New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

Web address: http://www.nylj.com

VOLUME 231—NO. 62 THURSDAY, APRIL 1, 2004

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

BY EDWARD M. SPIRO

Reduced Protection for Discovery from Attorneys

NOTWITHSTANDING the broad, permissive scope of discovery laid out by the Federal Rules of Civil Procedure, courts in the Southern District of New York have traditionally carved out more exacting requirements for discovery sought from attorneys. Three recent decisions from the U.S. Court of Appeals for the Second Circuit, on appeals from the Southern District, indicate a marked retreat from this approach. These cases signal that requests for discovery from attorneys, so long as they do not trespass on privileged material or threaten undue disruption to the litigation process, need overcome no greater hurdles than discovery requests propounded to non attorneys.

'Shelton' Abandoned

In the first of those cases, *In re Subpoena Issued to Dennis Friedman*,[1] the panel majority issued a decision expressly rejecting the three-part test for permitting attorney depositions developed by the Eighth Circuit in *Shelton v. American Motors Corp.*[2] and widely followed in the Southern District.

The district court in *Shelton* had entered a default judgment against the defendants because their in-house attorney had violated court orders to answer questions at her deposition, relying upon the attorney-client privilege and the work-product doctrine.

In reversing the judgment, the Eight Circuit observed that within the steadily expanding boundaries of discovery, the practice of deposing opposing counsel had become increasingly popular — a circumstance the court characterized as a "negative development." The court explained that forcing trial counsel to testify as a witness, "disrupts the adversarial system," "lowers the standards of the profession," "adds to the already burdensome time and costs of litigation" and "detracts from the quality of client representation" in that it diverts counsel from the task of preparing the client's case and threatens to have a "chilling

effect" on the attorney-client communication.

Finding that depositions of opposing counsel should not be completely foreclosed, the *Shelton* court nevertheless concluded that such depositions should occur only under limited circumstances. Specifically, the court required parties seeking to depose opposing counsel to show that the information sought (1) can be obtained through no other means; (2) is relevant and non-privileged; and (3) is crucial to the preparation of the case.

Relying on *Shelton*, the district court in *In re Subpoena Issued to Dennis Friedman* had denied a request by the liquidation trust to depose the counsel for the debtor's former directors who had asserted an advice of counsel defense. The district court found that although the proposed deposition was not barred by privilege, and sought information that was relevant and possibly crucial to the plaintiff's case, under *Shelton* other methods for obtaining the information, such as written interrogatories, should be employed before resorting to an oral deposition.

Shelton has gained broad acceptance for the principle that depositions of opposing counsel are disfavored. Indeed, the Second Circuit has itself cited *Shelton* for this precise proposition.[3] But, in rejecting the district court's reasoning in *In re Subpoena Issued to Dennis Friedman*, the majority of the appellate panel distanced itself from the court's previous citations to that case, noting that it had never adopted the *Shelton* rule.

According to the majority, the *Shelton* rule is inconsistent with the otherwise permissive deposition-discovery regime under the Federal Rules of Civil Procedure and unnecessary as a safeguard to the integrity of the adversary system because the flexible approach Rule 26 already offers provides adequate protection against improperly intrusive depositions.

Specifically, the court noted that the Federal Rules authorize depositions "regarding any matter, not privileged, that is relevant to the claim or defense of any party" and place no initial burden on parties to justify their deposition and discovery requests. The majority also observed that oral depositions are actually considered preferable to written interrogatories, inasmuch as depositions permit follow-up questions, invite more spontaneous responses, and allow for observation of a witness's demeanor.[4]

The majority further relied on the standards set forth in Rule 26, which grant the district court broad discretion to manage discovery, including imposing limitations on the use of discovery methods otherwise permitted under the rules, and which expressly authorize the court to issue any order that is required by justice or to prevent annoyance, embarrassment, oppression or undue burden or expense.

In the context of attorney depositions, the majority explained that under Rule 26, the court might consider the need to depose the lawyer, the lawyer's role in the matter and relation to the pending litigation, the risk of encountering privilege or work-product issues and the extent of discovery already conducted.

Recognizing that in some circumstances it might be appropriate to consider whether interrogatories should be used, "at least initially and sometimes in lieu of a deposition," the majority stressed that "the fact that the proposed deponent is a lawyer does not automatically insulate him or her from a deposition nor automatically require prior resort to alternative discovery devices."

Although *In re Subpoena Issued to Dennis Friedman* indicates a change in attitude toward attorney depositions, it will not necessarily result in a radical departure from the current practice regarding attorney depositions in the Southern District. Indeed, as the majority noted, a number of district courts have already employed the type of flexible approach to assessing requests to conduct attorney depositions prescribed by the court.

For example, in *United States Fidelity & Guaranty Co. v. Braspetro Oil Services Co.*[5] (a case cited with approval in *In re Subpoena Issued to Dennis Friedman*), Southern District Magistrate

Edward M. Spiro *is a principal of Morvillo, Abramowitz, Grand, Iason & Silberberg PC, concentrating in commercial litigation. Mr. Spiro is the co-author of "Civil Practice in the Southern District of New York," 2d Ed. (West Group 2003).* **Judith L. Mogul** *assisted in the preparation of this article.*

Judge Theodore H. Katz, after noting that the proposed attorney depositions in that matter did not seriously threaten to disrupt either the litigation or the attorney client relationship, went on to find that the *Shelton* test had been satisfied.

Other recent cases have permitted the deposition to proceed after application of the *Shelton* test[6] and have granted a protective order barring the attorney deposition as disruptive and unduly burdensome, without reference to *Shelton*.[7]

Thus, even before *In re Subpoena Issued to Dennis Friedman*, where the contemplated attorney deposition did not threaten to disrupt the litigation process or intrude on privileged territory, courts frequently permitted such depositions to proceed. Although the burden will now rest squarely with the party resisting the deposition to demonstrate the need for a protective order, where the deposition is demonstrably intrusive or disruptive, there is no reason to believe that the requested protection will be withheld.

What is remarkable about the decision in *In re Subpoena Issued to Dennis Friedman* is the highly unusual context in which that opinion was issued.

Over the strong objection of concurring Judge Richard C. Wesley, the majority issued its denunciation of the *Shelton* rule in what was a purely advisory opinion. The majority conceded that the court had no appellate jurisdiction because the appeal in that case had been rendered moot when the attorney whose testimony was at issue agreed to be deposed prior to the issuance of the court's decision.

Yet, the majority brushed aside Judge Wesley's concern that absent a case or controversy, the court's decision resolved a dispute that no longer existed. The majority explained that because two "esteemed" district court judges in that litigation had proceeded on the erroneous assumption that the Second Circuit had adopted the *Shelton* rule, its "non-binding discussion of the merits will hopefully serve the useful purpose of cautioning about the limits of our prior rulings on a frequently litigated issue and perhaps avoid some needless appeals."

Discoverability of Documents

The second decision from the Second Circuit Court of Appeals, *Ratliff v. Davis Polk & Wardwell*,[8] concerns the discoverability of documents held by an entity's attorneys, where the attorneys, but not the entity itself, are within the court's subpoena power.

Previously, the Second Circuit in *In re Sarrio, S.A.*,[9] had stated that documents in possession of a client outside the reach of a subpoena do not become available to process when they are transferred to a lawyer within reach of that subpoena, if the transfer is for the purpose of obtaining legal advice.

In explaining *Sarrio*'s rationale, the *Ratliff* court observed, "[e]xposing documents — not otherwise subject to production — to discovery demands after delivery to one's attorney whose office was located within the sweep of a subpoena would produce a curious and unacceptable result. The price of an attorney's advice would be disclosure of previously protected matters."

But *Ratliff* goes on to make clear that once documents located with an attorney are used in a manner inconsistent with the attorney client privilege, the simple fact that they are housed with the attorney will not insulate them from discovery.

In *Ratliff*, a Dutch accounting firm (not subject to subpoena in this district) had voluntarily cooperated with a prior Securities and Exchange Commission (SEC) investigation into its audits of a former client. The accounting firm was represented in that investigation by the New York law firm of Davis Polk & Wardwell, through which it provided documents and testimony to the SEC. Davis Polk retained transcripts of the SEC testimony as well as the documents provided to the SEC on behalf of its client.

After attempting to obtain discovery directly from the Dutch accounting firm, plaintiffs in a subsequent civil suit against the accounting firm's former client sought copies of those documents and transcripts through a subpoena served on Davis Polk.

Davis Polk resisted the subpoena, arguing that notwithstanding the absence of protection afforded by the attorney-client privilege, under *Sarrio*, documentary evidence is not available from a lawyer custodian where the court does not have jurisdiction over the client owner of the documents. The district court accepted that argument, finding that because the client was not subject to subpoena, documents in the possession of its attorneys, obtained through and in connection with its representation of the client, were similarly unreachable.

The Second Circuit reversed, holding that the protection discussed in *Sarrio* for documents held by attorneys was not available to Davis Polk in this case. The court found that whatever protection documents sent by the accounting firm to its New York attorneys may have had when they were originally sent, once the client voluntarily disclosed those documents to a third party, that protection was lost.

Noting the breadth of disclosure contemplated by the Federal Rules of Civil Procedure, and the "strong policy considerations favoring full and complete discovery," the court found itself "hard pressed to suppress documents that have already seen the bright light of public disclosure." It concluded that absent some privilege, documents held by an attorney on behalf of a foreign client "are as susceptible to subpoena as those stored in a warehouse within the district court's jurisdiction."

Quoting *Colton v. United States*,[10] the court noted that "any other rule would permit a person to prevent disclosure of any of his papers by the simple expedient of keeping them in the possession of his attorney."[11]

A third opinion filed by the Second Circuit last year also bears brief mention. In *In re Grand Jury Subpoenas Dated March 19, 2002, and Aug. 2, 2002*,[12] the court affirmed a district court order compelling a New York law firm to comply with grand jury subpoenas for Swiss bank records in its possession.

The law firm unsuccessfully argued that the work product doctrine protected those records from disclosure, because its "selection and compilation" of the bank records were "part of an evolving strategy to defend [its clients] from possible criminal charges."

The court concluded that the law firm had not overcome the presumption that third-party documents in a law firm's possession are discoverable. Specifically, it found that the affidavits submitted by the firm, which simply asserted that the firm "possesse[d] only a subset of the materials subpoenaed and that this subset was created pursuant to a carefully orchestrated defense strategy," as well as the firm's failure to submit the documents for in camera review, failed to establish "a real, rather than speculative, concern" that counsel's thought processes would be exposed.[13]

These cases underscore that attorneys seeking to block discovery which encroaches on their client relationships can no longer rest on any presumption against such discovery. Instead, they should construct careful, well-documented arguments, marshaling any available evidence that substantiates the intrusion into the attorney-client relationship.

1. 350 F.3d 65 (2d Cir. 2003).
2. 805 F.2d 1323 (8th Cir. 1986).
3. *United States v. Yonkers Board of Educ.*, 946 F.2d 180, 185 (2d Cir. 1991); *Gould Inc. v. Mitsui Mining & Smelting Co.*, 825 F.2d 676, 680 n.2 (2d Cir. 1987).
4. 350 F.3d at 69 n.2, citing, e.g., *Mill-Run Tours, Inc. v. Khashoggi*, 124 F.R.D. 547 (S.D.N.Y. 1989); *Greenberg v. Safe Lighting Incorporated, Inertia Switch Division*, 24 F.R.D. 410 (S.D.N.Y. 1959); and Southern District Local Civil Rule 33.3(b) (generally limiting the use of interrogatories to those circumstances where they are a more practicable method of obtaining the information sought than through a request for production or a deposition).
5. 2000 WL 1253262 (S.D.N.Y. Sept. 1, 2000).
6. See *Alcon Laboratories, Inc. v. Pharmacia Corp.*, 225 F. Supp. 2d 340 (S.D.N.Y. 2002).
7. See *DeCarlo v. Archie Comic Publications, Inc.*, 2000 WL 1297691 (S.D.N.Y. Sept. 14, 2000).
8. 354 F.3d 165 (2d Cir. 2003).
9. 119 F.3d 143 (2d Cir. 1997).
10. 306 F.2d 633 (2d Cir. 1962).
11. *Ratliff* is potentially significant on another point as well. Although apparently not directly at issue in that case, the court noted, in a footnote, its rejection of the concept of "limited waiver" of the attorney client privilege, under which a party could disclose privileged material to a third party, such as the SEC, yet continue to maintain confidentiality for such material as against other entities. Although the court has never expressly endorsed the concept of limited waiver of the attorney-client privilege, its decision in *In re Steinhardt Partners*, 9 F.3d 230 (2d Cir. 1993) has long been thought to leave the door open for a limited or selective waiver in the context of the more flexible work-product doctrine. See *Maruzen Company, Ltd. v. HSBC USA, Inc.*, 2002 WL 1628782 (S.D.N.Y. July 23, 2002). At least one Southern District court has read *Steinhardt* broadly, to sanction selective waiver for material protected under the attorney- client privilege as well as the work-product doctrine. See *In re Leslie Fay Companies, Inc. Securities Litigation*, 161 F.R.D. 274 (S.D.N.Y. 1995). It remains to be seen whether the *Ratliff* footnote will be read to limit application of the selective waiver doctrine to work-product alone.
12. 318 F.3d 379 (2d Cir. 2003).
13. Id., quoting *Gould Inc. v. Mitsui Mining & Smelting Co.*, 825 F.2d at 680.