

June 1994

Litigation Journal

PUBLISHED BY THE LITIGATION SECTION



VOLUME 13 • NUMBER 3

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DEPOSITIONS OF OUT-OF-STATE PARTIES

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I. Introduction and background.

We have received a large number of questions concerning the place for taking depositions of out-of-state parties and the allocation of travel expenses. To the extent that these issues have come before the circuit courts, they have thus far been decided on a case-by-case basis without benefit of guiding Oregon rules of practice. The Multnomah County courts' motion panel, however, may well issue guidelines in this area because of the volume of disputes and inquiries from lawyers that have arisen. There are no reported Oregon appellate cases regarding the scheduling of depositions of out-of-state parties.

This article suggests general rules of practice governing the place of such depositions based on more developed federal law. We suggest that Oregon practice should track the federal presumptions and that litigants and courts should consider four factors in determining whether the presumptive rule in question should be disregarded: 1) relative costs; 2) convenience of counsel and the parties; 3) judicial efficiency; and 4) fairness.

II. Presumptive rules of convenience.

The federal courts have developed some basic presumptions or rules of convenience regarding the depositions of nonresident parties. The presumptions that have arisen in federal law regarding depositions of nonresident parties are only that; they function

merely to facilitate decisionmaking when other relevant factors do not favor one side or the other. *Mill-Run Tours, Inc. v. Khashoggi*, 124 F.R.D. 547, 550 (S.D.N.Y. 1989). The rules differ depending on whether the party is an individual or a corporate or other organization and whether the party is a plaintiff or a defendant. The rules presume that the traveling party will be bearing his or her own costs. See *Detweiler Bros., Inc. v. John Graham & Co.*, 412 F. Supp. 416, 422 (E.D. Wash. 1976).

A. Individual Nonresident Plaintiff: The general rule is that absent special circumstances, a nonresident plaintiff should appear in the forum district to be deposed. See, e.g., *Orrison v. Balcro Co.*, 132 F.R.D. 202, 203 (N.D. Ill. 1990); *Ellis Air Lines v. Bellanca Aircraft Corp.*, 17 F.R.D. 395, 396 (D. Del. 1955). The rationale for this rule is that the plaintiff has generally chosen the forum and so should be required to appear there. *Id.*

B. Individual Nonresident Defendant: Federal law favors the convenience of the individual defendant with an initial presumption that the deposition should occur at the place of his or her residence or principal place of business. *Turner v. Prudential Ins. Co.*, 119 F.R.D. 381, 383 (M.D.N.C. 1988).

C. Foreign Corporate Plaintiff: The deposition of a plaintiff corporation through its agents and officers should be taken at or near the corporation's place of business.

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See, e.g., *Farquhar v. Shelden*, 116 F.R.D. 70, 72 (E.D. Mich. 1987). One rationale for this rule is that having depositions at or near the place of the corporation's business will be the least disruptive of the corporation's business. See 4 J. Moore & J. Lucas, *Moore's Federal Practice* ¶26.70 [1.-4].

D. Foreign Corporate Defendant:

The rule in favor of depositions at the principal place of business of a corporate party is even stronger when the corporation is the defendant. See, e.g., *Farquhar*, 116 F.R.D. at 72; 4 J. Moore & J. Lucas, *Moore's Federal Practice* ¶26.70 [1.-4] (2ded. 1994).

Besides prevention of inconvenience to a corporation, another rationale underlying this rule is that the plaintiff had a choice of forum and so has to live with the inconvenience of discovery taking place outside the forum. *Payton v. Sears, Roebuck and Co.*, 148 F.R.D. 667, 669 (N.D. Ga. 1993). However, a plaintiff will not have to travel to the place of residence of the defendant's chosen corporate representative. See *Resolution Trust Corp. v. Worldwide Ins. Management Corp.*, 147 F.R.D. 125, 127 (N.D. Tex. 1992), *aff'd*, 992 F.2d 325 (5th Cir.), *cert. denied*, 114 S. Ct. 551 (1993) (designated officer of judgment debtor would be required to attend deposition at debtor's headquarters although officer resided overseas).

III. Factors that would alter application of the general presumption.

The Southern District of New York in *Mill-Run Tours, Inc. v. Khashoggi* analyzed three broad categories of factors that might influence the proper situs of a deposition of a nonresident party: 1) relative costs; 2) convenience; and 3) litigation efficiency. 124 F.R.D. 547, 550-51. Relevant factors listed by other courts deciding where a nonresident party shall be deposed and who pays associated travel costs fall into one of the above three categories, and a fourth, that of fairness.

A. *Relative costs*: A court may take

into consideration that it would cost less to conduct depositions in a certain place. See *Glass v. Superior Court*, 251 Cal. Rptr. 690, 693 (Ct. App. 1988). Special circumstances indicating departure from the general rule that a nonresident plaintiff must travel to the forum include significant financial hardship to the plaintiff and relative lack of hardship for the defendant. See, e.g., *Terry v. Modern Woodmen of America*, 57 F.R.D. 141, 150 (W.D. Mo. 1972). *But see Thompson v. Sun Oil Co.*, 523 F.2d 647 (8th Cir. 1975).

B. *Convenience of counsel and the parties*: The district court in *Turner* suggested that when counsel for the parties are

"THE COURT MAY ALSO CONSIDER WHETHER THE NONRESIDENT DEPONENT FAILED TO MAKE HIMSELF OR HERSELF AVAILABLE FOR DEPOSITION WHEN IN OR NEAR THE FORUM FOR ANOTHER PURPOSE."

located in the forum, then the plaintiff need not travel to the nonresident individual defendant. 119 F.R.D. at 383-84. In addition, where the burden on counsel is great, a deposition may take place in a locale other than the presumptively appropriate one. *Republic of the Philippines v. Marcos*, 888 F.2d 954, 956 (2d Cir. 1989). A solo practitioner may be unduly burdened by having to travel outside the forum. *Mill-Run Tours*, 124 F.R.D. at 551. The party's residence and the potential disruption of the party's affairs are also significant factors. *Id.*

C. *Litigation efficiency*: The location of documents may dictate the appropriate location of depositions. *Mill-Run Tours*, 124 F.R.D. at 547. Judicial supervision is also a factor. *Id.* The court in *Turner* noted that if significant discovery disputes could arise, then it is appropriate to schedule depositions in the forum for ease of resolution by the forum court. 119 F.R.D. at 383-84. *Accord Ex parte Nissei Sangyo America, Ltd.*, 577 So. 2d 912, 914-15 (Ala. 1991).

D. *Fairness*: In some cases, the ratio-

nale based on the plaintiff's choice of forum may not apply. Where the plaintiff had little choice about the forum, then it may not be fair to presume that the plaintiff must bear significant costs of travel for depositions. See *Ellis Air Lines*, 17 F.R.D. at 396; *Kostek v. 477 Corp.*, 316 A.2d 423, 424 (Conn. Super. Ct. 1974). If the defendant has asserted a permissive counterclaim, then the defendant has also chosen the forum, so it may be fair to treat the defendant as a nonresident plaintiff at least for depositions relating to the counterclaim. See *Continental Federal Savings and Loan Ass'n v. Delta Corp. of America*, 71 F.R.D. 697, 700 (W.D. Okla. 1976).

The court may also consider whether the nonresident deponent failed to make himself or herself available for deposition when in or near the forum for another purpose. See *Bristol-Myers Squibb Co. v. Chen*, 588 N.Y.S.2d 672, 673 (App. Div. 1992).

IV. Trial court discretion.

Should disputes arise regarding the taking of depositions, a party may by motion seek an order that discovery be had only "on specified terms and conditions, including a designation of the time or place." ORCP 36C(2); Fed. R. Civ. P. 26(c)(2). Trial courts have great discretion in establishing the time and place of a deposition. See, e.g., *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1181 (9th Cir. 1988) (discretion to limit conduct of discovery); *In re Standard Metals Corp.*, 817 F.2d 625, 628 (10th Cir. 1987); 8 C. Wright & A. Miller, *Federal Practice & Procedure* §§2111-12 (1970).

Courts may attach conditions such as the payment of costs. *Asea, Inc. v. Southern Pac. Transp. Co.*, 669 F.2d 1242, 1248 (9th Cir. 1981). Courts may also require a deponent who will appear at trial to come to the forum at some earlier time near the trial for deposition. See *Green v. Kautex Machines, Inc.*, 490 N.Y.S.2d 388, 389 (App. Div. 1985) (trial court's deferral of deposition in forum to within 10 days of trial not an abuse of discretion). □