IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Christopher Duggan, et al.,	:	
Plaintiffs,	:	
v.	:	Case No. 2:08-cv-814
The Village of New Albany, et al.,	:	JUDGE SARGUS
Defendants.	:	

OPINION AND ORDER

The background of this §1983 case has been set forth extensively in prior orders of the Court and will not be repeated here. The case is now before the Court by way of a motion filed by defendants to quash the deposition subpoena issued to New Albany Law Director (and Schottenstein, Zox & Dunn lawyer) Mitchell Banchefsky. Responsive and reply memoranda have been filed and the motion is now ripe for decision. For the following reasons, the motion will be granted.

I. Some Background

This case involves an alleged assault by a New Albany police officer on Christopher Duggan, and the aftermath of that alleged assault, including the way in which the Village of New Albany reacted to its report. At all pertinent times, attorney Mitchell Banchefsky was New Albany's Law Director. He is also a lawyer employed by Schottenstein, Zox & Dunn, the law firm which represents New Albany in this case.

On August 3, 2009, plaintiffs' counsel issued a deposition subpoena for Mr. Banchefsky. For obvious reasons, the defendants objected to that deposition. The parties conferred in an effort to resolve that objection, but could not do so. Defendants then filed their motion, basing their objection on the fact that Mr.

Banchefsky is, in essence, the defendants' attorney, and that under existing case law, depositions of opposing parties' counsel are disfavored and can be taken only in very limited circumstances. The parties' briefs are directed to the question of whether there are circumstances in this case which would support the Duggans' request to depose Mr. Banchefsky.

II. The Parties' Positions

New Albany's position is simple. Mr. Banchefsky is both its Law Director and a lawyer with the firm representing it in this case. Thus, he is to be treated as an attorney for a party in litigation. Under the seminal case of Shelton v. American Motors, 805 F.2d 1323 (8th Cir. 1986), a party requesting the deposition of opposing counsel must make a three-part showing that the deposition is necessary. The three Shelton factors address the absence of other, less intrusive means to obtain the requested information; the relevance (and non-privileged nature) of the information sought; and the centrality of that information to the key issues in the case. New Albany argues that the Duggans have not, and cannot, satisfy the Shelton test, and therefore are not entitled to take Mr. Banchefsky's deposition.

The Duggans make two responses to this argument. First, relying on an order issued by Magistrate Judge King in The Villas of High Pointe Village, LLC v. City of Athens, Case No. 2:06-cv-966 (S.D. Ohio December 27, 2006), they assert that the law does not prevent the deposition of a city law director. That order permitted a deposition of Athens Law Director Garry E. Hunter. Second, addressing the Shelton factors, they argue that Mr. Banchefsky's testimony is both relevant and non-privileged, and that they need to depose him early in the case in order to determine if Schottenstein, Zox & Dunn may be under an ethical duty to withdraw as New Albany's counsel.

III. Analysis of the Issue

Although not entirely clear, the first portion of the Duggans' responsive memorandum appears to argue that the fact that Mr. Banchefsky may have some unprivileged testimony to give, coupled with the principle they divine from Judge King's order that "the law does not prevent [the] deposition" of a city law director, means that an analysis of the Shelton factors is unnecessary here. The Court does not read that much into Judge King's order. The order is less than a page long and does not contain any analysis of the issue. In the past, this Court has applied the Shelton factors to any request to depose counsel for an opposing party, and it will do the same in this case. See, e.g., Fresenius Medical Care Holdings v. Roxanne Laboratories, 2007 WL 543929 (S.D. Ohio February 16, 2007) (applying Shelton test to a request to depose in-house counsel of corporate opponent).

Fresenius sets out the relevant analytical model as follows:

> In *Shelton*, the court set forth a three-part test for determining when taking the deposition of either trial counsel or in-house counsel for a party opponent in litigation may be appropriate. First, the information being sought must ordinarily be predominately, if not exclusively, within the knowledge of the attorney rather than other witnesses. Second, the information must be relevant and not privileged. Finally, the information must be of great significance to the opposing party either for purposes of prosecuting a claim or defending against a claim. These factors are then balanced so that the Court may make a determination whether the need for the discovery, and the general proposition that all witnesses in possession of relevant evidence are subject to being deposed, outweigh the intrusion which will unquestionably occur when an opposing party's attorney is deposed.

Fresenius, 2007 WL 543929, *4. As this Court also noted in Fresenius, the issue in this type of case "is not that the attorney-witness will be asked only questions which would call

for the disclosure of privileged information, but that the combination of the likelihood that many questions put to the witness would call for the invocation of the privilege and the witness's unique relationship with the client, which ought not to be infringed upon absent some showing of substantial need, justifies caution in permitting the deposition of opposing counsel to proceed." Id.

An important factor in this analysis is, of course, what the Duggans anticipate that Mr. Banchefsky might say during his deposition. Although a party who has not yet deposed a witness may not be in the best position to anticipate the witness' testimony, in order to perform a proper Shelton analysis, there must be some indication that the anticipated testimony, whatever it may be, goes to issues that are central to the case, and that the attorney is either the best, or perhaps the only, source of that testimony.

The Duggans contend that Mr. Banchefsky was undoubtedly involved in the decision-making process about how New Albany handled their complaint and its investigation into the alleged assault, and that it is possible that some of this involvement consisted of giving business-type advice rather than legal advice. They also assert that his testimony is relevant to the post-arrest conduct of New Albany, which is an issue raised by the pleadings. Next, they argue that even if much of his testimony would be privileged, he can still be compelled to testify to non-privileged matters such as describing the legal services he performed, "the subject matter of meetings ..., the persons present, the location of the meetings, or the persons arranging the meetings...." Plaintiff's Memorandum in Opposition, Doc. #48, at 8. Finally, they point out that if Mr. Banchefsky is, in fact, a crucial witness in the case, the parties' interests will be served by a deposition which sheds

light on the question of "whether or not SZD will have to be disqualified as counsel." Id. at 9.

These arguments are not particularly persuasive. Most, if not all, of them can be made in any case where opposing counsel is a potential deponent. Unless the attorney whose deposition has been noticed has served exclusively as litigation counsel, and therefore had no involvement in the underlying factual scenario, the opposing party can always assert that there may be some areas of unprivileged information to explore, that the attorney may have provided some modicum of non-legal advice, and that the issue of disqualification should be explored sooner rather than later. Shelton teaches that these arguments are, by themselves, insufficient.

Here, the subjects of Mr. Banchefsky's non-privileged testimony identified by the Duggans, such as who might have arranged for or attended meetings about the alleged assault, can be easily explored through other witnesses. Unless Mr. Banchefsky was the only person present at a meeting, the other non-lawyer attendees can provide this information as well as he can. Further, none of these matters are of great significance to the case. Certainly, even as to the issues about which Mr. Banchefsky may have non-privileged knowledge, what was said in such meetings and what people did after the meetings were concluded appears to be much more important than who set them up or who attended them. If any of the conversations in meetings which he attended were not privileged, the other attendees can also be deposed about those conversations. In short, the Duggans have not identified one single piece of information that only Mr. Banchefsky possesses, nor have they shown that anything he could properly testify about is crucial to their ability to prove their allegations. Finally, it seems likely that a large portion of his relevant knowledge was gained from privileged communications

made to him in his capacity as Law Director. The Duggans have not cited to any evidence that he routinely participated in business or strategic decisions made by New Albany as a business or strategic advisor, or that he did so in this case. Simply put, they have not made the required showing that he is a proper deponent.

Given that failure, the possibility that Mr. Banchefsky might one day become a fact witness and thereby create a disqualification issue for Schottenstein, Zox $ Dunn does not, by itself, overcome the fact that Duggans' arguments fail the Shelton test. Of course, should the defendants choose to make Mr. Banchefsky their own witness at a later date, the analysis would be quite different. Having yet to reach that bridge, the Court prefers not to cross it now. The motion to quash will be granted.

IV. Disposition

For the foregoing reasons, the motion of defendants The Village of New Albany and Police Chief Mark Chaney to quash the deposition subpoena issued to Mitchell Banchefsky (#46) is granted.

Any party may, within ten (10) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due ten days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or

District Judge. S.D. Ohio L.R. 72.4.

/s/ Terence P. Kemp
United States Magistrate Judge