Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Factors Courts Consider In Deposition Location Disputes

By **Kevin O'Brien** (September 13, 2019, 1:08 PM EDT)

Kevin O'Brien

Although the Federal Rules of Civil Procedure provide a fairly comprehensive framework for noticing and conducting depositions, the rules offer no express guidance.

Take the example of a California plaintiff who has sued a New York corporation in the Southern District of California. The plaintiff notices a deposition for the defendant's corporate representative in Los Angeles.

The company representative has no desire to incur the time and expense of traveling across the country for the privilege of being grilled by opposing counsel, and responds, "If they want to take my deposition, they'll have to come to New York." As the company's outside counsel, you'd like to be able to tell your client, "You're right, they can't do that, it's against the rules." What you actually have to tell her is "Well, we can object…but really, there are no rules."

The problem is there is no express provision in the federal rules as to the location of a deposition. Rule 30(b)(1) directs that the party noticing the deposition state the time and location for the examination, and Rule 30(b)(3) requires the noticing party to specify the method for recording the testimony, but there is no guidance on the whether the location selected in the notice is appropriate.

In most cases, a mutually convenient location is obvious or can be worked out among counsel. However, in litigation where parties and witnesses are located in various states and/or countries, a party deponent may be asked to venture well outside of the 100-mile limit for subpoenaed nonparties under Rule 45(c)(1)(A). As a result, federal courts are frequently called on to resolve objections to out-of-state (or out-of-country) deposition notices.

Most courts addressing the issue have invoked a "presumption" that depositions of corporate representatives are to be conducted at the location of the company's principal place of business. However, given the absence of an express rule, courts also implement multifactor balancing tests to determine whether the presumption may be rebutted. This article will analyze some of the recent decisions on this topic with a focus on some of the key factors that the courts have emphasized as crucial in making the determination.

In Griggs v. Vanguard Group Inc..[1] the plaintiff, Griggs, was located in Oklahoma City and her counsel

was in Tulsa, Oklahoma. The defendant, Vanguard, was an investment company with its headquarters in Malvern, Pennsylvania; its local counsel was in Tulsa and its national counsel was in Philadelphia.

Griggs noticed a deposition for Vanguard's corporate representative pursuant to Rule 30(b)(6) listing the location as Oklahoma City. Vanguard objected, stating that the deposition should occur in Malvern. Griggs moved to compel the deposition and Vanguard cross-moved for a protective order pursuant to Rule 26(c)(1) which allows relief for a movant seeking protection from "annoyance, embarrassment, oppression, or undue burden or expense."

The court began its analysis by citing the "general" rule that a Rule 30(b)(6) deposition is held at the corporation's principal place of business "absent an agreement of the parties or justice requiring otherwise." The court then listed the factors that "may overcome" the general rule:

- The location of counsel;
- The number of corporate representatives sought to be deposed;
- The burden on the corporation if its agents are required to travel;
- Travel expenses of the deponents and counsel;
- The likelihood of significant disputes requiring adjudication by the forum court;
- The defendant's contacts with the forum of the deposition;
- Whether the persons sought to be deposed often engage in travel for business purposes, and;
- The general equities of the given factual setting.[2]

Applying these factors, the court determined that the defendants had no significant contacts with the Oklahoma City forum, which favored a deposition in Malvern. The location of counsel also favored the Malvern location, because Vanguard's national counsel was only 30 miles away "while no counsel is based so close to Oklahoma City."

And even though the plaintiff's counsel would have significant travel expenses going to Pennsylvania, the court found that factor also favored Malvern because defendants' counsel would have to travel only 30 miles and the deponents not at all. In contrast, an Oklahoma City deposition would require both sets of counsel to travel a short distance but the deponent to travel a long distance. Although this analysis did not really establish that a Pennsylvania deposition would produce lower overall travel expenses, the court seemed to support it by emphasizing the separate factor that the deponent did not regularly travel to Oklahoma City for business purposes.[3]

Other factors did favor Oklahoma City — the minimal number of corporate representatives needed to travel (one) and the absence of any unusual burden of forcing defendants to travel (the court indicated Vanguard had not cited any business conflicts or other circumstances that would rule out travel by the deponent). The "likelihood of significant dispute" factor favored neither location, as the court noted that it would have authority to resolve disputes relating to the deposition no matter where it took place as Rule 26(c)(1) allows protective orders to be sought "in the court where the action is pending."[4] Lastly, the court rejected Griggs' argument that the "general equities" favored the Oklahoma City location

because the defendant corporation was better able to bear the costs of travel than an individual plaintiff:

While the Court does not doubt this assertion, Plaintiff has done nothing to take this case outside the realm of the many individual-versus-corporation lawsuits filed in federal courts daily. Accepting Plaintiff's proposition, by itself, as a sufficient reason to shift the Rule 30(b)(6) deposition(s) from Defendants' principal place of business to the forum would eliminate the well-accepted presumption for holding depositions at a corporate defendant's principal place of business in a huge swath of cases.

The court added that a "stronger showing of particular circumstances," such as significantly higher expenses in being forced to travel and conduct depositions in foreign jurisdictions, was required for this factor to favor the Oklahoma City location. The court's conclusion was that the factors did "not tip the scales meaningfully in either direction" and that as a result the presumption that a corporate representative would be deposed in the company's principal place of business controlled. [5]

The court's analysis in Griggs decision is notable in at least two respects. First, the court's clear rejection of the plaintiff's "general equities" argument may be cited in other disputes of this nature to support the "presumptive" position that a corporate deponent be deposed at his or her home location.

Second, the court in a footnote indicated that it was "unaware of any barrier to Plaintiff conducting the deposition(s) by videoconference — an increasingly common approach that often provides cost savings for one or more parties."[6] Federal Rule of Civil Procedure 30(b)(4) indicates that "the parties may stipulate — or the court may on motion order — that a deposition may be taken by telephone or other remote means." Consideration of the video deposition alternative was a more significant factor in other recent cases addressing this issue.

Dingeldey v. VMI-EPE-Holland B.V.[7] involved an American plaintiff moving for an order to compel the defendant's corporate representative of the Netherlands defendant to appear for his Rule 30(b)(6) deposition in New York, with defendants cross-moving for a protective order that the examination take place at the company's Netherlands headquarters. The court cited the "rebuttable presumption" that the deposition take place where the defendant resides, but noted the court had the discretion to order otherwise after applying factors of "cost, convenience, and litigation efficiency," a more streamlined menu of variables than considered by the court in Griggs.

The court ruled that all factors favored the Netherlands location. The court noted that the defendant's presence in the New York forum was not voluntary and that the fact that the company was subject to New York long-arm jurisdiction did not overcome the presumption regarding deposition location.[8]

As to cost, the court conceded that the defendant corporation possessed greater financial resources than the plaintiff, but noted that because plaintiff's counsel was retained on a contingent fee basis, the plaintiff himself would not incur any out-of-pocket costs "at this time." (This finding gave no weight to the cost to plaintiff counsel or the potential reduction of plaintiff's award by the amount of the expenses).

Similarly, the "convenience" factor did not alter the analysis, as the court found both the plaintiff's counsel and the defendant's witness would be similarly inconvenienced by having to travel abroad for the deposition. Finally, the court ruled with regard to "litigation efficiency" that the need to seek court intervention regarding the deposition was unlikely based on the lack of discovery disputes in the case.[9]

In ordering the deposition to be conducted in the Netherlands in accordance with the controlling presumption, the court noted that it had raised the alternative of a video deposition with plaintiff's counsel at hearing, but the plaintiff had declined, indicating a preference for "a face-to-face, non-electronic deposition to better assess witness credibility issues."

Significantly, the court found this argument entirely unpersuasive, stating "such objection to video-conferencing the deposition of witness located abroad has been rejected by courts."[10] The growing use of technology and availability of remote video depositions would suggest that overcoming the presumption to force a defendant to travel for a deposition has become more difficult.

However, there are still instances in which a court will exercise its discretion to move a deposition from a party's "home base." In Republic of Turkey v. Christie's Inc.,[11] the defendant, Christie's, moved to compel representatives of the plaintiff nation to appear for supplemental depositions in New York, where they had been deposed earlier in the case.

Because Turkey was the plaintiff, the presumption was that it had agreed to make its deponents available for questioning in the forum where it sued. The court noted "this is not an absolute rule, and courts must strive to achieve a balance between claims of prejudice and those of hardship."[12] Although the court did not set out a list of factors, it assessed the "hardships" to both parties associated with the locations proposed for deposition.

The court diverged from the holding in Dingledey by observing that while a video deposition was available, "'concern about not being able to see Plaintiff's demeanor or observe what documents are present and being reviewed are valid factors considered' by courts,"[13] and found that a video deposition from Turkey "would unduly prejudice" Christie's because of the complexities of requiring multiple interpreters and foreign language documents.[14]

On the other hand, Turkey's deponents would face the hardship of over 14 hours of travel to New York and had already made the journey earlier in the litigation. The court concluded that holding the deposition in a suitable alternative forum (here, London) would best balance Turkey's hardship against Christie's prejudice, reducing the travel burden on the deponents and allowing defendants to conduct the depositions in person. As a further attempt to balance the equities, the court directed Turkey to pay $4,000 to Christie's "to offset some of their costs" of depositions in London rather than New York (based on an estimate of $16,000 that the defendants would incur in additional costs).[15]

Given the absence of a governing federal rule, the Republic of Turkey decision demonstrates the latitude and creativity that federal courts may display in fashioning resolutions to deposition location disputes. Counsel facing this issue are well advised to think creatively as well in advising clients who wish to resist traveling for a deposition — video depositions, cost sharing and other alternatives may all be "on the table" if the court is asked to resolve a dispute.

Kevin O'Brien is a partner at Porter Wright Morris & Arthur LLP.

[1] Griggs v. Vanguard Group, Inc., 2019 U.S. Dist. LEXIS 103343 (W.D. Okla., June 20, 2019)

[2] Id. at *6-7, citing Kelly v. Mercedes-Benz USA, Inc., 2015 U.S. Dist. LEXIS 29271 at *1 (N.D. Okla., Mar 8, 2015)

[3] Id. at *7-8.

[4] Id. at *10, citing FRCP 26(c)(1).

[5] Id. at *10 and fn. 3.

[6] Id. at *5 fn. 1.

[7] Dingeldey v. VMI-EPE-Holland B.V., 2018 US Dist. LEXIS 77553 (W.D.N.Y. May 8, 2018)

[8] Id. at *3.

[9] Id. at *4-7.

[10] Id. at *7-8, citing S.E.C. v. Aly, 320 F.R.D. 116, 119 (S.D.N.Y. 2017).

[11] Republic of Turkey v. Christie's, Inc., 326 F.R.D. 402 (S.D.N.Y. 2018).

[12] Id. at 405.

[13] Id., citing Petaway v. Osden, 2018 US Dist. LEXIS 36484 at *3 (D. Conn. Mar. 5, 2018).

[14] Id. at 406.

[15] Id. at 406-407 and fn. 4.