, the party seeking discovery must make a good faith effort to obtain the discovery through less intrusive methods. Once these methods have been exhausted, the party seeking discovery may then re-urge the court to permit the attorney deposition. However, unlike the apex deposition doctrine, *Shelton* requires that the party seeking discovery show that the information sought is not only relevant, but "crucial" to the preparation of the case. (Under the apex deposition doctrine, the information need only be relevant.(31)) The *Shelton* court based this "cruciality" standard on *Hickman v. Taylor*, which allows discovery of work product only upon a showing of "substantial need" or "undue hardship."(32) The "cruciality" standard distinguishes attorney depositions from apex depositions, which do not involve concerns about discovery of work product.

At this point, the court may order the attorney's deposition. Of course, the attorney witness must be permitted to object to questions that call for privileged information; the fact that the party seeking the deposition has undertaken other discovery does not deprive the resisting party or its attorney witness the right to assert the privilege.

Because even at this point the attorney deposition may still involve privilege objections, the party resisting discovery should be permitted to refile a motion for protection and supplemental affidavit asserting the privilege with respect to the particular topics contained in the deposition notice. Depending on the amount of privileged information at issue, the court may want to consider ordering a deposition on written questions to permit the party seeking the discovery the opportunity to obtain whatever nonprivileged information it can while also permitting the attorney witness the right to assert the privilege to particular matters. Using depositions on written questions would help limit the expense of multiple oral depositions and might provide a clearer record for the trial judge and appellate court.

Conclusion

Texas courts should adopt the limitations that most other jurisdictions follow with respect to deposing opposing counsel. Just as in the context of apex depositions, a party resisting an attorney deposition should be allowed to move to quash the deposition and force the discovering party to first use less intrusive discovery. This approach would protect in-house and other attorneys from the threat of being deposed needlessly. Although this proposed rule does not eliminate the possibility of attorney depositions under appropriate circumstances, it would discourage the use of these depositions as an abusive discovery tactic and would improve the quality of civil practice in Texas.

Notes

1. 1. Hilliard v. Heard, 666 S.W.2d 584, 585 (Tex. App. - Houston [1st Dist.] 1984, no writ).
2. 666 S.W.2d 584 (Tex. App. - Houston [1st Dist.] 1984, no writ).
3. 750 S.W.2d 312 (Tex. App. - Beaumont 1988, no writ).
4. For instance, in *Hilliard v. Head*, one of the "attorney affidavit" cases, the court rejected the contention of the attorney that compelling the deposition was a useless act because the attorney would assert meritorious claims of an attorney-client privilege and work product immunity. The court stated:

   > The possible future assertion of such claims does not require preemptive rulings by the court. Whether or not such claims will be asserted is conjectural until they are made of record, and the mere prospect that such privilege or immunity will be urged on deposition does not justify prior restraint on the taking of a deposition. Further, respondent is entitled to know which objection (i.e., attorney-client privilege or work product immunity) is made to each question. The propriety of any such objection, when made, can be determined in accordance with Texas Rule of Civil Procedure 215a.

   Hilliard, 666 S.W.2d at 585. It seems doubtful that the West or Hilliard courts considered the full ramifications of their rulings on attorney depositions as a tool for harassment.
5. The increased size of the American bar, the increased number of interstate cases, and the corresponding decrease in repeat dealings suggest that the practice of deposing opposing counsel has shifted from a genuine fact-finding endeavor to a harassing tactical device. *See* Timothy Flynn, Jr., Note, "On Borrowed Wits: A Proposed Rule for Attorney Depositions," 93 Colum. L. Rev. 1956, 1956, n.l. (1993) (citing Brian R. Pioske, Note, "Suppose You Want to Depose Opposing Counsel: Shelton v. American Motors Corporation," 73 Minn. L. Rev. 1116, 1119 n.14 (1989)).
6. 773 S.W.2d 718 (Tex. App. - Corpus Christi 1989, no writ).
7. *Id*. at 720.
8. *Id*.
9. *Id. at* 720-21.
10. *See, e.g*., Crown Central Petrol. Corp. v. Garcia, 904 S.W.2d 125, 126 n.1 (Tex. 1995) (citing Monsanto Co. v. May, 889 S.W.2d 274, 274 (Tex. 1994) (motion for leave to file petition for mandamus overruled) (Gonzales, J., dissenting) ("Apex depositions … conducted before less intrusive means of discovery have been exhausted, create a tremendous potential for abuse and harassment. … The use of apex depositions as a tool to coerce settlement is a recurring problem that needs to be addressed. … No telling how many more billable hours will be expended needlessly before the Court decides to tackle this important issue.")).
11. It is difficult to identify a "majority" or "minority" view on the attorney deposition issue, but it seems fair to characterize cases requiring a showing of special need for an attorney deposition as the modern view. Many of the more liberal decisions addressing attorney deposition are decades old. *See, e.g*., Daniels v. Hadley Memorial Hosp., 68 F.R.D. 583, 589 (D.D.C. 1975) (motion to quash attorney deposition was premature until deposition takes place and usurps court's role in ruling on objections of privilege); Scovill Mfg. Co. v. Sunbeam Corp., 61 F.R.D. 598, 603 (D. Del. 1973) (refusing to grant protective order); Shiner v. American Stock Exch., 28 F.R.D. 34, 34-35 (S.D.N.Y. 1961) (protective order is premature until specific questions are asked and objections of privilege are made); Mills Music, Inc. v. Cromwell Music, Inc., 14 F.R.D. 411, 413 (S.D.N.Y. 1953) (compelling attorney deposition and stating "[c]ontrary to the old rules, 'fishing expeditions' are allowed."); United States v. Anderson, 34 F.R.D. 518, 522 (D. Colo. 1963) ("The fact that one is an attorney creates no immunity from depositions."); McCall v. Overseas Tankship Corp., 16 F.R.D. 467, 468 (S.D.N.Y. 1954) ("That the witness is an attorney … does not relieve him of his duty to testify.").
12. See 8A Charles Alan Wright, et al., Federal Practice and Procedure § 2102, at 27 (1994).
13. The landmark case, discussed extensively in this article, is Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986); *see also* American Casualty Co. v. Krieger, 160 F.R.D. (S.D. Cal. 1995) ("There are good reasons to require the party seeking to depose another party's attorney to bear the burden of establishing the propriety and need for the deposition."); E.E.O.C. v. HBE Corp., 157 F.R.D. 465, 466 (E.D. Mo. 1994) (granting motion for protective order of attorney); Kelling v. Bridgestone/Firestone, Inc., 153 F.R.D. 170, 171 (D. Kan. 1994) ("To permit unbridled depositions of a party's attorney opens the door to delay, disruption of the case, harassment, and perhaps disqualification of the attorney."); Doubleday v. Ruh, 149 F.R.D. 601, 613-15 (E.D. Cal. 1993) (*Shelton* is "a frequently cited test"); United States v. All Funds On Deposit in Any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith, 801 F.Supp. 984, 996 (E.D.N.Y. 1992) (affirming magistrate's application of *Shelton* test), *aff'd*, 6 F.3d 37 (2d Cir. 1993); Eschenberg v. Navistar Int'l

Trans. Corp., 142 F.R.D. 296, 299 (E.D. Mich. 1992) ("*Shelton* persuasively articulates the valid policy considerations that require the parties' attorneys to be shielded from discovery, and alters the standard accordingly to grant greater protection."); In re Sause Bros. Ocean Towing, 144 F.R.D. 111, 116 (D. Or. 1991) ("Courts look with disfavor on attempts to depose opposing counsel."); Harriston v. Chicago Tribune Co., 134 F.R.D. 232, 233 (N.D. Ill. 1990) ("The courts have not looked with favor upon attempts to depose opposing counsel."); Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., 125 F.R.D. 578, 593 (N.D.N.Y. 1989) (noting trend toward requiring extraordinary showing before attorneys may be deposed); Advance Sys., Inc. of Green Bay v. APV Baker PMC, Inc., 124 F.R.D. 200, 201 (E.D. Wis. 1989); N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 84 (M.D.N.C. 1987) ("A request to take the deposition of a party's attorney … constitutes a circumstance justifying departure from the normal rule."); Chase Manhattan Bank, N.A. v. T&N PLC, 156 F.R.D. 82, 84 (S.D.N.Y. 1994); West Peninsular Title Co. v. Palm Beach County, 132 F.R.D. 301, 302-03 (S.D. Fla. 1990); Buford v. Holladay, 133 F.R.D. 487, 491 (S.D. Miss. 1990); Marco Island Partners v. Oak Dev. Corp., 117 F.R.D. 418, 420 (N.D. Ill. 1987); see Board of Comm'rs v. Missouri Pac. R.R. Co., 647 So.2d 340, 341 (La. 1994); McMurry v. Eckert, 833 S.W.2d 828, 831 (Ky. 1992) ("the potential for harm to the administration of justice is too great to permit" deposing opposing counsel "routinely"); Kilpatrick v. First Church of the Nazarene, 538 N.E.2d 136, 141 (Ill. App. Ct. 1989); Spectra-Physics, Inc. v. Superior Court, 244 Cal. Rptr. 258, 262 (Cal. Ct. App. 1988).

14. 805 F.2d 1323 (8th Cir. 1986).
15. An example of Burns's testimony:

> Any information I have concerning documents which might possibly be responsive to your question, I've acquired solely through my capacity as an attorney for American Motors in my efforts to find information that would assist me in defending the company in litigation, and therefore, I decline to respond to the question.

Shelton, 805 F.2d at 1325.

16. Shelton, 805 F.2d at 1327; see also S.E.C. v. Morelli, 143 F.R.D. 42, 46-47 (S.D.N.Y. 1992) (party's attempt to depose adversary's attorney was impermissibly designed "to ascertain how [his adversary] intends to marshal the facts, documents and testimony in its possession, and to discover the inferences [his adversary] believes properly can be drawn from the evidence it has accumulated.").
17. Shelton, 805 F.2d at 1327.
18. *Id.* (citing Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring) ("Discovery was hardly intended to enable a learned profession to perform its functions … on wits borrowed from the adversary.")).
19. *Id.*
20. *Id.* at 1330.
21. *Id.* at 1327.
22. *Id.*
23. *Id.*
24. *Id.*
25. Crown Central Petrol. Corp. v. Garcia, 904 S.W.2d 125, 128 (Tex. 1995).
26. *Id.; see also* Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979) (questioning deposition of corporate president because plaintiff had not deposed subordinate employees identified by defendant as having more direct knowledge).
27. *See, e.g.,* Garcia, 904 S.W.2d at 128.
28. *Id.*
29. *Id.*
30. *See* Frozen Food Express Indus., Inc. v. Goodwin, 921 S.W.2d 547, 549 n.3 (Tex. App. - Beaumont 1996, no writ) ("In view of *Crown Central*, we question whether it is an appropriate practice to notice the deposition of an 'apex' witness without regard to identifying the specific areas of inquiry in the notice. We recommend to litigants the practice of deposition notices identifying the specific areas of inquiry when deposing an 'apex' witness.").
31. *See, e.g.*, Tex. R. Civ. P. 192.3(a) ("In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action …. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."); Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action …. The information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.").
32. Shelton, 805 F.2d at 1328 (citing Hickman v. Taylor, 329 U.S. 495, 511 (1947)); *see also* Fed. R. Civ. P. 26(c)(3) (work product can be discovered upon a showing of substantial need or undue hardship).

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