PRACTICE TIPS

Guess Who's Coming to the Deposition?

By Eric H. Singer

As the deposing attorney you should not have to guess; you should know. Or you should be able to anticipate who will be there, *besides* the deponent, and be armed to take appropriate action in advance if possible – because it is, in fact, *your* problem.

But sometimes, despite your best efforts, you may be caught off-guard. Such was the predicament of one of our colleagues last Fall, who, on the morning of the deposition, learned that the deponent intended to bring with him a non-attorney "adviser" from out of state. The colleague then sent out a plea for help on one of the state bar's practice section's list serves asking for case law or a rule that would allow for the *per se* exclusion of the surprise adviser.

The responses came back aflutter.

One lawyer replied that Maryland Rule 2-411 gives each party the right to conduct a deposition of the other and has no provision in it which allows the deponent to condition his appearance at the deposition on his desire to bring an advisor or guru with him. He went on to say the deponent's counsel has an absolute right to attend, but "friends, families, and fans cannot." He asserted, further, that "because the right to conduct the deposition belongs to the party taking it, that party and their counsel can decide who will or will not attend the deposition."

That remark reminded me of my own experience two years ago in which an opposing counsel, insisting that the deponent's husband had no right to be present, proclaimed, "Only parties are allowed to be present at a deposition."

Still another replier chimed in, "Why not invoke the rule on witnesses, since the deposition is the equivalent of trial testimony? Our office has done that in these situations and the Court agreed." Yet another commentator boldly insisted that Maryland Rule 5-601, the rule for sequestering on witnesses at trial, also applied to depositions.

Really?

All of these well-intended replies were, and are, incorrect.

In federal practice, the rule since 1970 has been, and remains, one of general openness of depositions to persons *other* than parties, barring good cause shown pursuant to a protective order obtained under Fed. R. Civ. P. 26(c). The burden of seeking such an order of exclusion is, of course, on the movant, and one has to move for such order before the deposition occurs and before exclusion can occur. *See BCI Comm. Systems, Inc. v. Bell Atlantic Systems, Inc.*, 112 F.R.D. 154, 157, 159 (N.D. Ala. 1986) ("without a protective order in hand, a lawyer has no right to insist that anyone, party or nonparty, be excluded from a deposition."). "As a general rule, any party or representative of a party, or witness with information relevant to the claims or defenses, or any investigator or expert witness may attend depositions." 6 *Moore's Federal Practice* (Matthew Bender, 3d Ed.), § 26.105[6] (citing *Estate of Bell v. Brd. of Educ.*, 225 F.R.D. 186, 196 (S.D. W. Va. 2004)). Indeed, some courts (but not all) have held that pre-trial discovery, including attendance at depositions, is open to the public and press generally unless good cause through a protective order motion can be shown. *See Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978) ("As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings. F. R. Civ. P. 26(c)."); *Avirgan v. Hull*, 118 F.R.D. 252, 257 (D.D.C. 1987) (rejecting deponent's motion for a protective order to prevent press and public from attending his deposition).

Not all federal courts followed the well-reasoned decision in *BCI*, above, claiming, instead, that Fed. R. Evid. 601, "the rule on witnesses," applied to depositions, giving the deposing party the right to request automatic exclusion, and trumping the need to seek a protective order and have the burden placed on the movant to show good cause for a protective order under Fed. R. Civ. P. 26(c)(5). The reasoning was that Fed. R. Civ. P. 30, like Maryland Rule 2-414(b), specified that at oral deposition, examination and cross-examination was to occur "as permitted in the trial of an action in open court," and that the applicability of Fed. R. Evid. 615 was thereby implied. To clarify this conflict, in 1993, Fed. R. Civ. P. 30, pertaining to depositions, was amended to make it perfectly clear that Fed. R. Evid. 601 did

not apply to attendance at a deposition at least by other witnesses. *See* 6 *Moore's Federal Practice*, § 26.105[6], n.72 ("Note that Rule 615 . . . , which allows a party to request that witnesses be excluded from hearing testimony, does not apply to discovery.") Thus, in our federal system for the past 19 years, counsel noted at the outset above, would have no automatic right to exclude the mysterious non-attorney advisor, perhaps a potential witness in the case, from that morning's depositions whatsoever.

And that should hold true in Maryland state court, too.

Maryland Rule 2-403(a)(6) reflects the federal policy and practice of openness at deposition, for it allows for exclusion of persons *only* through a motion for a protective order that asks that "discovery be conducted with no one present excepted persons designated by the court." Rule 2-403(a) is based largely on Fed. R. Civ. P. 26(c) as it existed in 1980, which reflected earlier liberalizing amendments to Fed. R. Civ. P. 26(c) in 1970. *See Tanis v. Crocker*, 110 Md. App. 559, 574 (1996). As the Court in *Tanis* noted, Rule 2-403(a) and the 1980 version of Fed. R. Civ. P. 26(c) are almost identical. Indeed, the language in Rule 2-403(a)(6) and Fed. R. Civ. P. 26(c)(5) as it stood in 1980, in particular, is, in fact, identical. (The language in today's version of Fed. R. Civ. P. 26(c) -- at the relevant, renumbered subparagraph, (1)(E) – reads substantially the same as Rule 2-403(a)(6).)

And there is no question that in 1980 and earlier (just as they did subsequently, as in *BCI*, above), the federal district courts regularly dealt with sequestering potential witnesses and visitors (and even opposing counsel and parties) to a deposition through protective order motions under Rule 26(c)(5). *See, e.g., Beacon v. R.M. Jones Apt. Rentals*, 79 F.R.D. 141, 141-42 (D. Oh. 1978). Thus, there is no reason to believe that Rule 2-403(c)(6) was somehow *not* intended to be the mechanism through which one had the burden of moving to exclude someone from an otherwise open deposition.

Of course, it is true that the Maryland Rules, unlike the 1993 amendments to the Federal Rules of Civil Procedure, do not made it crystal clear that the automatic right to sequestration of witnesses at trial under Md. R. Evid. 6-501 does not apply to pre-trial discovery. On the other hand, two points are noteworthy.

First, the Supreme Court of Colorado, in a unanimous, *en banc* decision, held that its identical version of Maryland's Rule 2-403(c)(6) controlled the issue of attendance of persons at oral deposition and that the request on sequestering witnesses at trial under its version of Maryland Rule 5-615 did *not* control. And, notably, it came to this decision even before the 1993 federal rule amendments went into effect and without making any reference to them. *See Hamon Contractors, Inc. v Dist. Ct. of First Jud. Dist.*, 877 P.2d 884, 888 (Colo. 1994). The Court of Appeals of Oklahoma came to a similarly unanimous resolution in *Pryor Auto. Supply., Inc. v. Estate of Edwards*, 815 P.2d 202, 204 (Okla. App. 1991).

Second, and more important, our own Court of Appeals, albeit in the criminal law context, has tipped its hand on the issue of whether a deposition should be considered as part of a trial and hence, logically, whether the rule on witnesses in Rule 5-615 should allow a deposing attorney to simply pronounce, unilaterally and automatically, who will and will not be attending a deposition, and it has very strongly suggested that automatic sequestration allowed at trial should not apply, even to a *de bene esse* deposition preserved use at trial.

In *State v. Earp*, 319 Md. 156 (1990), the Court of Appeals ruled that the trial court did not violate then-Rule 4-321 when witnesses at trial had previously been shown a *de bene esse* videotaped deposition of the victim. Rule 4-321, since rescinded, provided for the exclusion of witnesses from testimony in criminal cases. Notably, the Court found this Rule, analogous to Rule 5-615, dealt with exclusion of witnesses from court proceedings, which, the Court stated, were distinct from depositions. *Id.* at 169. "[I]ndeed," it went on to state, "it is doubtful that such an order [of exclusion] would have been appropriate at that state of the proceeding." *Id.* at 170. Finally, the Court of Appeals added, "Had the defendant wished to limit the showing of the deposition by court order, he could have sought a protective order pursuant to Rule 4-261(g)(5)," *id.*, the criminal law rule on depositions which allows a court to seal a deposition pursuant to protective order motion, and which is now Rule 4-261(f)(5)) and the criminal law analogue to Rule 2-403(a)(7).

In *Earp*, then, the Court of Appeals signaled that, in order to exclude persons from a deposition, one must bear the burden of seeking and obtaining a protective order for good cause under Rule 2-403(a). So the short of it is, or should be, that just because you're the deposing attorney does not mean you have the ultimate say-so of who gets to be present at "your" deposition; nor can you invoke the rule on witnesses and be done with it. You have to show good cause – and there may be many good reasons, and federal case law provides instructive examples -- why those other folk who wish to attend the deposition should not be permitted to do so, and you have to be prepared to make your case under Maryland Rule 2-403(a)(6).

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