

ARE IMPEACHMENT DEPOSITIONS SUBJECT TO DISCOVERY?

By Ted Babbitt

In virtually every case involving an expert, well-prepared trial counsel seek prior depositions that might be inconsistent with the expert's opinion. The existence of such depositions and their contents is a closely guarded secret, kept that way until the cross examination trap has been sprung. Ordinarily, the depositions themselves enjoy no discovery protection but there is a conflict among the Districts as to whether the fact that the depositions have been chosen by an attorney cloaks them with the work product privilege.

In Acken v Northup, 27 F.L.W. D2230 (Fla. 2nd DCA, Oct. 11, 2002). The Second District found that impeachment depositions of an expert are protected by the work product privilege and not discoverable. In that case, after disclosure of plaintiff's experts, plaintiff requested production of any and all depositions which defense counsel had in its custody or control. The trial court granted a motion to compel production and a writ of certiorari was granted by the Second District. The defendant contended that he had done research to locate prior depositions of plaintiff's expert which could be used for impeachment and that revealing those depositions would violate the work product privilege because the depositions had been selected and compiled based upon counsel's mental impressions of which issues would be important at trial. The Second

District agreed and concluded that the trial court had departed from the essential requirements of law by compelling their production.

The Second District relied on the Third District case of Smith v Florida Power & Light Co., 632 So.2d 696 (Fla. 3rd DCA 1994). In that case, the defendant sought production of its own documents which it had learned that plaintiff's attorney had in his possession. The Third District concluded that the attorney's selection of the documents was cloaked in the work product privilege because their production would disclose which documents the attorney felt were important in the case.

In Gardner v Manor Care of Boca Raton, 27 F.L.W. D837 (Fla. 4th DCA April 10, 2002), the Fourth District rejected Smith as controlling in a case in which the defendant asked for production of all surveys and personnel files of a nursing home which the plaintiff found to be relevant. The Fourth District found those documents to be discoverable under the theory that the documents in question had actually been produced by the defendant who already had knowledge of them, so the number of documents were finite as opposed to Smith, in which the number of documents might be infinite.

The Second District refused to adopt the reasoning of the Fourth even though the facts in Acken were closer to Gardner than Smith because in Acken, the number of depositions were not infinite. The Second District questioned

whether Smith and Gardner could be reconciled and certified conflict to the Supreme Court.

It is interesting to note that there is no discussion in Acken about the fact that in Gardener the documents had originated with the Defendant since they were produced by them rather than as in Acken independently obtained from an outside source. Perhaps that is because that is a distinction without a difference.

In any case, wherever documents originate from and no matter whether the number of those documents is finite or infinite, it would seem that counsel's impression as to which ones are important and which ones are not would go directly to the mental impressions of an attorney which are protected by work product. While the Fourth District has not spoken on the precise question of whether depositions obtained for impeachment are discoverable by an opposing party, until the Supreme Court resolves the conflicts among the Districts, that issue is in doubt.

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