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THE PROPER LOCATION OF PARTY-DEPOSITIONS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

You are the vice-president of a company that has recently been sued in an Illinois federal court. You work at the company's New York headquarters and reside in New Jersey. You just received a notice requiring you to appear for a deposition in Illinois. Are you required to appear? Can you insist that the deposition take place in New York? New Jersey? Can you demand a telephonic deposition? Can you demand deposition by written questions? If you appear in Illinois, can you require the party noticing the deposition to reimburse your expenses?

The answers to these and other questions relating to the location of party-depositions [1] cannot be found in the Federal Rules of Civil Procedure. While the Rules provide numerous mechanisms for noticing and conducting party-depositions, [2] they are silent about location. [3] Determining the proper location of party-depositions requires a foray into a confusing, and sometimes inconsistent, line of case law. For instance, some courts hold that the proper location to depose a corporate representative is the judicial district in which the ***764** corporation maintains its principal place of business, [4] while others suggest that it is the district in which the suit is pending. [5]

This Article clarifies the law concerning the proper location of party-depositions and proposes a hard-and-fast rule for determining the appropriate location of all party-depositions. Section I examines the procedural guidelines to quash or modify a notice of deposition. Section II analyzes the cases attempting to delineate standards for ascertaining the proper location of party-depositions. Lastly, Section III proposes an amendment to Rule 30 of the Federal Rules of Civil Procedure

setting forth concrete standards for determining the proper location of party-depositions.

I. PROCEDURAL GUIDELINES

A party may unilaterally choose the location to conduct the deposition of an opposing party.[6] If the place chosen is unsuitable, the deponent may contest the notice of deposition by filing a motion for a protective order pursuant to Rule 26(c).[7] The party noticing the deposition then files a response brief setting forth his reasons for selecting the location.[8]

Under Rule 26, a judge may "for good cause shown ... make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including an order limiting discovery to specified places.[9] Because the standard of appellate review is deferential, the broad discretion given district courts by Rule 26(c) effectively limits the scope of review.[10]

***765** In a motion for a protective order, the deponent bears the burden of proving that the location will cause him undue burden or expense.[11] Naked assertions made by the moving party's attorney are insufficient to support a protective order.[12] The motion must be supported by well-documented affidavits or a verified motion[13] to corroborate the allegations of undue hardship.[14]

II. LOCATION OF DEPOSITIONS

The proper location of a party-deposition generally turns on two factors: first, whether the deponent is an individual or an organizational representative; and second, whether the party is a plaintiff or a defendant.

A. General Rules

Courts usually permit an individual defendant to be deposed in the district of his residence.[15] Conversely, an individual plaintiff must generally submit to deposition in the district where he commenced the litigation.[16] Courts reason that the plaintiff may not later complain of his chosen forum, whereas defendants have

no similar choice. [17] Unless otherwise ordered by a court, deponents are required to pay their own transportation costs. [18] Similarly, a corporate plaintiff must produce its agents or officers for depositions in the district in which it instituted suit. [19] If the deponent is an ***766** officer, director, or managing agent of a defendant, the deposition should proceed in the district where the organization maintains its principal place of business, [20] even though the deponent resides elsewhere. [21]

Determining the location of party-depositions becomes more confusing when the defendant asserts a counterclaim. Courts treat a defendant who files a permissive counterclaim [22] as a plaintiff for the purposes of determining the proper location of a deposition. [23] A defendant with a compulsory counterclaim [24] remains entitled to protection from deposition anywhere other than his residence, if an individual party, or its principal place of business, if an organizational party. [25] Cross-claims should be treated the same as permissive counterclaims given that they are permissive in nature. [26]

*767 B. Exceptions to the General Rules

These general rules are subject to exceptions based upon a balancing of certain factors, [27] including which party is better able to absorb the deponent's transportation costs; the location of documents necessary at the deposition; [28] the convenience of the deponent, parties and counsel; the location of documents or physical evidence; [29] which court is best suited to supervise the deposition; [30] the deponent's physical well-being; [31] the counsels' location; [32] and the location of prior depositions. [33] If these factors weigh in favor of a different location, an exception to the general rules is made.

For instance, in Mill-Run Tours, Inc. v. Khashoggi, [34] the court ordered two individual defendants to submit to depositions in the district in which the suit was pending. One deponent resided in Europe and the other in the Middle East. [35] Yet, they were both ordered to appear for depositions in New York. In making an exception to the general rule that individual defendants are to be deposed in their place of residence, the court found that the balancing test weighed in favor of New York. Since both parties had New York counsel, all relevant documents were located in New York, and the court could not feasibly supervise depositions overseas, the court held that New York was the proper forum for the depositions. [36]

***768** In Kasper v. Cooper Canada, Ltd.,[37] two officers of the defendant corporation were ordered to appear in Illinois for depositions. The corporation's principal place of business was Toronto, but other factors weighed in favor of Chicago: counsel for both parties were located in Chicago, many of the requested documents were in Chicago, the defendant corporation had substantial business interests in Chicago, and the defendant, a large corporation, was more able to absorb the cost of travel than was the individual plaintiff.[38] Likewise, in Turner v. Prudential Insurance Co. of America,[39] the court ordered an officer of the defendant corporation, whose principal place of business was in Florida, to submit to a deposition in North Carolina. The court did so on the grounds that both parties' attorneys were located in North Carolina and a large insurance company, like Prudential, had disproportionately more resources than the individual plaintiff.[40]

Courts tend to make an exception to the general rules when the deponent is a defendant, especially if he is an officer, director, or managing agent of a large organizational defendant. Yet, one court has made such an exception even when the deponent was an individual plaintiff. In DePetro v. Exxon, Inc.,[41] an individual plaintiff brought an employment discrimination action against Exxon Corporation, a multi-national entity. Plaintiff filed the case in Alabama, but then moved to California.[42] Exxon noticed the plaintiff's deposition for Alabama.[43] Plaintiff moved for a protective order, arguing that it would be "unreasonable and unduly burdensome" to compel her to come to Alabama for the deposition.[44] Plaintiff claimed that she lacked the financial resources ***769** necessary to make the trip to Alabama, and requested that the court order Exxon to depose her by telephone or through written interrogatories.[45]

Exxon argued that since the plaintiff chose to file the suit in Alabama, she must appear there for deposition.[46] Finding for the plaintiff,[47] the court gave Exxon three alternatives. First, the court quoted then-Judge Harlan for the proposition that written questions may substitute for an oral examination:

> Then-Judge Harlan has indicated that if an oral deposition would be too expensive or too inconvenient for a party then the court in its discretion may order that written questions be used.[48]

Second, Exxon could, at its expense, take the plaintiff's deposition by telephone or in person in Alabama.[49] Finally, " w hen justice requires it is also appropriate for a court to allow a defendant to depose a nonresident plaintiff in her place of residence but to require that the defendant pay the expenses of the plaintiff's lawyer to attend the deposition."[50]

Whenever practical, the general rules should govern the location of party-depositions. When there is a disparity of resources between the parties or a genuine inconvenience to the deponent, however, courts should make exceptions.

C. Alternatives to Oral Depositions

As stated in DePetro, courts should consider certain alternatives before ordering a party to submit to a deposition in a faraway district. The primary alternative is the telephonic deposition. Rule 30(b)(7) of the Federal Rules of Civil Procedure provides that "[t]he parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone."[51] Upon a motion of the party-deponent,[52] ***770** courts can order parties to take a telephonic deposition of a nonresident deponent in lieu of an in-person deposition.[53] This is especially the case if the deposition will be simple and straightforward.[54] On the other hand, telephonic depositions may not be attractive if the deponent is a key witness,[55] the deposition involves complex documents,[56] or the party-deponent has failed to demonstrate that he will suffer undue hardship or expense by submitting to an oral deposition.[57] If the court orders a nonresident deponent to submit to an oral deposition, it can compel the party who noticed the deposition to pay all or some portion of the deponent's travel expenses.[58] Absent a showing of undue hardship or expense, the deponent will be responsible for his own expenses.[59]

Another alternative to the oral deposition is a deposition by written questions.[60] Like the telephonic deposition, a deposition by written questions is a viable alternative, if the deponent's testimony is simple and straightforward.[61] If, however, the deponent's testimony is vital to the issues of the case, or the deponent has failed to show that he would suffer undue hardship or expense by submitting to an ***771** oral examination,[62] then deposition by written questions is less effective.

III. PROPOSED RULE 30(b)(8)

Procedural reform in the federal judicial system represents a continuous effort to codify common law rules of pleading to establish uniformity in federal practice. [63] The adoption, in 1938, of the Federal Rules of Civil Procedure reflected the culmination of this process [64] and " t he most notable of these rules were those bearing on discovery." [65] Whether the question dealt with the sufficiency of a complaint or methods of summary disposition, the Federal Rules reflect a desire to reduce wasteful litigation and the squandering of precious judicial resources.

In that historical context, the law concerning the proper location of party-depositions requires clarification. Neither parties nor judges should be required to mull through dozens of contradictory cases to determine which district is appropriate for a given deposition. Requiring the noticing party to guess at the proper location and then fight it out in court is time consuming and wasteful.

In former Chief Justice Warren Burger's 1980 Annual Report on the State of the Judiciary, he lamented that:

> Delay and excessive expense now characterize a large percentage of all civil litigation.... Lawyers devote an enormous number of "chargeable hours" to the practice of discovery. We may assume that discovery usually is conducted in good faith. Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. [66]

***772** Codification and the predictability that is attendant to it will aid in reducing vexatious and nonproductive litigation over the location of party-depositions, except in truly extraordinary cases. Accordingly, the following section should be added to Rule 30(b) of the Federal Rules of Civil Procedure:

> LOCATION OF PARTY-DEPOSITIONS. The party noticing a deposition of another party may choose any reasonable location to take the deposition. If the deponent is an individual defendant, the district in which he or she resides is presumed reasonable. If the deponent is an individual plaintiff or an officer, director or managing

> agent of an organizational plaintiff, the district in which the suit is pending is presumed reasonable. If the deponent is an officer, director or managing agent of an organizational defendant, the district in which the organization maintains its principal place of business is presumed reasonable. These presumptions may be rebutted by a showing of undue hardship or expense on the part of the deponent, and the expenses associated with the deposition may be allocated among the parties if justice requires. For purposes of this section, defendants who have filed cross-claims or permissive counterclaims are treated as plaintiffs.

This proposed rule will simplify the tasks of lawyers and judges alike, and will provide stability without inflexibility. While Proposed Rule 30(b)(8) will not alleviate all of Chief Justice Burger's concerns, it will take federal procedural practice a step in the right direction.

V. CONCLUSION

Proposed Rule 30(b)(8) is meant to simplify and streamline the discovery process. No longer will noticing parties have free reign to choose the location of a party-deposition. Although the noticing party does have first say as to location, Proposed Rule 30(b)(8) sets certain guidelines which must be met, absent extraordinary circumstances. The enactment of Proposed Rule 30(b)(8) will simplify the tasks of the noticing attorney, the deponent and the courts, and hopefully will eliminate a significant amount of the litigation.

Footnotes

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1 The term “party” includes the officers, directors, and managing agents of an organizational party. See FED.R.CIV.P. 30. Rule 45 of the Federal Rules of Civil Procedure governs the proper location for nonparty depositions.

2 FED.R.CIV.P. 26, 30. If the person to be deposed is a party to the action, or an officer, director or managing agent of a party to the action, a subpoena is not required and a notice is sufficient to require his attendance. 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2107, 2112 (1970).

3 The notice must state only the time and place for taking the deposition. FED.R.CIV.P. 30(b)(1).

4 See generally Zuckert v. Berkliff Corp., 96 F.R.D. 161, 162 (N.D.Ill.1982) ("As a general rule, the deposition of a corporation by its agents and officers should be taken at its principal place of business.").

5 See Producers Releasing Corp. De Cuba v. PRC Pictures, Inc., 8 F.R.D. 254, 256 (S.D.N.Y.1948) (holding that corporate officers must be deposed in the district where the suit is pending).

6 See, e.g., Turner v. Prudential Ins. Co. of Am., 119 F.R.D. 381, 383 (M.D.N.C.1988).

7 See, e.g., Continental Fed. Sav. & Loan Ass'n v. Delta Corp., 71 F.R.D. 697, 699 (W.D.Okla.1976).

8 Id.

9 FED.R.CIV.P. 26(c).

10 See Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1365-66 (7th Cir.1985) (holding that the deposition of the corporate plaintiff's president, a resident of Greece, must occur in the forum state or, alternatively, in New York, the location of one of the defendant's offices).

11 See Dalmady v. Price Waterhouse & Co., 62 F.R.D. 157, 159 (D.P.R.1973); see also Mill-Run Tours v. Khashoggi, 124 F.R.D. 547 (S.D.N.Y.1989).

12 Dalmady, 62 F.R.D. at 159.

13 Id.

14 Id.

15 See, e.g., Farquhar v. Shelden, 116 F.R.D. 70, 72-73 (E.D.Mich.1987) (holding that the defendant, a resident of the Netherlands, must be deposed in his place of residence, especially when he agrees to pay the plaintiff's costs).

16 See, e.g., Orrison v. Balcor Co., 132 F.R.D. 202, 203 (N.D.Ill.1990); Hunter v. Riverside Community Memorial Hosp., 58 F.R.D. 218 (E.D.Wis.1972).

17 Farquhar, 116 F.R.D. at 72.

18 See, e.g., Fruit Growers Co-op v. California Pie & Baking Co., 3 F.R.D. 206, 208 (S.D.N.Y.1942) ("[I]t does not seem to me that plaintiff, who sought relief in this forum, should have the right to require the payment of the expenses of the taking of the depositions in the forum of its choice, of its officers or managing agents.").

19 See, e.g., South Seas Catamaran, Inc. v. Motor Vessel "Leeway", 120 F.R.D. 17, 21 (D.N.J.1988); Sonitrol Distrib. Corp. v. Security Controls, Inc., 113 F.R.D. 160, 161 (E.D.Mich.1986).

20 See, e.g., Irrigation Technology Leasing Assocs., Inc. v. Superior Farming Co., No. 90 Civ. 7982, 1992 U.S.Dist. LEXIS 17536, at *1 (S.D.N.Y. Nov. 17, 1992) (holding that the officers of the defendant, a California corporation, must be deposed in California, even when the case is pending in New York); Trans Pac. Ins. Co. v. Trans-Pacific Ins. Co., 136 F.R.D. 385, 392 (E.D.Pa.1991) (arguing that the managing agent of a nonresident corporation must be deposed in district where defendant corporation maintains its principal place of business); Wilson v. Lamb, 125 F.R.D. 142, 144 (E.D.Ky.1989) (holding that the executives of the defendant, a Michigan corporation, must be deposed in Michigan).

21 See Moore v. Pyrotech Corp., 137 F.R.D. 356, 357 (D.Kan.1991) (holding officer and director of defendant corporation who resides in Vancouver must appear for deposition at corporation's principal place of business in Kansas).

22 A permissive counterclaim is "any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." FED.R.CIV.P. 13(b).

23 See, e.g., Fortune Management, Inc. v. Bly, 118 F.R.D. 21, 22 (D.Mass.1987); Continental Fed. Sav. & Loan Ass'n v. Delta Corp., 71 F.R.D. 697, 701 (W.D.Okla.1976). But see Irrigation Technology Leasing Assocs., Inc., No. 90 Civ. 7982, 1992 U.S.Dist. LEXIS 17536, at *2.

24 Rule 13(a) of the Federal Rules of Civil Procedure provides:
A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.
FED.R.CIV.P. 13(a).

25 Zuckert v. Berkliff Corp., 96 F.R.D. 161, 162 (N.D.Ill.1982).

26 FED.R.CIV.P. 13(g); see also United States v. Confederate Acres Sanitary Sewage & Drainage Sys., Inc., 935 F.2d 796, 799 (6th Cir.1991).

27 Irrigation Technology Leasing Assocs., Inc., No. 90 Civ. 7982, 1992 U.S.Dist. LEXIS 17536, at *1.

28 See Trans Pac. Ins. Co. v. Trans-Pacific Ins. Co., 136 F.R.D. 385, 393 (E.D.Pa.1991); Mill-Run Tours, Inc. v. Khashoggi, 124 F.R.D. 547, 551 (S.D.N.Y.1989); Turner v. Prudential Ins. Co. of Am., 119 F.R.D. 381, 382-83 (M.D.N.C.1988).

29 See, e.g., Mill-Run Tours, Inc., 124 F.R.D. at 551; Philadelphia Nat'l Bank v. Dow Chem. Co., 106 F.R.D. 342, 345 (E.D.Pa.1984).

30 See, e.g., Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1365 (7th Cir.1985).

31 See Montgomery v. Sheldon, 16 F.R.D. 34, 35 (S.D.N.Y.1954).

32 See, e.g., Kasper v. Cooper Canada, Ltd., 120 F.R.D. 58, 59 (N.D.Ill.1988); Sugarhill Records, Ltd. v. Motown Record Corp., 105 F.R.D. 166, 171-72 (S.D.N.Y.1985).

33 See Philadelphia Nat'l Bank, 106 F.R.D. at 345.

34 124 F.R.D. 547, 551 (S.D.N.Y.1989).

35 Id. There was some dispute concerning whether the deponents resided in the United States. Id. at 549.

36 Id. at 550-52. The court rejected the deponents' argument that the deposition should proceed overseas because the deponents were subject to criminal prosecution upon entering the United States. Id.

37 120 F.R.D. 58, 59 (N.D.Ill.1988).

38 Id. at 59-60. The court also considered the fact that plaintiff's counsel was handling the case on a contingent-fee arrangement. Id. at 60.

39 119 F.R.D. 381 (M.D.N.C.1988).

40 Id. at 382-84. Accord Sugarhill Records, Ltd., 105 F.R.D. at 171-72 (requiring employees of a large corporate defendant to submit to depositions in district in which suit was pending, because attorneys on both sides' were located in the forum district and the defendant was a large corporation); Philadelphia Nat'l Bank, 106 F.R.D. at 345 (requiring the employees of the nonresident defendant corporation to appear for deposition in the forum district when all counsel were located in forum district, all documents were located there, and the defendant corporation had previously produced its employees for depositions in the forum district).

41 118 F.R.D. 523 (M.D.Ala.1988).

42 Id.

43 Id. at 524.

44 Id.

45 Id.

46 Id. Alternatively, Exxon agreed to take the deposition in California. Id. Plaintiff objected to this option, as well, on the ground that she did not have the funds to fly her Alabama attorney to California for the deposition. Id.

47 Id. "[A] court may be as inventive as the necessities of a particular case require in order to achieve the benign purpose of the rule [Rule 26(c)]." Id. (quoting WRIGHT & MILLER, supra note 2, at § 2036).

48 Id. (citing Hyam v. American Export Lines, 213 F.2d 221, 223 (2d Cir.1954)).

49 Id.

50 Id.

51 FED.R.CIV.P. 30(b)(7) (stating that "a deposition taken by telephone is taken in the district and at the place where the deponent is to answer questions propounded to the deponent").

52 At least one court has held that it did not have the authority to order telephone depositions sua sponte. Proctor v. General Conference of Seventh-Day Adventists, No. 81-C-4938, 1987 U.S.Dist. LEXIS 6014, at *3 (N.D.Ill. June 24, 1987).

53 See DePetro, 118 F.R.D. at 525; see supra notes 41-50 and accompanying text; see also Davis v. Sedco Forex, No. 86-2311, 1986 WL 13301 (E.D.Pa. Nov. 21, 1986) (holding telephonic deposition is a viable alternative to oral deposition in admiralty case).

54 See DePetro, 118 F.R.D. at 525.

55 See Mercado v. Transoceanic Cable Ship Co., No. 88-5335, 1989 U.S.Dist. LEXIS 8484, at *3 (E.D.Pa. July 25, 1989).

56 Id. "Where, as in this case, diagrams and photographs are to be discussed and portions thereof pinpointed and highlighted, there is a real likelihood of confusion and, therefore, prejudice. This is especially true where the photographs and diagrams are highly relevant to the issues in the case." Id.

57 See Bieganek v. Wilson, No. 84-C-10899, 1986 WL 9192 (N.D.Ill. Aug. 18, 1986) (denying plaintiff's motion for a telephone deposition and ordering plaintiff to submit to depositions in the forum district, where plaintiff failed to show undue hardship); accord Clem v. Allied Van Lines Int'l Corp., 102 F.R.D. 938, 940 (S.D.N.Y.1984).

58 See, e.g., Trans Pac. Ins. Co. v. Trans-Pacific Ins. Co., 136 F.R.D. 385, 393 (E.D.Pa.1991) (ordering the defendant to reimburse the plaintiff deponent for one-half of deponent's transportation expenses); DePetro, 118 F.R.D. at 524-25. See also John R. Schmertz, Jr., Oral Depositions: The Low Income Litigant and the Federal Rules, 54 VA.L.REV. 391 (1968).

59 See, e.g., Slade v. Transatlantic Fin. Corp., 21 F.R.D. 146, 147 (S.D.N.Y.1957).

60 See generally FED.R.CIV.P. 31.

61 See DePetro, 118 F.R.D. at 524-25.

62 See Clem, 102 F.R.D. at 940.

63 See Paul D. Carrington, Historical Introduction to FEDERAL RULES OF CIVIL PROCEDURE at IX-X (West 1991) (educational edition).

64 Although the adoption of the Federal Rules of Civil Procedure codified much of the federal practice, the historical roots of procedural reform stem from the implementation of the Field Code in New York state in 1848. This constituted the initial effort to dispense with conflicting common law rules, and the wasteful litigation they generated, in exchange for definitive procedural guidance. See generally id. at IX.

65 Id. at X.

66 Chief Justice Warren E. Burger, Annual Report on the State of the Judiciary, Address Before the American Bar Association (Feb. 3, 1980), quoted in FED.R.CIV.P., Order of Apr. 29, 1980, at 15-16 n. 4 (West 1993) (educational edition).

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