

STATE OF NORTH CAROLINA

COUNTY OF WAKE

NORTH CAROLINA LEAGUE, OF
CONSERVATION VOTERS, INC., *et al.*,
Plaintiffs

and

COMMON CAUSE,
Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, in
his official capacity as Chair of the House
Standing Committee on Redistricting, *et*
al.,
Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 015426

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

REBECCA HARPER, *et al.*,
Plaintiffs

v.

REPRESENTATIVE DESTIN HALL, in
his official capacity as Chair of the House
Standing Committee on Redistricting, *et*
al.,
Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 500085

**ORDER ON (1) NCLCV PLAINTIFFS' MOTION FOR PROTECTIVE ORDER,
(2) LEGISLATIVE DEFENDANTS' MOTION FOR CLARIFICATION, AND (3)
LEGISLATIVE DEFENDANTS' MOTION TO SEAL**

THESE MATTERs came before the undersigned three-judge panel upon 1) NCLCV Plaintiffs' Motion for Protective Order, filed December 29, 2021, pursuant to Rule 26(c) of the North Carolina Rules of Civil Procedure; 2) Legislative Defendants' Motion for Clarification, and in the alternative, Motion to Compel, submitted provisionally under seal on December

29, 2021, pursuant to Rules 26, 30, and 37 of the Rules of Civil Procedure; and, 3) Legislative Defendants' Motion to Seal their Motion for Clarification, and in the alternative, Motion to Compel submitted contemporaneously with the Motion on December 29, 2021, pursuant to Rule 27 of the General Rules of Practice for the Superior and District Courts.

Procedural and Factual Background

In this litigation, Plaintiffs seek a declaration that the North Carolina Congressional, North Carolina Senate, and North Carolina House of Representatives districts established by an act of the General Assembly in 2021, N.C. Sess. Laws 2021-174 (Senate Bill 750), 2021-173 (Senate Bill 739), and 2021-175 (House Bill 976) (collectively the "Enacted Plans"), violate the rights of Plaintiffs under the North Carolina Constitution. Plaintiffs seek to enjoin the future use of the 2021 congressional and state legislative districts.

On December 13, 2021, after receiving an order from the Supreme Court of North Carolina directing this Court to resolve all Plaintiffs' claims on the merits by January 11, 2022, this Court entered a Case Scheduling Order giving the parties until December 31, 2021, to complete discovery in advance of trial, which is set to commence on January 3, 2022. The parties were further ordered that expert reports produced to opposing parties "shall be accompanied by all source code, source data, input parameters, and all outputted data." On December 14, 2021, Legislative Defendants filed a Motion to Compel seeking this very information for the expert reports produced by Plaintiffs during the preliminary-injunction phase of this litigation.

Legislative Defendants' motion was granted in part by the Court on December 15, 2021¹; however, NCLCV Plaintiffs were not required under that order to produce any documents or information that their expert Professor Moon Duchin did not consider or

¹ On December 15, 2021, the Court contemporaneously entered a Protective Order governing the exchange of confidential and highly confidential materials in these consolidated cases.

receive. On December 20, 2021, this Court entered an order clarifying that NCLCV Plaintiffs were to produce to Legislative Defendants the method and means by which the Optimized Maps were formulated and produced, including, but not limited to all source code, source data, input parameters, and all outputted data associated with the Optimized Maps, and that NCLCV Plaintiffs were to identify any and all persons who took part in drawing or participated in the computerized production of the Optimized Maps. This production was ordered to occur by the December 23, 2021, deadline in the Case Scheduling Order for initial expert reports.

After the production of this material, Legislative Defendants thereafter noticed the deposition of Sam Hirsch, an attorney in Jenner & Block LLP's Washington D.C. office and admitted *pro hac vice* by this Court as counsel of record for NCLCV Plaintiffs, on December 27, 2021. The notice of deposition states that Mr. Hirsch's deposition is scheduled to occur on December 31, 2021. Legislative Defendants likewise included Mr. Hirsch in their list of witnesses they may call to testify at trial, and this list was provided to NCLCV Plaintiffs on December 27, 2021.

On December 29, 2021, NCLCV Plaintiffs filed the present Motion for a Protective Order, seeking to quash the notice of deposition directed to Sam Hirsch and direct Legislative Defendants to strike Sam Hirsch from their witness list for trial. Legislative Defendants submitted a written response to this motion on December 29, 2021.

Also on December 29, 2021, Legislative Defendants submitted provisionally under seal the present Motion for Clarification, or in the alternative, Motion to Compel, seeking an order clarifying whether this Court's order granting *pro hac vice* status to Sam Hirsch allows Legislative Defendants to obtain deposition and trial testimony of him without a subpoena, contending that Mr. Hirsch is now a fact witness in this matter. In the alternative, Legislative Defendants seek an order compelling Mr. Hirsch to testify at the noticed

deposition and at trial. Legislative Defendants also filed a Motion to Seal the Motion for Clarification due to NCLCV Plaintiffs designating the entirety of their documents produced in response to this Court's December 20, 2021, Order as Confidential per the Court's December 15, 2021, Protective Order. NCLCV Plaintiffs submitted a written response to these motions on December 29, 2021.

The parties have fully briefed their respective positions on the Motions, and the matters are now ripe for resolution by the Court.

NCLCV Plaintiffs' Motion for Protective Order and Legislative Defendants' Motion for Clarification, and in the alternative, Motion to Compel

After considering NCLCV Plaintiffs' motion and Legislative Defendants' motion, the parties' respective responses to the motions, and the matters contained therein, and having reviewed the record proper, the Court, in its discretion, rules upon the motions as follows:

Testimony Regarding the Optimized Maps is Relevant to the Issues in this Redistricting Litigation and Compelling the Testimony of Mr. Hirsch Satisfies the Shelton Test

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." N.C.G.S. § 1A-1, Rule 26(b)(1). "The test for relevance for discovery purposes only requires that information be 'reasonably' calculated to lead to the discovery of admissible evidence." *Lowd v. Reynolds*, 205 N.C. App. 208, 214, 695 S.E.2d 479, 483 (2010) (quoting N.C.G.S. § 1A-1, Rule 26(b)(1)). "[O]rders regarding discovery are within the discretion of the trial court." *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 448, 271 S.E.2d 522, 523 (1980). One method of obtaining discovery is through depositions upon oral examination, which are governed by Rule 30 of the North Carolina Rules of Civil Procedure. Rule 30 provides that "[a]fter commencement of the action, any party may take the testimony of *any person*, including a party, by deposition upon oral examination." N.C.G.S. § 1A-1, Rule 30(a) (emphasis added). Furthermore, the

Rule provides that “[t]he attendance of witnesses *may* be compelled by subpoena as provided in Rule 45[.]” *Id.* (emphasis added).

Trial courts have authority over the proceedings before it, as well as the counsel in those proceedings. Indeed, the power of the court to deal with its attorneys “is an inherent one because it is an essential one for the court to possess in order for it to protect itself from fraud and impropriety and to serve the ends of the administration of justice which are, fundamentally, the *raison d’etre* for the existence and operation of the courts.” *Law Offices of Peter H. Priest, PLLC v. Coch*, 2014 NCBC 54, *36 (quoting *Swenson v. Thibaut*, 39 N.C. App. 77, 109, 250 S.E.2d 279, 299 (1978)).

“The seminal case on the issue of deposing litigation counsel is *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), which limited the deposition of opposing counsel to circumstances ‘where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged [sic]; and (3) the information is crucial to the preparation of the case. Courts throughout the country, including North Carolina’s federal courts, have adopted the *Shelton* test.” *Blue Ridge Pediatric & Adolescent Med., Inc. v. First Colony Healthcare, LLC*, 2012 NCBC 45, 58 (N.C. Super. Ct. Aug 9, 2012) (internal citation omitted).

As did the trial court in *Blue Ridge Pediatric & Adolescent Med.*, this Court agrees that “[w]hile not binding on this Court, *Shelton* and its progeny offer guidance to the Court in deciding this motion. This Court concludes that the *Shelton* test is appropriate in this case because the test closely parallels the language of Rule 26, which allows a party to limit discovery by convincing a court that information sought in discovery by deposition, upon oral examination, is (1) not ‘obtainable from some other [less burdensome] source . . . ,’ (2) ‘not

privileged . . . ,’ and (3) ‘importan[t to] the issues at stake in the litigation.’” *Id.* at 61 (citing N.C. R. Civ. P. 26(b)(1)) (alterations in original).

Here, NCLCV Plaintiffs are correct that the ordinary manner by which a party can compel a witness’s attendance at a deposition is to issue a subpoena to that witness; however, in the extraordinary circumstances governing the timing constraints of this case to come to a full resolution of all claims by January 11, 2022, compelling Mr. Hirsch to sit for deposition—as noticed, despite the absence of a subpoena—serves the needs of this important litigation and the ends of the administration of justice in a case in which he has made an appearance. Indeed, the only means that exist to obtain the information is to depose Mr. Hirsch, the information sought is relevant and nonprivileged, and the information is crucial to the preparation of the case. Evidence before the Court demonstrates that NCLCV Plaintiffs, in complying with the Court’s December 20, 2021, Order, identified Mr. Hirsch as a person who plainly and meaningfully took part in the drawing and computerized production of the Optimized Maps. *See* Leg. Def. Mot. to Clarify, Exhibit A. Mr. Hirsch’s involvement, the Court observes, occurred prior to the initiation of NCLCV Plaintiffs’ legal action filed against the Legislative Defendants challenging the state legislative and congressional redistricting plans at issue—and the other persons involved are not expected to be called as witnesses in this case. *Id.* Accordingly, the information sought through Mr. Hirsch’s deposition is relevant and can only be obtained through him. The Court, however, acknowledges that because attorney-client privilege may protect some of the information to which Mr. Hirsch will be called to testify, nothing in this Order shall be construed as a limitation on NCLCV Plaintiffs’ or Mr. Hirsch’s ability to assert *bona fide* attorney-client privilege and work product doctrine assertions at his deposition.

Furthermore, as the Court explained in its Order on Legislative Defendants’ Motion for Partial Reconsideration, the underlying data and persons involved in the creation of the

Optimized Maps are indeed relevant and discoverable for the following reasons: the Optimized Maps were presented, and referenced over ninety (90) times, to the Court in NCLCV Plaintiffs' Complaint; at the hearing on the Motion for Preliminary Injunction the NCLCV Plaintiffs mentioned the Optimized Maps on numerous occasions and provided the Court with copies of the same; and, NCLCV Plaintiffs, in both their Complaint and at the hearing on the Motion for Preliminary Injunction, requested that in the event Legislative Defendants are required to draw remedial maps and fail to do so to the satisfaction of the Court, that the Court require the use of the Optimized Maps for the 2022 Elections. Simply put, NCLCV Plaintiffs have put the issue of the Optimized Maps before the Court, and this includes the testimony of a person who directed the creation of the Optimized Maps. Accordingly, this Court will deny NCLCV Plaintiffs' Motion for a Protective Order and grant Legislative Defendants' Motion seeking to compel Mr. Hirsch's appearance at the noticed deposition and, if called, at trial.

Mr. Hirsch Carries the Responsibility for Complying with the Ethical Rules Governing When an Attorney May Be Called Upon as Both an Advocate and Necessary Witness at Trial

As an additional matter, when seeking to be admitted *pro hac vice*, an attorney must certify "that with reference to all matters incident to the proceeding, the attorney agrees to be subject to the orders and . . . the civil jurisdiction of the General Court of Justice." N.C.G.S. § 84-4.1(3).

It is incumbent upon attorneys admitted *pro hac vice* to comply with our state's rules of professional conduct. At issue here, Rule 3.7 of the North Carolina Rules of Professional Conduct provides that "[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." N.C. Rules of

Prof'l Conduct R. 3.7(a). In a Formal Ethics Opinion issued by the N.C. State Bar on April 22, 2011, entitled "Lawyer as Advocate and Witness," the State Bar explained that this Rule requires the attorney to evaluate whether he or she may become a necessary witness in a case. 2011 Formal Ethics Opinion 1 ("A lawyer who is named as a witness by an opposing party must evaluate his knowledge of the facts in controversy and make a good faith determination as to whether his testimony will be relevant, material, and unobtainable elsewhere. This evaluation must be ongoing as the case moves toward trial, contested issues are identified, and discovery discloses additional witnesses and information about the case. However, to avoid prejudicing a client due to a last-minute change of trial counsel, a lawyer should withdraw from representation in the trial if the lawyer knows or reasonably should know that he is a necessary witness."). The Formal Ethics Opinion also clarified that the "underlying reason for the prohibition—confusion of the trier of fact relative to the lawyer's role—does not apply when the lawyer's advocacy is limited to activities outside the courtroom. Although a lawyer may continue to provide representation outside the courtroom, the lawyer should not use this as an excuse to delay withdrawal from representation in the litigation if the lawyer knows or reasonably should know that he is a necessary witness." *Id.* (internal citations omitted).

Although Mr. Hirsch's representation of NCLCV Plaintiffs outside of the courtroom does not implicate Rule 3.7, NCLCV Plaintiffs have indicated that Mr. Hirsch is set to examine certain witnesses at the trial of these consolidated cases. As such, it is incumbent upon Mr. Hirsch to determine whether he is a necessary witness such that he would need to withdraw as counsel at the trial of this matter.

Legislative Defendants' Motion to Seal

As the Court reminded the parties in the December 13, 2021, Case Scheduling Order, if a party intends to submit any materials under seal, they are to comply with Rule 27 of the

General Rules of Practice. Rule 27 of the General Rules of Practice governs the process for when a party submits a document under seal, and further provides that the court “may rule on the motion with or without a hearing. In the absence of a motion or brief that justifies sealing the document, the court may order that the document (or part of the document) be made public.” N.C. R. Super. & Dist. Cts. 27(b)(6).

NCLCV Plaintiffs have designated as Confidential the document included with Legislative Defendants’ Motion to Clarify as Exhibit A. In their written response to the Motion to Seal, NCLCV Plaintiffs state that they agree that the Motion for Clarification may enter the public record, including its discussion of Mr. Hirsch related to the Optimized Maps, but maintain that the Cover Letter attached to that motion is confidential and should be sealed. NCLCV Plaintiffs have proposed to provide a public version of the document disclosing general information described in Legislative Defendants’ Motion while redacting other, specific portions and maintaining the full unredacted version under seal indefinitely.

The Court disagrees with Legislative Defendants that the document marked as Exhibit A to Legislative Defendants’ Motion to Clarify was not properly designated as Confidential by NCLCV Plaintiffs at the time of disclosure. The Court also appreciates that NCLCV Plaintiffs have proposed a reasonable alternative to balance public access to the record in this case with the need for certain information, if properly designated, to remain confidential. The Court, however, finds that the nature of the information disclosed—for the reasons explained above—and the compelling public interest in the nature of this litigation requires that Exhibit A be made a part of the public record in full. Accordingly, this Court will order that Legislative Defendants’ Motion to Seal be Denied and that the Motion and attached Exhibit A be filed as part of the public record.

Conclusion

WHEREFORE, the Court, for the reasons stated herein and in the exercise of its discretion, hereby ORDERS the following:

1. NCLCV Plaintiffs' Motion for a Protective Order is DENIED.
2. Legislative Defendants' Motion to Clarify is GRANTED and Mr. Sam Hirsch is hereby commanded to appear at the duly noticed deposition on December 31, 2021, or at another time and place agreed upon by the parties, and, if called, testify at trial set to commence January 3, 2022.
3. Legislative Defendants' Motion to Seal is DENIED and the Motion and attached Exhibit A shall be filed as part of the public record.

SO ORDERED, this the 30 day of December, 2021.



A. Graham Shirley, Superior Court Judge

/s/ Nathaniel J. Poovey

Nathaniel J. Poovey, Superior Court Judge

/s/ Dawn M. Layton

Dawn M. Layton, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via e-mail transmission addressed as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 30th day of December 2021.

/s/ Kellie Z. Myers
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