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Deposed Parties: Who Has A Right To Access Depositions In Civil Cases?

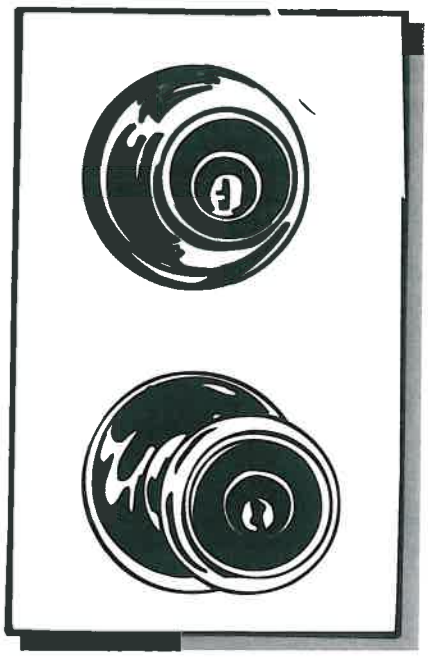
Robert L Tucker

Deposed parties

Who has a right to access depositions in civil cases?

by Robert L. Tucker

More than a decade ago, an article appeared in the American Bar Association's *Litigation* magazine, titled "The Folklore of Depositions." In that article, the statement was made that absent a protective order, anyone at all — whether a party or not — has the right to attend a deposition in a civil case.[1] But neither of the two cases cited in the article directly addressed the specific issue of whether counsel can exclude a party, a witness, the press or the public from a deposition in a civil case without previously obtaining a protective order limiting the persons who may be present.



Tension between rules

Historically, under the federal rules, there was a tension between Federal Rule of Civil Procedure 26(c)(5) on the one hand, and Federal Rule of Civil Procedure 30(c) and Federal Rule of Evidence 615 on the other. The language of Rule 26(c)(5) implies rather strongly that, absent a protective order, anyone — whether a party, witness or non-party — may attend a deposition in a civil case. The rule says that, on motion and for good cause shown, the court may enter any order necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including an order "that discovery be conducted with no one present except persons designated by the court . . . ." The obvious implication is that, absent such a protective order, a lawyer has no right to exclude a party, witness or non-party from attending a deposition. Rule 26(C) of the Ohio Rules of Civil Procedure tracks the language of its federal counterpart.

On the other hand, Rule 615 of the Federal Rules of Evidence provides for the exclusion of witnesses (subject to certain exceptions) so that they cannot hear the testimony of other witnesses. Until recently, Federal Rule of Civil Procedure 30(c), in describing how depositions are to be conducted, stated that "examination and cross-examination of witnesses may proceed as permitted at the trial." The argument was sometimes made that Rule 30(c) allowed an attorney to invoke "the Rule" (referring to Evid. R. 615) to exclude potential witnesses from attending the depositions of other witnesses.

Ohio's version of Evid. R. 615 is substantially similar to its federal counterpart. No reported Ohio case has ever determined whether Ohio's version of Rule 615 can be invoked at a deposition. Nor has any reported Ohio case ever determined whether an attorney has the right to exclude non-parties — whether they be expert or lay witnesses, the press or the public — from attending a deposition without getting a protective order.

Amendment to 30(c)

At the federal level, the issue has been clarified to some degree by a 1993 amendment to Federal Rule of Civil Procedure 30(c). The amended rule now provides that examination and cross-examination of witnesses in a

ROBERT L. TUCKER IS AN ATTORNEY WITH BUCKINGHAM, DOOLITTLE & BURROUGHS IN AKRON.

deposition "may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence *except* Rule 103 and 615." It is now clear under the federal rules that counsel may no longer seek to exclude expert or lay witnesses from a deposition absent a protective order.[2] But the issue of when and whether parties, witnesses, the press or members of the public can be excluded from a deposition absent a previously-issued protective order remains unclear.

Exclusion of parties

Under both Ohio and federal practice, absent a court order, a party to a civil lawsuit ordinarily has the right to attend any deposition taken in that suit.[3] A corporate party has the right to attend a deposition through a corporate representative. Under Federal Rule of Civil Procedure 26(c)(5), the courts may exclude a party from a deposition only in extraordinary circumstances.[4] Exclusion of a party should be ordered "rarely indeed" because a party's right to attend a deposition in his or her own case has a constitutional dimension and, therefore, is entitled to special protection.[5] Exclusion of a party from a deposition in his or her own case requires "a particular and individualized showing of good cause" before such a motion can be granted.[6]

A court can enter an order precluding a party from attending a deposition if, for example, the deposition is likely to elicit confidential information that could be harmful in the hands of a competitor.[7] Other examples where exclusion of a party might be proper include cases where there is cause to believe that a party would harass the deponent, or where security issues are involved (such as cases in which a prisoner is a party).[8] But absent a court order in advance of the deposition, it is well-established that a party has an absolute right to attend any deposition taken in his or her own case.

Exclusion of expert and lay witnesses

There has been considerable debate about whether counsel for a party can demand the exclusion of a potential or known expert or lay witness from a deposition. Prior to the 1993 amendment to the federal rules, several courts held that Rule 615 applied at depositions and that an attorney for a party could exclude potential witnesses from a deposition without getting a protective order beforehand.[9] But the better view — and the view that ultimately prevailed with the 1993 amendment to Rule 30(c) — was that a protective order was required before a potential lay or expert witness could be excluded from the deposition of another witness.

In *Skidmore v. Northwest Engineering Co.*, the plaintiff brought one of his expert witnesses to a deposition of one of the defendant's employees.[10] Counsel for the defendant attempted to invoke Rule 615 to exclude the plaintiff's expert from the deposition. Plaintiff's counsel insisted that the presence of his expert was necessary to assist him in understanding the technical testimony of the defendant's employee, and contended that no one, including experts who will testify for an opponent, may be excluded from a deposition except by order of the court under Rule 26(c).

The *Skidmore* court noted that several earlier decisions had applied Rule 615 to depositions. But the court disagreed with those decisions, and concluded that the civil rules allow exclusion of persons from depositions only in exceptional circumstances, and then only on motion and order of the court. The *Skidmore* court felt that the policy reasons for the sequestration rule were not applicable when an expert witness was involved. Construing Rules 615 and 26(c) together, the *Skidmore* court held that the burden should be on the party opposing the presence of an expert to obtain a protective order in advance of the deposition.

The same conclusion was reached with respect to lay witnesses in *BCI Comm. Systems, Inc. v. Bell Atlanticom Systems, Inc.*[11] In *BCI*, the defendants sought an order prohibiting potential witnesses for the plaintiff from attending the depositions of other witnesses, and invoked Rule 615 in support of their request. The plaintiff contended that, under Rule 26(c), pretrial discovery is generally conducted in public, and there was no good cause for excluding potential lay witnesses from attending the depositions of other witnesses. The *Bell* court agreed, and concluded that witnesses ordinarily have a right to attend depositions of other witnesses in the same case. It added that orders excluding their presence should rarely be granted.

While no Ohio decisions are on point, it seems that Ohio courts should follow the latter view that depositions are presumptively open, and require a protective order before potential lay or expert witnesses can be excluded. It is already a routine practice for a party to seek a protective order when confidentiality, privacy or other concerns necessitate restrictions on who may have access to discovery materials. These protective orders are generally negotiated between parties without need for intervention by the court.

Given the presumptively open nature of discovery, it does not seem too much of a burden to require a party to seek a protective order if that party desires to prohibit other potential witnesses from attending a deposition. This is especially true since, absent a protective order, there is no proscription against providing a witness with a copy of the transcript of another witness' deposition. Expert witnesses are routinely given copies of depositions of the other party's fact and expert witnesses. That being the case, there is no reason why the witness should be prohibited from actually attending the deposition itself under ordinary circumstances.

Exclusion of the press and public

The real battleground seems to be not whether parties and witnesses can attend discovery depositions, but whether the general public and the press have the right to attend them as well. Much of the conflict stems from various decisions addressing the right of access by the press to interrogatory answers,

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documents produced or deposition transcripts generated in discovery, rather than whether the press or public are permitted to attend depositions as spectators. In one such instance, the U.S. Supreme Court stated that "pretrial depositions and interrogatories are not public components of a civil trial." The Court added that such proceedings were not open to the public at common law and, even now, are generally conducted in private as a matter of modern practice.[12]

On the other hand, other federal decisions have held that, under the Civil Rules, there is a presumption that discovery will be open. This presumption has been held to be grounded only in the civil rules themselves, and does not derive from either the common law or any First Amendment right of access.[13]

A number of federal and state cases also have directly addressed the question of whether the public and press have the right to attend discovery depositions in civil cases. The federal courts are still split on the issue. The state cases generally turn on whether, as a matter of state constitutional, statutory or decisional law, there is a presumption of openness in discovery.

In *Amato v. City of Richmond*, a newspaper sought leave to intervene in a civil case for purpose of attending certain depositions. The paper acknowledged that it had no First Amendment right to attend the depositions.[14] The *Amato* court denied the paper's request, observing that, since the U.S. Supreme Court decision in *Seattle Times v. Rhinehart*, courts have generally denied requests of reporters to attend depositions. The *Amato* court said that depositions are freely open to the public only in antitrust actions brought by the United States, and that allowing the media to attend every deposition in any case of public interest would significantly hinder the discovery process.

In *Times Newspapers Ltd. (of Great Britain) v. McDonald Douglas Corp.*, a newspaper sought a declaratory judgment that it was entitled to be present at all depositions relating to the crash of an airplane manufactured by the defendant.[15] Concluding that there was no such right under federal law, the court held that depositions are neither a judicial trial nor a part of a trial, but are instead a proceeding preliminary to a trial. Consequently, neither the public nor representatives of the press have a right to be present at them. At least one Florida appellate decision and one decision of the Washington Supreme Court have also concluded that the public and media do not generally have a right to attend pretrial depositions.[16]

But other federal and state courts disagree. In *Thrifty Dutchman, Inc.*, a corporation that was not a party in interest filed a motion for authority to attend depositions in the bankruptcy proceeding.[17] The bankruptcy court held that depositions are public proceedings to which the public has access unless compelling reasons exist for denying access. Because

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corporations also qualify as members of the public, the corporation was permitted and authorized to attend depositions noticed and conducted in that or any other bankruptcy proceeding.

In *Avirgan v. Hall*, a non-party deponent in a civil case sought a protective order prohibiting the attendance of the press and other members of the public at his deposition.[18] The deponent contended that the plaintiffs invited the press for the purpose of annoyance and harassment. The court, denying the protective order, said that even though the deponent's concerns were more weighty because he was not a party to the underlying action, the grant of a protective order excluding the public and press would run afoul of the presumption still inherent in Rule 26(c) — despite the Supreme Court's decision in *Seattle Times* — that discovery should be open.

The most abundant source of decisions relating to the right of the press or public to attend depositions come from the state courts of Florida. Florida courts have historically held that, in both civil and criminal cases, depositions are public judicial proceedings to which there is a general right of public access.[19] However, the validity of these decisions may now be questionable as a matter of Florida law, given the Florida Supreme Court's decision in the *Palm Beach Newspapers* case that the public and media generally do not have the right to attend pretrial depositions.

Conclusion

Absent extraordinary circumstances and a prior court order, parties to a civil action have an absolute right to be present at depositions taken in their own case. The law now seems clear, at least at the federal level, that actual or potential expert or lay witnesses may attend other depositions taken in civil actions, absent a court order to the contrary.

As to the right of the general public or press to attend discovery depositions, the law remains unclear. At the federal level, decisions go both ways. In state court cases, the issue turns on whether the state courts follow the Florida rule that discovery depositions are presumptively open to the public, or instead follow the Washington rule that they are not. The question remains open in Ohio, for there are no reported decisions addressing the issue. ■

Endnotes

[1] *Edward v. Greene*, "The Folklore of Depositions," 11 *Litig.* 13 (1985) ("Without a protective order in hand, a lawyer has no right to insist that anyone, party or non-party, be excluded from a deposition.").

[2] The Advisory Committee Notes to the 1993 amendment to Federal Rule 30(c) clearly state that "other witnesses are not automatically excluded from a deposition simply by the request of a party." The notes add, however, that the 1993 amendment "does not attempt to resolve issues concerning attendance by others such as the public or press."

[3] *See, e.g., Roberts v. Sycamore Hosp.* (Montgomery App. 1985), 198 Ohio App. LEXIS 8778 at *3 ("According to Civ. R. 30(c), all parties have a right to be present at a deposition . . . ."); *see also*, Evid. R. 615 (1) and (2).

[4] *Hines v. Wilkinson* (S.D. Ohio), 163 F.R.D. 262, 266, *citing*, 8 C.A. Wright, A.R. Miller and R.L. Marcus, *Federal Practice and Procedure*, §2041 at 536 (1994) (hereinafter "Wright & Miller").

[5] *Id., citing Galella v. Onassis* (2d Cir. 1973), 487 F.2d 986, 997.

[6] *Id., citing, Hamon Contractors, Inc. v. District Court* (Colo. 1994), 877 P.2d 884, 887; *Montgomery Elev. Co. v. Superior Court* (Ariz. 1983), 661 P.2d 1133, 1135; *BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc.* (N.D. Ala. 1986), 112 F.R.D. 154, 157, *affirmed*, 995 F.2d 236 (11th Cir. 1993); *Beacon v. R.M. Jones Apartment Rentals* (N.D. Ohio 1978), 79 F.R.D. 141, 142; *In re Levine* (D.Colo. 1989), 101 Bankr. 260, 262-263.

[7] *See, e.g.*, 8 Wright & Miller at §2041, p. 537 (and cases cited therein).

[8] *Galella, supra* note 5 at 997; *James v. Roberts* (S.D. Ohio 1995), 163 F.R.D. 260.

[9] *See, e.g., In Re Shell Oil Refinery* (D. La. 1991), 136 F.R.D. 615, 617, n. 1 ("Federal Rule of Evidence 615 applies to pretrial depositions through Federal Rule of Civil Procedure 30(c), which states that the Federal Rules of Evidence apply to depositions."); *Lumpkin v. Bi-Lo, Inc.* (D. Ga. 1987), 117 F.R.D. 451, 453 ("*** Rule 615 of the Federal Rules of Evidence does apply to depositions."); *Williams v. Electronic Control Systems, Inc.* (D. Tenn. 1975), 68 F.R.D. 703-04, ("[Rule 615] applies to the taking of depositions."). *See also, Naismith v. Professional Golfers Ass'n* (N.D. Ga. 1979), 85 F.R.D. 552, 567 (holding that Rule 615 applies at depositions but not between depositions and trial).

[10] (S.D. Fla. 1981), 90 F.R.D. 75.

[11] *Supra* note 6.

[12] *Seattle Times Co. v. Rhinehart* (1984), 467 U.S. 20, 33.

[13] *Tavoulareas v. The Washington Post Co.* (D.C. Cir. 1984), 724 F.2d 1010, 1016; *see also, National Polymer Products v. Borg-Warner Corp.*, 641 F.2d 418, 423 (6th Cir. 1981)("The discovery rules themselves place no limits on what a party may do with materials obtained in discovery."); *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980)(quoting *American Telephone and Telegraph Co. v. Grady* 594 F.2d 594, 596 (7th Cir. 1978)) ("As a general proposition, pretrial discovery must take place in the [sic] public unless compelling reasons exist for denying the public access to the proceedings."); *In re Halkin* (D.C. Cir. 1979), 598 F.2d 176, 188 (D.C. Cir. 1979) ("Without a protective order, materials obtained in discovery may be used by a party for any purpose, including dissemination to the public.").

[14] (E.D. Va. 1994), 157 F.R.D. 26.

[15] (C.D. Cal. 1974), 387 F.Supp. 189.

[16] *Palm Beach Newspapers, Inc. v. Burk* (Fla. App. 1985), 471 So. 2d 571, 579 ("We do not read that everybody, public and press, are entitled *ipso facto* to attend unless the court orders otherwise."). *Rhinehart v. Seattle Times Co.* (Wash. 1982), 98 Wash. 2d 226, 654 F.2d 673, 684 ("It appears from the opinion that Florida law depositions are generally open to the public. That is not the case in this state.")

[17] (Bankr. S.D.Fla. 1989), 97 *Bankr.* 111.

[18] (D. D.C. 1987), 118 F.R.D. 252.

[19] *Cazarez v. Church of Scientology* (Fla. Cir. Ct. 1980), 6 *Med. L. Rptr.* 2109 ("The court finds that the deposition taken in this case is a public judicial proceeding to which the Florida Courts have recognized a general right of public access."); *Johnson v. Broward County* (Fla. Cir. Ct. 1981), 7 *Med. L. Rptr.* 2125, 2126 ("Depositions have been held to be judicial proceedings . . . The mere desires of parties to a judicial proceeding to exclude the press or public are insufficient."); *Florida v. Alford* (Fla. Cir. Ct. 1979), 5 *Med. L. Rptr.* 2054, 2055 ("Discovery depositions taken pursuant to subpoenas issued by the state shall be open."); *Florida v. Diggs* (Fla. Cir. Ct. 1980), 5 *Med. L. Rptr.* 2596, 2597 ("Since they constitute public judicial proceedings, electronic media and still photography coverage of pre-trial depositions is allowed. . . ."); *Florida v. Bundy* (Fla. Cir. Ct. 1979), 4 *Med. L. Rptr.* 2629, 2630 ("[T]his court is of the opinion that closure orders may be entered only to prevent clear and present danger of the defendant's right to a fair trial.").