

STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES
FIRST NATIONAL CENTER
120 NORTH ROBINSON, SUITE 860
OKLAHOMA CITY, OKLAHOMA 73102



In the Matter of:

Geary Securities, Inc. *fka* Capital West Securities, Inc.;
Keith D. Geary; Norman Frager; and CEMP, LLC,

Respondents.

File No. 09-141

**DEPARTMENT'S OBJECTION TO ISSUANCE OF DEPOSITION SUBPOENAS
DUCES TECUM TO TERRA BONNELL AND MELANIE HALL**

"Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring). Accordingly, the Oklahoma Department of Securities ("Department") herein objects to the issuance of the Deposition Subpoena Duces Tecum ("Subpoena") to Terra Bonnell and Melanie Hall, counsel for the Department in this matter. The Department requests that the Hearing Officer exercise his authority under 660:2-9-4(a) of the Rules of the Oklahoma Securities Commission and the Administrator of the Department of Securities and refuse to issue the Subpoenas as requested by Respondent Norman Frager. The Subpoenas are unreasonable, oppressive, excessive in scope, unduly burdensome and not relevant.

I. Deposing Department's counsel is not a proper discovery method.

Under the Oklahoma Administrative Procedures Act, a party to a proceeding may take depositions in the same manner as authorized in civil actions. Okla. Stat. tit. 75, §315. Since this State's discovery code is modeled after the Federal Rules of Civil Procedure, federal case law is instructive when interpreting pertinent state law provisions. *Heffron v. District Court of Oklahoma County*, 2003 OK 75, ¶13, 77 P.3d 1069, 1076 (Okla. 2003). Rule 30 of the Federal Rules of Civil Procedure authorizes a party to take the deposition of "any person".¹ However, "[r]equests to depose opposing counsel are subject to great scrutiny and are to be sparingly granted." *In re Muskogee Env'tl. Conservation Co., Inc.*, 221 B.R. 526, 532 (Bankr. N.D. Okla. 1998). The federal courts have recognized that particular circumstances may justify a deposition of opposing counsel; however, such circumstances are limited. See *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986); *State of Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 2007 WL 649335 at *2 (N.D. Okla. 2007).

The court in *Shelton* established a three-prong test for determining the appropriateness of deposing opposing counsel. The three factors, *all* of which must be proven by the party seeking to take the deposition, are as follows:

- (1) no other means exist to obtain the information than to depose opposing counsel (*citation omitted*);
- (2) the information sought is relevant and nonprivileged; and
- (3) the information is crucial to the preparation of the case.

Shelton, 805 F.2d at 1327, *cited with approval in Boughton*, 65 F.3d at 830-831 and *Edmondson*, 2007 WL 649335 at *2.

¹ Section 3230 of the Oklahoma Discovery Code is modeled after Rule 30 of the Federal Rules of Civil Procedure.

Respondent Frager is seeking information as to “whether or not Pershing ever entered into a loan with Geary Securities for the purchase of the securities at issue.” However, Respondent Frager has not proven that the Department’s attorneys are the only persons with such information or knowledge. Further, Respondent Frager has not proven that no other means exist to obtain the information than to depose opposing counsel.

Carol Gruis, the Department’s Director of Licensing and Examinations, is knowledgeable about the information Respondent Frager seeks. Carol Gruis has been listed on the Department’s witness list for over a year. Only now does Respondent Frager seek the issuance of a deposition subpoena to Ms. Gruis. Representatives of Geary Securities who are on Respondent Frager’s witness list can also testify regarding the same information. Because the information sought by Respondent Frager is available from other sources, the first prong of the *Shelton* test is disposed of herein. Moreover, the remaining two factors of the test need not be applied or discussed.

The *Shelton* court summarized its disfavor with depositions of opposing counsel by stating:

Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standard of the profession, but it also adds to the already burdensome time and costs of litigation. It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony. Finally, the practice of deposing opposing counsel detracts from the quality of client representation. Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent.

Shelton, 805 F.2d at 1327. The court continued:

The harassing practice of deposing 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.

Due to his extensive opportunity to have conducted discovery before now, Respondent Frager's real motivation in requesting the Subpoenas is questionable. Respondent Frager is seeking a delay of the hearing in this matter, even though only 12 days ago, he agreed to the commencement of the hearing on June 18th.

Respondent Frager's tactics become even more problematic with the addition of the Department's counsel on his witness list filed on May 24, 2012. The addition may invoke the relevant ethical principles that would normally cause disqualification of trial attorneys. Rule 3.7 of Oklahoma's Rules of Professional Responsibility states as follows:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

Respondent Frager's harassing and abusive tactics are an inappropriate attempt to create hardship, delay and the potential disqualification of Department's counsel.

II. Requesting attorney work product is not a proper discovery method.

In addition to testimony, Respondent Frager seeks production of all notes, summaries, reports or memoranda prepared by counsel related to contacts with Pershing, LLC. These personal recollections and documents were formed or prepared in the course of counsel's legal duties on behalf of the Department. Decades ago, the United States Supreme Court looked unfavorably upon such discovery methods when it stated that "[the attempt] falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). The Court continued:

The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would therefore suffer.

Id. at 513.

Respondent Frager has no legitimate purpose for calling counsel for the Department as witnesses at the hearing since their testimony cannot qualify as evidence. Accordingly, Respondent Frager has no legitimate purpose for deposing the Department's counsel in advance of the hearing. Counsel's testimony and work product should be protected from discovery.

Conclusion

The Department requests that the Hearing Officer deny Respondent Frager's request for issuance of the Deposition Subpoena Duces Tecum to Terra Bonnell and Melanie Hall.

Respectfully,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing was emailed and mailed, with postage prepaid, this 29th day of May, 2012, to:

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