PLEASE LEAVE THE ROOM: WHO CAN ATTEND DEPOSITIONS?

by

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I. Introduction.

There are occasions when someone other than a party appears at a deposition, and attempts to sit in. These may be family members of the plaintiff or someone else wanting to provide support. They may be actual or potential expert witnesses or consulting experts. They might be news reporters, wanting to hear and see the proceedings. Maybe the next witness in a series of depositions wants to watch and hear the script, in order to be prepared for his deposition to follow. Or maybe an insurance adjuster, who needs to observe the plaintiff testifying, wants to attend in order to help evaluate the case.

The purpose of this article is to provide legal support for the positions that a person should be excluded from, or should be allowed to attend, a deposition.

II. Invoking "The Rule" at Trial: Rule 615, Federal Rules of Evidence.

An analysis of who can attend depositions begins with "The Rule" of exclusion at trial.

> The sequestration of witnesses is a centuries-old practice which descends from the common Germanic law. See *Geders v. United States*, 425 U.S. 80, 87, 47 L.Ed.2d 592, 96 S.Ct. 1330 (1976). Its aim is to exercise a restraint on witnesses tailoring their testimony to that of earlier witnesses and aids in detecting testimony that is less than candid. 425 U.S. at 87.[2]

The exclusionary rule applied in federal court trials is specific and unambiguous. Rule 615, Federal Rules of Evidence ("FRE") provides, "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses."[3] Rule 615 is mandatory; so any party may exclude witnesses at trial as a matter of right.[4] However, the rule does contain three exceptions; it does not allow for the exclusion of:

> (1) a party who is a natural person, or
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> (2) an officer or employee of a party which is not a natural person designated as a representative by its attorney, or
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> (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.[5]

When courts apply FRE 615 to depositions, these exceptions come into play.

A mandatory rule of exclusion does not appear to apply in Kansas State courts, where there is no specific rule of evidence in the statutes,[6] and where the exclusion of witnesses is left to the sound discretion of the trial court.[7]

III. The "Rule" in Discovery: Rule 26(c)(5), Federal Rules of Civil Procedure.

Rule 26(c)(5), Federal Rules of Civil Procedure ("FRCP") requires a party to seek a protective order and to establish good cause in order to exclude a non-party from a deposition.[8] The same rule applies in Kansas state court, K.S.A. 60-226(c)(5). If the moving party makes the requisite showing, the court may order "that discovery be conducted with no one present ***except persons designated by the court***."[9] Though the rule requires a party to show good cause for a protective order, the rule does not create exceptions for certain individuals, unlike FRE 615.

IV. The Relationship Between FRE 615 and Rule 26(c)(5), FRCP.

Courts are split on whether FRE 615 applies to depositions. Prior to 1993, Rule 30(c), FRCP provided that the "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence." Some courts have relied on the language of Rule 30(c), FRCP to apply FRE 615 to depositions. For example, in *Lumpkin v. Bi-Lo, Inc.,*[10] the plaintiff sought to exclude the District Manager and a personnel official of defendant from attending the plaintiff's deposition. The plaintiff argued that FRE 615 (providing for the exclusion of witnesses at trial), applies to depositions pursuant to Rule 30(c), FRCP.[11] Conversely, the defendant argued that Rule 26(c)(5), FRCP applies to depositions; thus, requiring the plaintiff to seek and obtain a protective order upon showing of good cause before any individual could be excluded from the deposition.[12] Accepting the plaintiff's argument; the court held that FRE 615 applies at depositions, through Rule 30(c), FRCP. However, the court also stated that a party would be required to obtain a protective order pursuant to Rule 26(c)(5), FRCP in order to prohibit witnesses from communicating with other witnesses between the time of their depositions and trial.[13] *See also Williams v. Elec. Control Sys., Inc.*,[14] (applying Rule 615 to depositions).

On the other hand, *see BCI Communication Sys., Inc. v. Bell Atlanticom Systems., Inc.*[15], which holds that FRE 615 does not apply at depositions or between depositions and trial; thus a party must seek a protective order before *anyone* can be excluded from a deposition.

In 1993, Rule 30(c) was amended specifically to preclude the application of Rule 615 to depositions. Thus, the rule now reads "[e]xamination and cross-examination of witnesses [at depositions] may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence ***except Rules 103 and 615***."[16] Thus, the exclusionary rule applicable at trial is not mechanically applied to exclude non-witnesses from a deposition. As the Advisory Committee notes[17] state:

> The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate.

Even after this amendment to Rule 30(c), some courts still rely on older cases which applied the previous Rule 30(c), and have perpetuated the controversy on the issue of whether Rule 615

applies to depositions. *See Lee v. Denver Sheriff's Dep't*,[18] (discussing the dispute as to the applicability of Rule 615 to depositions); *Wash. County Assessor v. W. Beaverton Congregation of Jehovah's Witnesses, Inc.*,[19] (discussing the split among federal circuit courts in applying Rule 615 to pretrial depositions and the split among state courts on whether similar state evidence rules apply to depositions).

However, several courts have finally acknowledged the revision of Rule 30(c), and have therefore required a party to seek a protective order pursuant to Rule 26(c)(5) before any individual can be excluded from a deposition. *See Tuszkiewicz v. Allen Bradley Co.;*[20] *Alexander v. FBI*;[21] *Weisler v. U.S. Dep't of Veterans Affairs*;[22] *Calhoun v. Mastec, Inc.*;[23] *Campinas Found. v. Simoni*;[24] and *Bell v. Bd. of Educ. of the County of Fayette*.[25]

This includes the District of Kansas. *Conrad v. Bd. of Johnson County Kan. Comm'rs.*[26] There, the plaintiff sought a protective order prohibiting the defendant's Director and another employee of the defendant from attending each other's depositions. In denying the requested protective order, Magistrate Waxse held:

> Plaintiff has failed to make a specific showing of harm that would justify sequestration here. Virtually every case and every deposition is fact intensive and involves many disputed issues of facts. Plaintiff offers no particular facts that would lead the Court to conclude that these witnesses cannot be trusted to tell the truth or that their attendance at each other's depositions will affect their testimony.[27]

The Court then helpfully expanded on this statement, by adding:

> Further, if the Court were to order sequestration here, sequestration would be necessary in virtually every case. Sequestration of deponents should be the exception rather than the rule.[28]

V. APPLICATION TO SPECIFIC CASES.

A. Parties to the Action.

Party Excluded. In *Galella v. Onassis*,[29] Jackie Kennedy Onassis was in litigation with the paparazzo, Ron Galella, and sought to exclude Galella from her deposition. The trial court granted the requested protective order, and the Court of Appeals affirmed. The court compared the language of Rule 26(c)(5) with the current and former versions of Rule 30(b).[30] Rule 30(b) previously allowed the court to order discovery to be conducted "with no one present except the parties to the action and their officers and counsel…" However, the 1970 revision of the rule removed the exception for parties and their officers and counsel. Thus, the court said, it now has the authority to exclude even a party, "although such an exclusion should be ordered rarely indeed."[31] The court found that the circumstances of the present case warranted the exclusion of a party plaintiff, because the plaintiff had violated a temporary restraining order entered against him to protect the defendant from harassment. Thus, the court found that the district court could reasonably have anticipated further inappropriate behavior by the plaintiff at the deposition.[32]

Party Not Excluded. In general, courts have been very reluctant to grant protective orders excluding parties to the action from attending depositions. In *Ferrigno v. Yoder,*[33] the court held that it was an abuse of discretion for the trial court to grant a protective order requiring husband and wife plaintiffs to be deposed separately. In its motion for the protective order, the defendant argued the need to "elicit candid responses," in the hope of learning whether the husband had actually given his wife the authority to sign documents as his agent.[34] The appellate court stated that the reason advanced for exclusion of the party witness did not constitute good cause, and that "[i]t is a venerated principle that a party has a right to be present at an oral deposition."[35] Citing *Galella* for the rule that the court has the power to exclude a party but only on rare circumstances, the court stated that a party should not be excluded based on the "cynical disbelief that a party-deponent will adhere to the oath to be truthful."[36]

Motions to exclude parties from deposition were also denied in *Mugrage v. Mugrage*,[37] (holding that a party may be excluded from a deposition "only upon the demonstration of 'exceptional circumstances'"); and *Hamon Contractors, Inc. v. Dist. Court of the First Judicial Dist.*,[38] (holding that a corporate representative could not be excluded from a deposition based only on the "possibility that the party will tailor his own testimony to assure consistency with that of the witness"). *See also, Donaghue v. Nurses Registry, Inc.*[39] (without citing the rules, holding that a deposition is part of the trial and that since a party has an "undisputed" right to be present at trial, he therefore has the same right to attend a deposition).

B. Corporate Representatives.

In *Lumpkin*,[40] the court ruled that, based on Rule 615, the plaintiff did not need a protective order to exclude the defendant's witnesses from attending the deposition of the plaintiff. However, the defendant argued that its District Manager and personnel official were corporate representatives, and as such, fell within exception two of the rule.[41] The court recognized that the language of the exception is in the singular – "an *officer* or *employee* of a party which is not a natural person designated as a representative by its attorney" – however, it was not settled whether *more than one* representative could be appointed. The court ruled that the district court has discretion to allow more than one corporate representative to attend a deposition, but in this case, the attendance of both representatives was not warranted.[42]

In *Lowy Development Corp. v. Superior Court of California*,[43] the court addressed the question of how many corporate officers could attend the deposition of other corporate officers. Lowy was described by the respondent court as "a small, family, closely-held corporation, in which all of the corporate officers are related and allied."[44] The plaintiff scheduled successive depositions of several of Lowy's corporate officers. The first deponent, Alan Lowy, arrived at his deposition with the six remaining deponents. The plaintiff then moved for a protective order which would allow only the deponent and Lowy's counsel to attend each deposition.[45] The trial court made an order excluding all officers that had not yet been deposed from the deposition of other officers. Lowy then petitioned for a mandamus order providing that "all corporate officers have an absolute right to be present at the deposition of any other corporate officer."[46] The appellate court stated that "the presence at each deposition of closely allied prospective deponents could foster collusive testimony and, in the words of the lower court, "obviate any possibility of getting an objective deposition from each one of those persons."[47] The appellate court stated that, as a party to the case, the corporation has the right to be "present" at each deposition but that the court could issue a

protective order to prevent *some* of the officers from attending.[48] Thus, the court held that Lowy could designate one officer, in addition to the deponent, to attend each deposition. "That representative must be the *same* at each deposition except for the officer's own, in which case another representative may be submitted."[49] *See also Wash. County Assessor,*[50] (holding that a corporation may designate one representative to attend the depositions of its corporate witnesses and that it may "not designate a different corporate representative for separate depositions of corporate witnesses").

In *Adams v. Shell Oil Co.*,[51] the court addressed whether a defendant corporation could designate a succession of representatives, who would also be acting as fact witnesses at trial, to attend the depositions of plaintiffs who were the corporation's employees. Shell argued that it was entitled to have a "knowledgeable" representative present to help counsel in asking questions, and thus, defendant planned to designate an individual "who has the most knowledge about the deponent's work."[52] The plaintiff employees argued that the practice of designating supervisors could affect their job security.[53] The court ruled that, regardless of whether the employees' job security was threatened, allowing Shell to continue the practice would give many of its fact witnesses the advantage of attending the plaintiffs' depositions. "Thus, by designating multiple corporate representatives who are also fact witnesses, Shell would in effect avoid the sequestration of witnesses rule."[54] Consequently, the court held that Shell could designate a representative who was not a witness and did not have supervisory authority over the plaintiff to attend the depositions.[55]

C. Counsel.

In *Montgomery Elevator Co. v. Superior Court of Arizona*[56] – a case involving multiple defendants, represented by several different counsel – the trial court granted a protective order allowing only one defense counsel to attend the deposition of the six-year-old plaintiff, based on the "tender age of the … deponent." The order, therefore, precluded two of the three defendant parties from having counsel present. The Arizona Supreme Court acknowledged that the court could exclude a party to the case from a deposition; however, it further held that a court could never exclude *all* counsel for a party, therefore depriving the party of representation.[57] The court stated that "the right of representation is basic to our system of justice and extends to every facet of the judicial process."[58] However, the trial court does have discretion in certain cases to "regulate, rather than eliminate representation" by requiring parties with common interests[59] to be represented by a particular lawyer.[60]

D. Non-Party Witnesses.

A court may be more willing to exclude a non-party witness from attending a deposition. In *Swiers v. P & C Food Markets, Inc.*,[61] the court affirmed an order excluding a *non-party witness* from attending the deposition of the defendant, but would not grant a similar motion excluding the *defendant* from the witness's deposition. The stated goal for the exclusion was, again, to elicit the "spontaneous testimony" of the witness, "uncolored by the testimony of [the] defendant."[62] *See also Naatz v. Queensbury Central School District*,[63] (holding that employees of a defendant are not parties and, therefore, may be excluded from attending the depositions of one another).

E. Expert Witnesses.

In jurisdictions which require a party to move for a protective order, upon a showing of good cause, before anyone can be excluded from a deposition, expert witnesses are not precluded from attending absent such a showing. For example, in *Brignola v. Pei-Fei Lee, M.D., P.C.*,[64] the appellate court reversed the granting of a protective order which had excluded the plaintiff's expert witness from attending the deposition of the defendant. The appellate court stated, "For a protective order to be issued, a factual showing of prejudice, annoyance, or privilege must be made."[65] Because the issues in the medical malpractice case were technical and complex, the court stated that having an expert present would greatly enhance the plaintiff's ability to discover relevant information. Thus, the burden must shift to the opposing party to state why the expert should be barred. "Defendant's conclusory claims that the expert's presence will cause annoyance or embarrassment do not satisfy that burden."[66] *See also Burrhus v. M&S Supply, Inc.*[67] (stating that a party must obtain a protective order to exclude an expert witness from a deposition).

On the other hand, jurisdictions which apply FRE 615 to depositions reach different results on this issue of expert witnesses. Because FRE 615 can be invoked as a matter of right, as long as an individual does not fall within one of the three categories of exceptions, a party does not have to show good cause to have him excluded from a deposition. Even under FRE 615, however, the third exception to the rule is "a person whose presence is shown by a party to be essential to the presentation of the party's cause."[68] The Advisory Committee's Note specifically states that "an expert needed to advise counsel in the management of the litigation" is an individual included in the exception.[69] *See Williams v. Electronic Systems, Inc*[70].(stating that a party merely must assert a need for the advice of the expert in the management of the lawsuit to have him present at a deposition).

At trial, determining whether an expert witness is "essential," thus exempting the individual from exclusion, is often affected by the extent to which the purpose of FRE 615 will be undercut by allowing the individual to hear the testimony of other witnesses.[71] More specifically, if the expert does not claim to have first-hand knowledge, there is little danger that the individual will falsify his testimony to match the fact testimony of other witnesses. In such a case, the expert should not be excluded from the trial.[72] Conversely, if the expert has the opportunity to conform his testimony to that of other witnesses, the court may rule that the individual is not "essential" and can be excluded.[73] Trial courts have broad discretion in ruling whether an expert should be allowed to attend or excluded. *See, e.g., Morvant v. Constr. Aggregates, Corp.*[74] Further, the party seeking to keep an expert witness in the court room has the burden of showing that her presence is essential; however, the court should generally accept any reasonably substantiated claim of need.[75]

Again, given the amendment to Rule 30(c), the application of FRE 615 would appear to be inappropriate.

F. Insurance Adjusters.

In *Cavuoto v. Smith*,[76] a personal injury action stemming from a car accident, the plaintiffs sought to exclude a representative of the defendant's insurance carrier from a pretrial deposition. The claim representative stated his reasons for attending the depositions "were to observe the witnesses, to hear the testimony and to assess this case both in terms of settlement possibilities and defense strategies."[77] The court held that the insurer was a "real party in interest in this action to the (potential) extent of $50,000 plus cost of defense…solely incurring and defraying the expense of defense counsel therein," and therefore, "ha[d] the right to be present at every adversary stage of the

litigation, through whichever agent or representative it may choose, to observe and appraise the conduct of its chosen counsel or for any other reason pertinent to its investment in connection with the litigation."[78] *See also Thrasher v. U.S. Liab. Ins. Co.*[79] (holding that the insurance carrier is a real party in interest). In *Bennett v. Troy Record Co.,*[80] the court held:

> Although the insurance carrier is not a "party" named in the action, 'in view of the realities of the relation between insurers and insured they should be treated as if they were one' and therefore it actually is not a true non-party witness. The relationship between a defendant and an insurance company is so closely related as to the subject-matter of the lawsuit that as a matter of fact, if not in law, the insurance company is the real and actual defendant, the real party in interest.

Additionally, courts have held that it is part of the insurance carrier's contractual duty to attend depositions when defending a claim. *Sears Roebuck & Co. v. Emerson Elec. Co.*[81] Thus, as an insurance carrier is a "party" to the liability case, courts should be reluctant to grant protective orders excluding representatives of insurance carriers from depositions.

G. Members of the Public.

The United States Supreme Court has held that depositions are not public elements of a trial, and depositions were not open to the public at common law.[82] Because information elicited at depositions is often unrelated to the underlying cause of action, restricting public access to pretrial discovery does not infringe the public's right to information.[83] Further, the Court has held that the public has no constitutional right to attend pretrial judicial proceedings. The right to a public trial, guaranteed by the Sixth Amendment of the Constitution, is a guarantee for the individual standing trial, not for the public.[84] The publication of pretrial information may unduly influence potential jurors; thus, closure of pretrial proceedings ensures fairness at trial.[85] Therefore, protective orders may be issued to exclude the public from depositions.[86] S*ee also Scollo v. Good Samaritan Hospital*,[87] (holding that a protective order should have been issued to exclude a reporter from Newsday from attending depositions held at the courthouse).[88]

In *Lewis R. Pyle Memorial Hospital v. Superior Court of Arizona*,[89] the court disagreed with the sweeping argument advanced by one party that civil depositions are open to the public unless closed by court order. Further, the court rebuffed the argument that because Rule 26(c)(5), FRCP provides the mechanism to exclude individuals from depositions, that it would be "rendered meaningless" by holding that depositions are closed to the public absent a protective order.[90] This case holds, then, that protective orders are not necessary to exclude members of the public from depositions. The *Pyle* court continued that, of course, parties may *agree* to exclude members of the public from depositions that generally are held at attorneys' offices, "a private setting."[91] *See also Cavuoto v. Smith*[92] ("[A]s a practical matter, no one may be present, without being invited, in the private offices of the attorneys where so many of the examinations are held").

However, according to *Pyle*, Rule 26(c)(5) should be applied when the parties *disagree* about who may be present. "We do not read the rule to mean that since an order may be obtained to

exclude persons then *ipso facto* everyone, the public and press, is entitled to attend absent an order to the contrary."[93]

A contrary position was taken by the court in *Washington County Assessor*[94] ("[D]epositions are generally open to the public;" thus, a party wishing to exclude a non-party individual must move for a protective order). If a deponent knows before the deposition that an unauthorized member of the public plans to attend with the consent of another party, the deponent should seek a protective order. On the other hand, if the deponent is not aware that the third-party will be attending, Rule 30(d) offers additional protection by allowing the party to register his objections on the record and demand the suspension of the deposition so that he may apply for a protective order. "[A] deponent may not refuse to be deposed or leave a deposition without complying with the rules."[95]

H. Violation of the Rule.

While one would think that a violation of the exclusionary rule would result in a witness not being allowed to testify, that is not always the case. In *Lemons v. St. John's Hospital of Salina*,[96] the court did affirm a trial court's order which refused to allow witness to testify, because witness had remained in court room in violation of the court's order excluding him.

However, in two older cases, that ruling did not necessarily follow. In *Davenport v. Ogg*,[97] the court held that a witness' breach of an order excluding witnesses from the courtroom is no ground for rejecting his testimony. Of course, on cross-examination, his attendance during the testimony of other witnesses may be shown to affect his credibility. And if it is shown that the party calling him as a witness participated in his contempt, this may be ground for rejecting his testimony. And in *Barber v. Emery*,[98] the court held that a witness may be disciplined for disregarding order to withdraw from the courtroom, but his disobedience would not disqualify him as a witness.

Such a situation is less likely to arise in a deposition, where the deposing party may either adjourn the deposition or call the court for immediate redress if some person should refuse to leave a deposition, in violation of an order excluding him.

VI. Conclusion

The trial court has wide discretion in shaping pre-trial discovery. The court's willingness to exclude certain individuals from attending a deposition will depend on who the individual is and whether the jurisdiction applies FRE 615 to depositions. In jurisdictions which apply FRE 615 to pretrial proceedings, an individual may be excluded without a showing of good cause, *if* that individual is not within one of the three exceptions to the rule. However, jurisdictions which follow Rule 26(c)(5), FRCP may be more willing to exclude individuals exempted under FRE 615 – a party to the case or a representative of a party to the case – if an adequate showing of cause is made.

Lawyers in Kansas have some guidance on how a federal court would resolve the dispute as to who may attend a deposition. While the decision of *Conrad v. Bd. of Johnson County Kan. Comm'rs*[99] appears to stand alone, that decision does hold that one must seek a protective order, and establish good cause, in order to exclude from the deposition someone other than a party representative, because FRE 615 does not apply to discovery. Indeed, Judge Waxse stated that sequestration of witnesses in depositions "should be the exception rather than the rule."[100] In this situation, the person opposing a non-party's attendance would bear the burden of proof.

There do not appear to be any Kansas state court decisions on point, leaving advocates to argue that the *Conrad* decision provides persuasive authority for requiring a showing of good cause to obtain a protective order for the exclusion of a non-party from a deposition. Those opposing the attendance of non-parties in a Kansas state court deposition could base their arguments on the United States Supreme Court's holding *Gannett Co. v. DePasquale* that depositions were closed at common law,[101] so that restricting a non-party's access to pretrial discovery is not inappropriate.[102] Presumably, in this situation, the person proposing to attend the deposition would bear the burden of proof.

This conclusion is supported by a Kansas statute, K.S.A. 60-230(h), which limits the attendees at a deposition to: the reporter, parties, counsel and paralegals, and the deponent. No one else may attend "[u]nless otherwise ordered by the judge or stipulated by counsel." Therefore, the statute comports with the holding in *Gannett*, and will require a motion and a court order to allow someone other than those listed in the statute to attend a deposition in a Kansas state court proceeding.

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[2] *State v. Heath*, 264 Kan. 557, 589, 957 P.2d 449 (1998).
[3] FRE 615.
[4] *Adams v. Shell Oil Co.*, 136 F.R.D. 615, 616 (E.D. La. 1991).
[5] FRE 615.
[6] In Kansas, the criminal statutes do provide for exclusion of witnesses in preliminary hearings, K.S.A. 22-2903, but not in trial, where such exclusion is discretionary. *State v. Guffey*, 205 Kan 9, 468 P.2d 254 (1970)(no error to refuse exclusion of witnesses); *State v. Schoenberger*, 216 Kan. 464, 532 P.2d 1085 (1975)("better practice" is to exclude witnesses on motion timely made, but no abuse of discretion in denying motion in the present case); *State v. Heath*, 264 Kan. 557, 957 P.2d 449 (1998)(abuse of discretion to refuse to exclude witness, but no prejudice, so not reversible).
[7] *Lennon v. Kansas*, 193 Kan. 685, 396 P.2d 290 (1964); *West v. West*, 135 Kan. 223, 9 P.2d 981 (1932); *Simpson v. Schiff*, 109 Kan. 9, 197 P. 857 (1921); *First Nat'l Bank of Russell v. Knoll*, 7 Kan. App. 352, 52 P. 619 (1898) (all holding that under Kansas state law, granting or refusal of a request to exclude witnesses is within the discretion of the trial court).
[8] Rule 26(c)(5), FRCP.
[9] Rule 26(c)(5),FRCP; K.S.A. 60-226(c)(5) (emphasis added).
[10] *Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451, 452 (M.D. Ga. 1987).
[11] *Id.* at 452-53.
[12] *Id.* at 453.
[13] *Id.* at 453 (citing *Naismith v. Prof'l Golfers Ass'n*, 85 F.R.D. 552, 567 (N.D. Ga. 1979).
[14] 68 F.R.D. 703 (E.D. Tenn. 1975).
[15] 112 F.R.D. 154, 157-59 (N.D. Ala. 1986).
[16] Rule 30(c), FRCP (emphasis added).
[17] RULE 30(c), FRCP, 1993 Amendments, advisory committee's note.
[18] 181 F.R.D. 651, 653 (D. Colo. 1998).
[19] 2005 WL 1432577, 2 n.2 (Or. T.C. May 26, 2005).
[20] 170 F.R.D. 15, 16 (E.D. Wisc. 1996).

[21] 186 F.R.D. 21, 53 (D.D.C. 1998).
[22] 2002 WL 987372, 1 (E.D. La. May 13, 2002).
[23] 2004 WL 1570302, 3 (W.D.N.Y. June 1, 2004).
[24] 2004 WL 2709850, 3-4 (S.D.N.Y. Nov. 23, 2004).
[25] 225 F.R.D. 186, 195-96 (S.D. W. Va. 2004).
[26] 2001 WL 1155298, 1 (D. Kan. Sept. 17, 2001).
[27] *Id.*, at 1.
[28] *Id.,* at 2.
[29] 487 F.2d 986 (2nd Cir. 1973).
[30] *Id.* at 997.
[31] *Id.*
[32] *Id.*
[33] 495 So.2d 886 (Fla. Dist. Ct. App. 1986).
[34] *Id.* at 887.
[35] *Id.* at 887-88.
[36] *Id.* at 888.
[37] 763 A.2d 347 (N.J. Super. Ct. Ch. Div. 2000).
[38] 877 P.2d 884 (Colo. 1994).
[39] 485 A.2d 945 (Conn. Super. Ct. 1984).
[40] *Supra*, footnote 4.
[41] 117 F.R.D. at 453-54.
[42] *Id.* at 454.
[43] 235 Cal. Rptr. 401 (Cal. Ct. App. 1987).
[44] *Id.* at 402.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 403.
[48] *Id.*
[49] *Id.* at 404 (emphasis added).
[50] 2005 WL 1432577 at 2
[51] 136 F.R.D. 615 (E.D. La. 1991.
[52] *Id.* at 616.
[53] *Id.*
[54] *Id.* at 617.
[55] *Id.* Query whether, given the inapplicability of FRE 615 to Rule 30, a similar ruling would now result.
[56] 661 P.2d 1133, 1134 (Ariz. 1983).
[57] *Id.* at 1136.
[58] *Id.* at 1135.
[59] One wonders how far the issue of "common interests" could be pressed, given the difference in positions often presented by or among co-defendants in any given case.
[60] *Id.* at 1136.
[61] 95 A.D.2d 881 (N.Y. App. Div. 1983).
[62] *Id.* at 882.
[63] 166 A.D.2d 866 (N.Y. App. Div. 1990).
[64] 597 N.Y.S.2d 250 (N.Y. App. Div. 1993).
[65] *Id.* at 251.
[66] *Id.*
[67] 933 S.W.2d 635, 641 (Tex. Ct. App. 1996).
[68] FRE 615(3).
[69] FRE 615 Advisory Committee Note.
[70] 68 F.R.D. at 704
[71] 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6245 (2005).
[72] *See, e.g., Mayo v. Tri-Bell Indus., Inc.*, 787 F.2d 1007, 1013 (5th Cir. 1986).
[73] *See, e.g., Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373-74 (5th Cir. 1981).
[74] 570 F.2d 626 , 630 (6th Cir. 1978).

[75] *Id.*
[76] 437 N.Y.S.2d 234 (N.Y. Sup. Ct. 1981).
[77] *Id.* at 235.
[78] *Id.* at 236.
[79] 225 N.E.2d 503 (N.Y. 1967).
[80] 269 N.Y.S.2d 213 (N.Y. App. Div. 1966).
[81] 2003 WL 22057251, 7 (N.D. Ill. Sept. 3, 2003) (citing *Employers Ins. of Wausau v. James McHugh Constr. Co.*, 144 F.3d 1097, 1105 (7th Cir. 1998)); *Carter v. Pioneer Mut. Cas. Co.*, 423 N.E.2d 188, 190 (Ohio 1981).
[82] *Seattle Times, Co. v. Rhinehart*, 467 U.S. 20, 33 (1984).
[83] *Id.*
[84] *Gannett Co. v. DePasquale*, 443 U.S. 368, 381 (1979).
[85] *Id.* at 378-79.
[86] *Rhinehart*, 467 U.S. at 34; *see DePasquale*, 443 U.S. at 379.
[87] 572 N.Y.S.2d 730 (N.Y. App. Div. 1991).
[88] *Citing, Rhinehart*, 467 U.S. at 33.
[89] 717 P.2d 872 (Ariz. 1986).
[90] *Id.* at 876.
[91] *Id.*
[92] 437, N.Y.S.2d 234 (N.Y. Sup. Ct. 1981).
[93] *Lewis R. Pyle Mem'l Hosp.*, 717 P.2d at 876.
[94] 2005 WL 1432577 at 2-3.
[95] *Lewis R. Pyle Mem'l Hosp.*, 717 P.2d at 877.
[96] 5 Kan. App. 2d 161, 613 P.2d 957 (1980).
[97] 15 Kan. 363, 1875 WL 818 (1875).
[98] 101 Kan. 314, 167 P. 1044 (Kan. 1917).
[99] *Supra*, note 26.
[100] *Supra*, note 28.
[101] *Supra*, note 32.
[102] *Id.*