Courts Discourage Depositions of an Adversary's Trial Lawyer

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In his March 6, 2013 “Privilege Points” release, Tom Spahn discusses discovery directed at the adversary’s trial lawyer:

Litigants sometimes seek to depose an adversary's trial lawyer. In some situations, such discovery must be appropriate because the trial lawyer possesses relevant knowledge about some historical event. But given the disruptive and inevitably acrimonious nature of such depositions, every court discourages them.

In Axiom Worldwide, Inc. v. HTRD Group Hong Kong Ltd., Case No. 8:11-cv-1468-T-33TBM, 2013 U.S. Dist. LEXIS 8475 (M.D. Fla. Jan. 22, 2013), plaintiff served defendant's trial lawyer with a deposition notice. The court considered two widely recognized standards for such discovery. The Second Circuit applies what it calls a "flexible test," which examines "whether the proposed deposition would entail an inappropriate burden or hardship on the responding party." Id. at *8 (citation omitted). The court also looked at the much stricter standard adopted by the Eighth Circuit in Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986). The Shelton standard permits such depositions only if the moving party establishes that the adversary's trial lawyer possesses "crucial" non-privileged information unavailable elsewhere. Id. at 1327. Acknowledging that the Eleventh Circuit has not selected a standard, the Axiom court applied a variation of Shelton, permitting a deposition limited to the defendant's trial lawyer's "non-privileged, personal knowledge" about a specific pertinent topic. Axiom, 2013 U.S. Dist. LEXIS 8475, at *15-16. The court also took a step that other courts have adopted – permitting the plaintiff to depose the defendant's lawyer "only by written questions" that the judge would review and approve beforehand. Id. at *16.

No court holds that trial lawyers are always immune from discovery, but all courts discourage such discovery.