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Don't Pack Your Bags… Yet, Rules for Setting the Location of a Defendant's Deposition

Kevin J. O'Brien

Butler Rubin Saltarelli & Boyd LLP

Amy A. Pines

GenRe-A Berkshire Hathaway Company

Kevin J. O'Brien is a partner at Butler Rubin Saltarelli & Boyd LLP, a Chicago law firm. He represents clients in a wide variety of complex commercial litigation, including insurance and reinsurance disputes.
Amy A. Pines is an attorney at General Reinsurance Corporation and a former attorney at Butler Rubin.
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You represent a large New York company that was named as the defendant in an out-of-state litigation. You just received a Notice of Deposition for the CEO. The deposition is scheduled to take place in forum district. You deliver the news to your CEO and she asks, "They can't make me go there, can they?" The answer, as it is for many issues relating to Federal Civil Procedure, is "it depends." Federal courts consider a number of factors, on a case-by-case basis, in determining the location of a defendant's deposition. Although there is no express rule, this discussion will assist you in appropriately advising your CEO.

THE FEDERAL RULES

The Federal Rules of Civil Procedure ("FRCP") provide numerous guidelines on noticing and conducting depositions. The notice must state only the time and place for taking the deposition. FRCP 30(b)(1). The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Id. at 30(b)(2). The parties may stipulate in writing or the court may, upon motion, order that a deposition be taken by telephone or other remote electronic means (in which case the deposition is to be taken in the district and at the place where the deponent is to answer questions). Id. at 30(b)(4). However, the FRCP are silent about location of the deposition.

THE RELEVANT CASE LAW AND ITS APPLICATION

A party may unilaterally choose the location of an opposing party's deposition, subject to the granting of a protective order by the court pursuant to FRCP 26(c)(2) designating a different place. Cadent Ltd. v. 3M Unitek Corp. 232 F.R.D. 625, 628 (C.D. Cal. 2002). Nevertheless, the general rule for setting the location of a corporate party's deposition is: "The deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business. This customary treatment is subject to modification, however, when justice requires." Wright, Miller, Kane, Marcus & Steinman, Federal Practice and Procedure: Civil 2d, § 2112 (2015 rev.). If a party chooses an objectionable location, a deponent may contest by filing a motion for a protective order. A protective order should be granted when the moving party establishes good cause for the order and justice requires a protective order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. FRCP 26(c). For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result

if no protective order is granted. Cadent , 232 F.R.D. at 625. A number of factors serve to rebut the presumption that a corporate party's deposition should be held at its principal place of business and may persuade the court to require the deposition to be conducted in the forum district or elsewhere. These factors include: location of counsel for the parties in the forum district; the number of corporate representatives a party is seeking to depose; the likelihood of significant discovery disputes arising which would necessitate resolution by the forum court; whether the persons sought to be deposed often engage in travel for business purposes; whether defendant has filed a permissive counterclaim; and the equities with regard to the nature of the claim and the parties' relationship. Smith v. Shoe Show of Rocky Mount, Inc. 2001 WL 1757184 at *3 (D.Mass April 26, 2001).

Although the factors are weighted equally, courts frequently base their decision on their analysis of potential discovery disputes. In Mill-Run Tours v. Khashoggi, 124 F.R.D. 547, 551 (S.D.N.Y. 1989), the most compelling factor in the court's denial of defendants' request for overseas depositions was the need for judicial supervision. Although a judge or magistrate could conceivably resolve discovery disputes at an overseas deposition by telephone, the court noted that such procedure is costly and unwieldy and that the acrimony over pending discovery issues indicated that the depositions would likely generate further disagreement. Holding the depositions in the forum district would accelerate the resolution of these disputes and minimize the risk of significant interruption of any deposition. Id.

In Custom Form Mfg., Inc. v. Omron Corp., 196 F.R.D. 333 (N.D.Ind. 2000), the court conducted a similar analysis. In directing a foreign national to travel to the U.S. for depositions, the court stated that allowing depositions to proceed in a foreign country would compromise the court's authority due to sovereignty issues. "If a federal court compels discovery on foreign soil, foreign judicial sovereignty may be infringed, but when depositions of foreign nationals are taken on American or neutral soil, courts have concluded that comity concerns are not implicated." Id. at 336-37. In addition, the court's authority would be compromised by distance, thus creating judicial inefficiencies. The court also indicated its preference for a domestic location would require fewer participants involved to travel, yielding mutual economic benefits. Finally, to prevent a windfall for either party, the court ordered that the reasonable cost of witness transportation would be divided equally between plaintiff and defendant. Id. at 338.

In Shoe Show, the plaintiff filed a sexual harassment suit and noticed Massachusetts depositions of two employees of the defendant (both currently residing outside of Massachusetts). The court ruled that one witness should travel to Massachusetts (the forum state) because all of the claims alleged misconduct of the deponent while employed by the company in Massachusetts, meaning that the witness could have reasonably foreseen returning to Massachusetts to testify. In contrast, the second witness, who was acting purely in an administrative capacity in an office in North Carolina, was allowed to testify in North Carolina. The court found: (1) defendant demonstrated that travel was unduly burdensome for the second witness; (2) the relevant records for the second witness were in North Carolina; and (3) Plaintiff did not convince the court that he was unable to absorb the costs of travel to take the North Carolina deposition.

ALTERNATIVES TO IN-PERSON DEPOSITIONS

If the analysis of these factors used by the courts indicates that your CEO might have to travel for her deposition, you can suggest alternatives. Pursuant to FRCP 31, depositions may be conducted via written questions where the issues to be addressed by the witnesses are narrow and straightforward and the hardships of taking an oral deposition would be substantial. Winbourne v. Eastern Air Lines, Inc., 632 F.2d 219, 226 (2d Cir. 1980). But most courts and authorities recognize that depositions on written questions are poor substitutes for the oral version. First, the interrogatory format does not permit the probing follow-up questions necessary in all but the simplest litigation. Second, counsel is unable to observe the demeanor of the witness to evaluate his credibility in anticipation of trial. Finally, written questions provide an opportunity for counsel to assist the witness in providing answers so carefully tailored that they are likely to generate additional discovery disputes. Wright, Miller, Kane, Marcus & Steinman, Federal Practice & Procedure, §§ 2039, 2131-32; Nat'l Life Ins. Co. v. Hartford Accid. and Indem. Co. 615 F.2d 595, 599-600 n.5 (3d Cir. 1980).

Another alternative is a videoconference deposition. Although there is no specific Federal Rule on videoconferencing, FRCP 30(b)(4) permits the examining party to conduct depositions "by telephone or other remote means." The courts have recognized that the direction of FRCP 1 to "secure the just, speedy, and inexpensive determination of every action" will support an order directing the use of videoconferencing. In re Central Gulf Lines, Inc., 1999 WL 1124789 (E.D. La., Dec. 3, 1999). Indeed, courts have ordered telephonic or videoconference depositions as

an alternative to depositions upon written questions. Zito v. Leasecomm Corp., 233 F.R.D. 395, 398 (S.D.N.Y. 2006). The Zito court directed the defendant to conduct depositions by telephone or videoconference, but reserved the right the order an in-person deposition if the defendant could "demonstrate that they are unable to conduct a meaningful deposition by telephone or videoconference." Id. In SEC v. Banc de Binary, 2014 WL 1030862 (D. Nev. 2014), the court left the decision up to the plaintiff—the plaintiff SEC could either conduct the depositions of the defendants' officers (who were from Israel and Cyprus) in Washington D.C. with the plaintiff paying the defendants' expenses, or "stipulate to an alternative procedure afforded by the Federal Rules of Civil Procedure" (including conducting video depositions or depositions upon written questions). In any event, proposing a video deposition may be one "last resort" in keeping your CEO close to home.

CONCLUSION

Because there is no hard and fast federal rule on the location for party depositions, the best approach is to keep your corporate officers informed. As soon as the out-of-state litigation is served on your client, explain to the officers that there is no express rule. If the officers understand the factors that courts consider and the potential to suggest alternatives to in-person testimony, they will be better prepared to deal with the Notice of Deposition for an out-of-state location.