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CORPORATE REPS IN DEPS: TO EXCLUDE OR NOT TO EXCLUDE

I. INTRODUCTION

Suppose an employee of a corporation initiates a lawsuit for sexual harassment.¹ Prior to trial, attorneys from both sides depose all fact witnesses and parties. These depositions elicit the events in question, as well as the employee's reputation and personal history. During the deposition proceedings, the defendant-corporation's representative attends all proceedings on the corporation's behalf.² Consequently, as a tactical move, the corporation substitutes representatives throughout all of the deposition proceedings, allowing the subsequent corporate deponent to hear the plaintiff's testimony and craft his account prior to his own deposition. For instance, the plaintiff's supervisor, or the alleged harasser, may observe the plaintiff's factual testimony before his own deposition. This tactic creates an advantage in primarily factual actions because the representative, in this case the alleged harasser, easily crafts testimony to rebut the plaintiff's account.

Then, continuing the strategic course of events, a new representative attends the subsequent deposition proceeding involving a new plaintiff fact witness. This problematic situation arises particularly when the corresponding representative is deposed immediately following the plaintiff witness, eliminating any opportunity to access written transcripts of previous testimony.³ Even in the event of accessible transcripts, the presence of such representatives may still impact the plaintiff's ability to testify fully and accurately.⁴

Prior to 1993, controversy surrounded the regulation and governance of

1. The cause of action could be a number of issues against an entity. For example, a worker brings suit against an employer, a corporation, or other entity, for sexual harassment, age discrimination, or workers compensation, among other claims.

2. See *infra* notes 29, 30, 141 (addressing whether corporate representatives are still permitted to participate as a right in deposition proceedings following amendments to the Federal Rules of Civil Procedure (FRCP)).

3. Even assuming that an opportunity exists to access previous deposition transcripts, courts may in fact seal deposition proceedings and ban certain communications between attorney and deponents until trial. However, courts have been reluctant and generally unwilling to seal prior testimony and prohibit such communications. For a discussion of the courts' treatment of sealing deposition transcripts, see *infra* notes 144, 161 and accompanying text.

4. See *infra* notes 47-57, 88-91, 132, 147, 161, 165 and accompanying text (addressing the impact of intimidation and fear of deponents on full and effective testimony).

depositions. The Federal Rules of Civil Procedure (FRCP) traditionally governed depositions.⁵ However, uncertainty existed in the courts concerning the nature of depositions as compared to trials.⁶ Consequently, some courts applied the Federal Rules of Evidence (FRE) to deposition proceedings.⁷

Under FRE 615, the opposing party can exclude witnesses at trial simply upon request.⁸ Yet the rule expressly permits properly designated corporate representatives to avoid sequestration and attend proceedings, even if they are fact witnesses.⁹ On the other hand, to conduct discovery “with no one present except persons designated by the court,” FRCP 26 (c)(5) requires a court order.¹⁰

Therefore, if a court exclusively applies FRCP 26(c)(5) to depositions, a party objecting to specific corporate representatives must obtain a court order for exclusion. In contrast, under FRE 615, a corporate representative has the right to be present, but the opposing party may remove a particular representative simply upon request.

Because of this conflict concerning the governance of deposition proceedings, Congress amended FRCP 30(c) in 1993.¹¹ The amendment

5. FED. R. CIV. P. 26(c) (1992). For the current language of FRCP 26(c)(5), see *infra* note 10. For information on applying FRCP to deposition proceedings, see also *infra* notes 6, 27.

6. See *infra* note 27 and accompanying text. In particular, confusion existed as to the nature and classification of discovery proceedings. As a result, some courts applied Federal Rule of Evidence 615 (FRE) to deposition proceedings in addition to the FRCP. See *infra* notes 7, 27 and accompanying text.

7. See, e.g., FRE 615, which states the following:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

FED. R. EVID. 615.

8. See *supra* note 7. FRE 615 indicates that the court “shall order” a witness excluded “[a]t the request of a party.” FED. R. EVID. 615 (emphasis added).

9. See *supra* note 7. Pursuant to FRE 615(2), designated corporate representatives, even if fact witnesses to the action, can avoid sequestration from the simple “request of a party.” FED. R. EVID. 615. If the corporation's representatives are not properly designated, then any party may exclude them without court intervention. See *id.*

10. After a history of revisions and amendments, FRCP 26(c)(5) presently states as follows:

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (5) that discovery be conducted with no one present except persons designated by the court . . .

FED. R. CIV. P. 26(c)(5).

11. Following its amendment in 1993, FRCP 30(c), in pertinent part, now reads:

expressly states that depositions are to be conducted as permitted at trial under the FRCP, except as under FRE 103 and 615.¹² As a result, objections to persons attending depositions are governed by FRCP 26(c)(5), thus requiring a court order for exclusion of witnesses during deposition proceedings. The Advisory Committee Notes to amended FRCP 30(c) indicate an intent to clarify the governing procedural rules for witnesses in depositions, but the Notes fail to clarify the substantive rule for when potential deponents and witnesses may attend. Further, the courts prior to 1993 indicated a general trend towards exclusion.¹³ However, since 1993, courts have favored the nonexclusion of potential fact witnesses from depositions.¹⁴ Therefore, the issue remains whether or not corporate representatives, while serving as potential fact witnesses, may attend the depositions of other fact witnesses.

This Note proposes an amendment to FRCP 26(c) that would clarify the corporate representative dilemma and give guidance to courts in its application. The proposed amendment also provides an additional ground for a protective order, which ensures integrity in pretrial depositions. In addition, a detailed advisory committee note setting forth the purpose of the amendment and its intended application would emphasize to courts the proper “good cause” standard of review expressed in FRCP 26(c). This amendment and advisory note would protect the interests of parties involved in the dispute as well as preserve the vital corporate representative power in judicial proceedings.

Part II of this Note establishes the framework and provides a foundation for the problem presented by corporate representatives in depositions. Next,

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections.

Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. . . . All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections.

FED. R. CIV. P. 30(c).

12. See *supra* note 11. For the language of FRE 615, see *supra* note 7. See also FED. R. EVID. 103. FRE 103 prescribes the manner for making and ruling on objections at trial. This rule provides that objections must be timely and they must state the specific grounds upon which a party has made an objection. The rule also states that proceedings shall be conducted so as to prevent inadmissible evidence from being suggested to juries. Lastly, FRE 103 affords for notice of plain errors affecting substantial rights even if not brought to the attention of the court. FED. R. EVID. 103.

13. See *infra* notes 23, 36-57 and accompanying text (citing general trend in favor of exclusion of potential fact witnesses prior to 1993).

14. See *infra* note 79 and accompanying text (citing general trend in favor of nonexclusion of potential fact witnesses following the 1993 amendment to FRCP 30(c)).

Part III traces the historical development of FRCP 26 and 30 as well as the courts' treatment of discovery governance, giving rise to the present dilemma. Part IV then analyzes the current problem, and Part V presents the proposal.

II. HISTORY

A. Purpose of Depositions

Depositions and pretrial discovery have become critical components of judicial proceedings. The Supreme Court recognized that deposition discovery pursuant to the FRCP is one of the most significant innovations in the adversary process.¹⁵ In contemporary practice, a civil trial without depositions is the exception.¹⁶ Deposition testimony directly impacts judicial proceedings by its use at trial for impeachment or in place of live testimony.¹⁷ Further, the rise in summary judgment adjudication increases the importance of deposition proceedings in order to establish facts that could dispose of the case without a formal trial.¹⁸

The Supreme Court has established the purposes and policies behind pretrial discovery and depositions.¹⁹ The Court stated that instruments of discovery, such as depositions, serve to “narrow and clarify the basic issues between the parties,” as well as provide a device to obtain the existence of

15. See *Hickman v. Taylor*, 329 U.S. 495, 500 (1947). In *Hickman*, discovery issues arose in the course of a lawsuit for the death of an employee while he was working on a tugboat. The Supreme Court recognized the importance of pretrial proceedings to the litigation process. See *id.* The Court stated that “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation . . . [and] [t]he deposition-discovery procedure simply advances the stage at which disclosure can be compelled . . . thus reducing the possibility of surprise.” *Id.* at 507.

16. *Visor v. Sprint/United Mgmt. Co.*, No. 96-1730, 1997 WL 567923, at *2 n.2 (D. Colo. Aug. 18, 1997).

17. *Id.*

18. *Id.* See also *Havens v. Metropolitan Life Ins. Co.*, No. 94-1402, 1995 W.L. 234710, at *12 (S.D.N.Y. Apr. 20, 1995) (stating that inherent pressures of litigation expedite discovery process and reduce cost of litigation); *In re Arbitration Between Intercarbon Beruda, Ltd. and Caltex Trading and Transport Corp.*, 146 F.R.D. 64, 70-71 (S.D.N.Y. 1993) (stating that FRCP is construed to secure just, speedy, and inexpensive determination without compromising goal of procedural efficiency); *Cippollone v. Liggett Group, Inc.*, 113 FRD 86, 91-92 (D.N.J. 1986) (requiring resources for long and expensive investigations and discovery would be ludicrous and instead court ordered to facilitate the expedient production of documents and discovery to streamline litigation); *La. Educ. Assoc. v. Richland Parish Sch. Bd.*, 421 F. Supp. 973, 976-77 (stating that heavier burden protects parties in compliance; otherwise no deterrent to frivolous pleading, and respondent would face burdensome and repetitious allegations).

19. See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (indicating that modern discovery instruments and pretrial procedures make trial less of a game and more of a fair contest with basic issues and facts disclosed to the fullest extent practicable); see also *Hickman v. Taylor*, 329 U.S. at 501.

facts or information relative to those issues.²⁰

Besides narrowing the pertinent issues and ascertaining relevant facts, this pretrial procedure reduces the possibility of surprise by allowing parties to obtain the most knowledge of the facts and issues before a formal trial.²¹ In addition, depositions allow parties to obtain information for cross-examination and the impeachment of witnesses.²² As set out above, the purposes and policies behind discovery assign depositions a critical role in judicial proceedings.

B. Governance of Depositions Before 1993

Prior to 1993, FRE 615 and FRCP 26 and 30 governed deposition proceedings. Federal courts varied in the application of these rules, thereby producing divergent outcomes. This section traces the applicable federal rules and the federal courts' interpretation of these rules leading up to the amendment of FRCP 30(c) in 1993.

1. Federal Rules

The history surrounding the governance of depositions prior to 1993 reveals an expansion of judicial discretion and control.²³ Following

20. *Hickman*, 329 U.S. at 501. Prior to *Hickman*, under federal practice, parties employed pleadings to give facts and formulate the issues. This method was cumbersome and narrowly confined. Yet in today's practice, pleadings serve to give notice and invest the deposition-discovery process with a vital role in preparation for trial. *Id.*

21. *Id.* In addition, the *Hickman* Court stated: "Thus civil trials in the federal courts no longer need to be carried on in the dark." *Id.* But see, e.g., Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983) (stating that the current "boom" in federal civil litigation and the attendant developments in discovery threaten to undermine the central goal of the FRCP articulated in Rule 1, namely, "to secure the just, speedy, and inexpensive determination of every action").

22. See *United States v. Int'l Business Machines Corp.*, 66 F.R.D. 215 (S.D.N.Y. 1974); see also *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2041 (2d ed. 1994); 10 FED. PROC. LAW. ED. § 26:217 (1994).

23. Prior to 1970, the corresponding provision to FRCP 26(c)(5) was FRCP 30(b) which stated "that the examination shall be held with no one present except the parties to the action and their officers or counsel." WRIGHT ET AL., *supra* note 22, § 2041; see also 4 JAMES WM. MOORE ET AL., FEDERAL PRACTICE ¶ 26.25 n.4 (2d ed. 1996). Courts read this provision literally to mean that the parties, their officers, and counsel could not be excluded from discovery proceedings. WRIGHT ET AL., *supra* note 22, § 2041. In 1970, an amendment to FRCP 30(b) transferred the protective order provisions from FRCP 30 to FRCP 26, but did not intend to change the substantive impact of the rule. See generally WRIGHT ET AL., *supra* note 22, § 2035. The transfer was initiated as a result of the recognition that depositions were more frequent and thus tactical problems associated with discovery began to arise. FED. R. CIV. P. 30(c) advisory committee's notes. See also Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 450 (1991) (categorizing the 1970 amendments as reflecting and encouraging a view of pretrial as an

amendments to the FRCP in 1970, courts exercised complete discretion as to the presence of parties and the procedures during depositions.²⁴ Yet controversy existed among the courts as to the scope of the FRCP and the application of FRE 615.²⁵ Until 1993, FRCP 30(c) stated that “[e]xamination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence.”²⁶ This language caused courts to vary in their interpretations of procedural review when considering the exclusion of persons from depositions.²⁷

Pursuant to this language in pre-1993 FRCP 30(c), FRE 615 presented the greatest problem for courts in governing depositions. Rule 615 states that “[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses.”²⁸ However, Rule 615 did not authorize exclusion of “an officer or employee of a party which is not a natural person designated as its representative by its attorney.”²⁹ According

“integrated process subject to overreaching control by the trial court”).

In 1970, Congress also amended FRCP 26(c) to include the phrase “discovery be conducted with no one present except persons designated by the court.” *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973) (citing FED. R. CIV. P. 26(c)). These revisions enlarged the courts’ discretion and control in governing deposition procedures. *See id.* at 997 (holding that this enlarged authority made it clear that the court had power to exclude even a party from proceedings under appropriate circumstances); *see also* 23 AM. JUR. 2D *Depositions and Discovery* § 103 (1983); Miller, *supra* at 451 (stating that the 1970 amendments sought to “encourage more frequent imposition of sanctions” for abuse and to strengthen judges’ power to sanction discovery proceedings) (quoting WRIGHT ET AL., *supra* note 22, § 2281, at 39 (Supp. 1991)).

24. *See Galella*, 487 F.2d at 997 (stating that the 1970 revisions enlarged the courts’ discretion and authority to exclude a party from proceedings). *See also* AM. JUR. 2D, *supra* note 23, § 103, at 437 (interpreting various cases to the exclusion of a party from discovery when necessary to protect the deponent from embarrassment or ridicule, to ensure independent testimony from successive deponents, to control disclosure of competitive information, or in other situations in need of privacy). *See generally supra* note 23 (discussing enlarged authority of courts).

25. *See infra* note 27 (pertaining to the courts’ confusion as to the application and interplay of FRE 615 and FRCP 26(c) with regard to depositions). This confusion led to Congress’s enactment of the 1993 amendment to FRCP 30(c), which finally resolved the conflict among courts. *See generally* 8A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2113 (2d ed. 1994).

26. FED. R. CIV. P. 30(c) (1992). *See, e.g.*, WRIGHT ET AL., *supra* note 25, § 2113 (stating that FRCP 30(c) directs that depositions should proceed as at trial in order to allow leading questions of adverse witnesses and greater scope on cross-examination).

27. *See, e.g.*, *Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451 (M.D. Ga. 1987) (applying FRE 615 to deposition proceedings); *Naismith v. Prof’l Golfers Ass’n*, 85 F.R.D. 552 (N.D. Ga. 1979) (same); *Williams v. Elec. Control Sys., Inc.*, 68 F.R.D. 703 (E.D. Tenn. 1975) (same). *But cf. Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973); *In re Shell Oil Refinery*, 136 F.R.D. 615 (E.D. La. 1991) (same); *BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154 (N.D. Ala. 1986) (same), *aff’d sub nom. BCI Comm. v. Boeing*, 995 F.2d 236 (11th Cir. 1993); *Kerschbaumer v. Bell*, 112 F.R.D. 426 (D.D.C. 1986) (same); *Skidmore v. Northwest Eng’g Co.*, 90 F.R.D. 75 (S.D. Fla. 1981) (applying FRCP 26 to deposition proceedings).

28. FED. R. EVID. 615. *See supra* note 7 and accompanying text (reciting provisions under FRE 615 upon which a court shall exclude witnesses from proceedings).

29. FED. R. EVID. 615. *See supra* notes 7-9 and accompanying text (reciting exceptions to FRE

to FRE 615, a corporate representative, designated as such by the corporation's attorney, cannot be excluded from trial at the mere request of a party.³⁰ Construing FRCP 30(c) along with FRE 615, corporate representatives then could not be excluded from depositions by the mere request of a party.³¹

FRCP 26(c)(5), however, also regulated the attendance of persons at deposition proceedings.³² The procedural difference in following FRCP 26, as opposed to FRE 615, reveals that the FRCP approach requires a court order based upon a "showing of good cause" to exclude witnesses during discovery proceedings.³³ As a result, some courts refused to apply FRE 615 to depositions and thereby required a court order for the exclusion of

615 for the exclusion of witnesses). Also included as exceptions to exclusion at the request of a party under FRE 615 are "(1) a party who is a natural person, . . . or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause." FED. R. EVID. 615.

30. See WRIGHT ET AL., *supra* note 22, § 2041, at 535-36 (regarding exclusion of witnesses, "it is now clear that [FRE] 615 does not warrant automatically excluding witnesses from depositions"). See also 6 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE, *Sequestration of Witnesses* § 1841 (rev. 1976) (noting that neither the party demanding nor the party against whom the demand was made may insist on sequestration or inclusion as a matter of right). See, e.g., *supra* note 27 and *infra* notes 36-65 (highlighting case law and exceptions to the FRE 615 general rule of exclusion).

31. See WRIGHT ET AL., *supra* note 25, § 2113 (Supp. 1999) (stating that the 1993 amendment "resolves a conflict in the cases about whether a protective order is necessary to exclude witnesses [in particular corporate representatives] by declaring that a motion under [FRCP] 26(c)(5) is essential"). See also FED. PROC. LAW. ED., *supra* note 22, § 26:217 (commenting that court determinations of witness exclusions have been simplified by the 1993 amendment to FRCP 30(c) because other witnesses are not automatically excluded from depositions simply by the request of a party). For an analysis of pre-1993 amendment cases, see *supra* note 27; *infra* notes 36-65.

However, a corporation must provide designated representatives who are competent to testify. See AM. JUR. 2D, *supra* note 23, § 145. These designated representatives may be "officers, directors, managing agents, or other persons who consent to testify on [the organization's] behalf." *Id.* The persons designated must testify as to matters known or reasonably available to the organization. *Id.* As a result, in situations like the hypothetical posed in the introduction to this Note, an employee's supervisor or manager charged in the complaint is designated as the corporation's representative and thereby permitted to attend all discovery proceedings absent a protective order. See also *Nutmeg Ins. Co. v. Atwell, Vogel & Sterling, Inc.*, 120 F.R.D. 504, 508 (W.D. La. 1988) (holding that, in accordance with FRCP 30(b)(6), designated corporate representatives shall testify as to matters known or reasonably available to the organization).

32. See FED. R. CIV. P. 26(c)(5) (1992) (regulating attendance of persons at deposition proceedings upon showing of good cause).

33. See *supra* note 10 and accompanying text (reciting the standard under FRCP 26(c) for issuing protective orders). See also WRIGHT ET AL., *supra* note 22, § 2041 n.3 (indicating that "there certainly are factors supporting the unfettered right of a party to attend trial that need not apply to attendance at a pretrial deposition"). But see *id.*, *supra* note 22, § 2035, at 478 (stating that courts consider the timeliness of the motion and examine all of the circumstances). Consequently, in order to establish good cause, "courts have insisted on particular and specific demonstrations of fact, as distinguished from stereotyped and conclusory statements." *Id.* See also *infra* notes 122-23 and accompanying text (revealing the transformed standard from good cause to extraordinary and compelling demonstrations of fact).

parties.³⁴ Courts applied the “good cause” standard only “rarely,” to protect a “party or person from annoyance, embarrassment, oppression, or undue burden or expense.”³⁵ This higher standard, which courts applied pursuant to the FRCP, favored the inclusion of persons at deposition proceedings.

2. *Judicial Application*

Prior to 1993, federal courts required a “good cause” standard for exclusion. Parties raised the good cause standard and various policy concerns in motions for protective orders to exclude witnesses during discovery proceedings. The courts applied these principles to the corporate representative context.

a. *Orders to Exclude Witnesses and Corporate Representatives*

(i) *Standard for Exclusion*

Prior to the 1993 amendment to FRCP 30(c), the courts exhibited a general trend toward witness exclusion. In 1973, the Court of Appeals for the Second Circuit established the traditional standard for exclusion in *Galella v. Onassis*, upholding a protective order during the taking of depositions.³⁶ In *Galella*, a false arrest and malicious prosecution case against President Kennedy’s widow, the plaintiff had already violated a temporary restraining order against the defendant.³⁷ In order to protect the defendant from further harassment, the court granted exclusion of the plaintiff from the defendant’s deposition.³⁸ Applying the “good cause” standard expressed in FRCP 26(c),³⁹

34. See *supra* note 27 and accompanying text (noting the cases in which FRE 615 was not applied to depositions, often resulting in the courts’ refusal to grant orders of exclusion due to the higher burden and procedural requirements for exclusion).

35. *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973). For a discussion of FRCP 26(c)(5), amendments to the FRCP, and the current state of the FRCP, see *infra* notes 66-76 and accompanying text. See, e.g., WRIGHT ET AL., *supra* note 22, § 2041 (discussing power to preclude parties from proceedings exercised by courts in other extraordinary situations as well); see also WRIGHT ET AL., *supra* note 22, § 2036 (“[FRCP] 26(c) was adopted as a safeguard for the protection of parties and witnesses in view of the almost unlimited right of discovery given by [FRCP] 26(b)(1).”); MOORE ET AL., *supra* note 23, ¶ 26.19 (reading FRCP to contemplate broad discovery with courts’ exercising wide discretion to implement full disclosure of relevant information, and “at the same time afford the participants the maximum protection against harmful side effects”).

36. See *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973). See also WIGMORE, *supra* note 30, § 1838, at 463 (“The expedient of sequestration is one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice.”); see also *Dunlap v. Reading Co.*, 30 F.R.D. 129, 130 (E.D. Pa. 1962) (extending rationale from WIGMORE, *supra*, to pretrial proceedings due to the discovery of relevant facts and information).

37. *Galella*, 485 F.2d at 991.

38. See *id.* at 997. This trend in favor of exclusion applied in the corporate representative context

the court reasoned that the power to exclude a party rested in the courts, but should be ordered rarely.⁴⁰

as well. *Compare* Lumpkin v. Bi-Lo, Inc., 117 F.R.D. 451 (M.D. Ga. 1987) with *Naismith v. Prof'l Golfers Ass'n*, 85 F.R.D. 552 (N.D. Ga. 1979). The *Naismith* court held that corporate representatives could not be excluded from depositions. However, it achieved the same result by sealing the deposition transcripts, precluding their review by the defendant witnesses. 85 F.R.D. at 568. In *Lumpkin*, the court extended the decision in *Naismith* by applying FRE 615 to depositions. 117 F.R.D. at 453. The court upheld a protective order by limiting the number of defendant witnesses representing the corporation at the plaintiff's deposition. *Id.* at 454.

For further discussion regarding the *Naismith* court's action in sealing the transcripts, see WRIGHT ET AL., *supra* note 25, § 2113, at 92 n.10. "[I]f exclusion is ordered, consideration should not be given as to whether the excluded witness likewise should be precluded from reading or being otherwise informed about, the testimony given in earlier depositions." *Id.* (quoting FED. R. EVID. 615 advisory committee's note). See also WRIGHT ET AL., *supra* note 25, § 2113, at 92 ("[I]f exclusion is ordered, consideration should be given as to whether the excluded witness likewise should be precluded from reading, or being otherwise informed about, the testimony given in earlier depositions.") (quoting the advisory committee's notes to FRE 615); 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE, *Witnesses* ¶ 615[01], at 615-8 (1996) ([T]he harm [FRE 615] was designed to prevent was the shaping of testimony by one witness to conform with that of another and that the opportunity to do so was as great when a witness was allowed to read trial testimony [the same as if heard in open court.]").

In *Lumpkin*, the court extended the *Naismith* holding to include the court's discretion in limiting the presence of representatives. See 117 F.R.D. at 453. Despite the expressed exception in FRE 615, the court stated that the judiciary's wide discretion determines the number of corporate representatives in attendance. See *id.* at 454. See also WEINSTEIN & BERGER, *supra*, ¶ 615[02], at 615-12. This treatise indicates that "[i]t is not clear from the text [sic] or legislative history of [FRE 615] whether more than one representative may be designated." *Id.* In most large organizations, it would be impossible to find one person with sufficient knowledge and information needed to assist the attorney. Further, "[u]nnecessary exclusions of one of a number of representatives may slow down the trial by requiring continuances so an attorney can consult with persons outside the courtroom." *Id.* Therefore, judges must have wide and flexible discretion to allow multiple representatives. *Id.* However, the *Lumpkin* court only permitted one corporate representative to attend the plaintiff's deposition. See 117 F.R.D. at 454. Cf. *Marks v. Powell (In re Marks)*, 135 B.R. 344, 345 (Bankr. E.D. Ark. 1991) (allowing attendance of only one corporate representative at deposition proceedings based on the purpose and rationale behind FRE 615, which permits one litigation representative per party).

39. See, e.g., *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973); *In re Shell Oil Refinery*, 136 F.R.D. 615 (E.D. La. 1991); *Clark v. Levine (In re Levine)*, 101 B.R. 260 (Bankr. D. Colo. 1989); *Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451 (M.D. Ga. 1987); *BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154 (N.D. Ala. 1986), *aff'd sub nom. BCI Comm. v. Boeing*, 995 F.2d 236 (11th Cir. 1993); *Naismith v. Prof'l Golfers Ass'n*, 85 F.R.D. 552 (N.D. Ga. 1979); *Beacon v. R.M. Jones Apartment Rentals*, 79 F.R.D. 141 (N.D. Ohio 1978); *Dunlap v. Reading Co.*, 30 F.R.D. 129 (E.D. Pa. 1962).

40. See *Galella*, 487 F.2d at 997. For a discussion of the courts' power to exclude persons from depositions based on the relevant history and amendments to the FRCP, see *supra* notes 7, 10, 11, 23-35 and accompanying text. Cf. *Naismith*, 85 F.R.D. at 567. In *Naismith*, a Georgia district court held that the rule of sequestration does not apply to corporate representatives in depositions due to the exception enumerated in FRE 615. *Id.* at 567. Although the court applied FRE 615 to depositions, it ruled that sequestration was not guaranteed between depositions and trial. *Id.* As a result, the court sealed the deposition transcripts under FRCP 26(c) to ensure that the defendants' credibility and individual testimonies would not be altered or corroborated in a gender discrimination suit. *Id.* at 568.

(ii) *Basis for Exclusion*

In *In re Levine*, a Colorado court granted a protective order sequestering party deponents related to a trust action alleging fraud and conspiracy.⁴¹ In so doing, the court enumerated the traditional concerns supporting exclusion.⁴² With respect to discovery, the court recognized its authority to exclude witnesses at depositions, but predicated its use on strong and compelling reasons.⁴³ Due to the risk that the deponents' testimony may be influenced, even unintentionally, if allowed to attend other witnesses' depositions, the court entitled the trustee to each witness's "independent, uninfluenced recollection of events, transactions and communications."⁴⁴ The court refused to allow FRE 615 to circumvent the restrictions under FRCP 26(c), especially where good cause exists for sequestration.⁴⁵ In addition, the court reasoned that based on their respective counsels' attendance at the other depositions, each deponent received full and effective representation at such discovery proceedings.⁴⁶

41. See *In re Levine*, 101 B.R. at 261.

42. For a listing of the traditional concerns supporting exclusion, see *supra* note 24.

43. *Id.* at 262 (citing *BCI Comm. Sys., Inc. v. Bell Atlantacom Sys.*, 112 F.R.D. 154 (N.D. Ala. 1986)). For a discussion of the *BCI Communication Systems* decision, see *infra* notes 64-65 and accompanying text. Cf. *infra* notes 79-99, 122-23 and accompanying text (applying an extraordinary and compelling standard).

44. *In re Levine*, 101 B.R. at 263. See also *Dunlap*, 30 F.R.D. at 131.

[S]equestration will deny to the dishonest witness the advantage of observing the experience of other witnesses as they give their testimony on direct examination and are confronted with contradictions or evasions under cross-examination. At the least, it will make available the raw reactions' and the individual recollection of each witness unaided by the stimulation of the evidence of any other witness.

Id. See generally *WRIGHT ET AL.*, *supra* note 22, § 2041 (considering the 1993 amendment to FRCP and stating that courts need to make decisions regarding depositions based on factors in *Dunlap* and not authorize automatic exclusion like at trial).

45. 101 B.R. at 262. See, e.g., *Dunlap*, 30 F.R.D. at 131 (holding that camaraderie of employees who work together constituted "good cause" for separation in pretrial exam when testifying against their employer regarding damage claim). See also *WRIGHT ET AL.*, *supra* note 22, § 2041. Courts have found "good cause" sufficient to require exclusion for matters involving confidential material and when one party can examine witnesses more effectively if others are not present. *Id.* The subtle and elusive components of memory can result in forgetfulness that is not associated with dishonesty or untruthfulness. *Dunlap*, 30 F.R.D. at 131-32. This argument would support the inclusion of parties in order to trigger recollections of past events. See *WRIGHT ET AL.*, *supra* note 22, § 2041.

46. See *In re Levine*, 101 B.R. at 262. See also *Solar Turbines, Inc. v. United States*, 14 Cl. Ct. 551, 553 (1988) ("[O]ur system of justice generally relie[d] upon . . . basic honesty . . . , harsh sanctions for perjury, and a panoply of rights concerning discovery and cross-examination to assure . . . truth is revealed in the courtroom.").

(iii) *Corporate Representative Context*

A Louisiana federal court decided a classic corporate representative situation in *In re Shell Oil Refinery*.⁴⁷ In this case, employees sued their corporate employer in a class action following injuries sustained from an explosion on the job.⁴⁸ Realizing that each deponent's supervisor was to serve as the representative during that employee's deposition, the employees moved to exclude the designated corporate representatives from the plaintiffs' depositions.⁴⁹ The plaintiffs claimed that the supervisory authority of these varying representatives and their status as witnesses intimidated the deponents, thereby influencing their testimony.⁵⁰ The technical subject matter entitled the corporation to have knowledgeable representatives present to assist counsel in the deposition.⁵¹

Initially, the court allowed the corporate representatives to attend the depositions based on the defendants' right to defend themselves at all stages of litigation.⁵² However, the court later held that this right is not unqualified.⁵³ As a result, the court precluded the defendant-corporation from designating representatives with supervisory authority over the plaintiff-deponents as well as potential fact witnesses.⁵⁴ By reading FRCP 26(c)(5) and FRE 615 together, the court found good cause to exclude the defendant-corporation's representatives based on a risk that, if allowed to attend, both the defendant-corporations' witnesses and the plaintiffs' witnesses might not testify as fully as they otherwise would if the court prohibited their attendance.⁵⁵ This risk included intimidation of the plaintiffs and altered

47. *Adams v. Shell Oil Co. (In re Shell Oil Refinery)*, 136 F.R.D. 615 (E.D. La. 1991). For a further analysis regarding the trend favoring exclusion applied in the corporate representative context, see *supra* note 38.

48. *In re Shell Oil Refinery*, 136 F.R.D. at 615. This class action suit arose from an explosion in the catalytic cracking unit at a Shell Oil Refinery facility in Louisiana. The designated corporate representatives with technical experience were supervisors on the unit. One problem was that few survived the explosion and others were physically incapable of testifying, thus limiting the number of possible witnesses from the refinery. *Id.* at 615-16.

49. *Id.* at 615.

50. *Id.*

51. *Id.* at 615-16.

52. *Id.* at 616. During a telephone conference, the court overruled the plaintiffs' first objection to the presence of one of the defendant's representatives. *Id.*

53. *Id.* The court found the right to defend at all stages of litigation unqualified based on its joint reading of FRE 615 and FRCP 26(c)(5). The court reasoned that FRE 615 applied to depositions through FRCP 30(c). A corporate representative could, therefore, only be excluded from a deposition proceeding upon a showing of good cause. *Id.* at 617.

54. *In re Shell Oil Refinery*, 136 F.R.D. at 617.

55. *Id.*

testimony by the defendants.⁵⁶ Consequently, the court did not preclude the defendant from having a corporate representative present, but that representative had to satisfy express restrictions.⁵⁷

b. Denial of Protective Orders to Exclude Witnesses and Corporate Representatives

Although the courts generally favored exclusion of potential fact witnesses from deposition proceedings, a few courts denied protective orders during discovery.⁵⁸ In *Skidmore v. Northwest Engineering Co.*, a Florida court denied a protective order excluding the plaintiff's expert witness from the deposition of one of the defendant's employees.⁵⁹ The defendant claimed that permitting such attendance would result in a "circus atmosphere" unfairly prejudicing the defendant because the expert had yet to form an opinion.⁶⁰ The court held that the party opposing an expert's presence at a deposition must show good cause for exclusion.⁶¹ As a result, the *Skidmore* court determined that FRCP 26(c)(5) governed depositions instead of FRE 615.⁶² Moreover, the court concluded that the policy reasons underlying the

56. *Id.* See also *Beacon v. R. M. Jones Apartment Rentals*, 79 F.R.D. 141, 142 (N.D. Ohio 1978) (excluding parties to the suit because questions of credibility, inherent in Title VII cases, permitted the greatest opportunity for testimony evaluation when the court secluded witnesses). See, e.g., WIGMORE, *supra* note 30, § 1837 (noting the historical "expedient of separating a party's witnesses in order to detect falsehoods by exposing inconsistencies"). See also *supra* notes 19, 46-55 (discussing interest in generating truthful and effective testimonial examinations).

57. See *In re Shell Oil Refinery*, 136 F.R.D. at 617-18. The *Shell* court held that the defendant could designate other representatives who were not supervisors or potential fact witnesses. To balance the interests of both parties, the court allowed supervisors assisting with technical aspects of the case to sit outside the deposition room and consult with attorneys during breaks. *Id.* at 617. The court further permitted excluded representatives to read daily transcripts during evening recesses and allowed the defendant's attorneys to follow-up in questioning the next day based on consultations with the excluded representatives. *Id.* at 618.

58. See, e.g., *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986); *United Incentives v. Sea Gull Lighting Prod., Inc.*, No 91-0226, 1991 WL 209018 (E.D. Pa. Oct. 7, 1991); *BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154 (N.D. Ala. 1986), *aff'd sub nom.* *BCI Comm. v. Boeing*, 995 F.2d 236 (11th Cir. 1999); *Kerschbaumer v. Bell*, 112 F.R.D. 426 (D.D.C. 1986); *Skidmore v. Northwest Eng'g Co.*, 90 F.R.D. 75 (S.D. Fla. 1981); *Williams v. Elec. Control Sys., Inc.*, 68 F.R.D. 703 (E.D. Tenn. 1975).

59. See *Skidmore*, 90 F.R.D. at 77.

60. But cf. WIGMORE, *supra* note 30; *infra* notes 61-65 (citing the policy behind exclusion of experts from deposition proceedings).

61. *Skidmore*, 90 F.R.D. at 76. See also *Kerschbaumer*, 112 F.R.D. at 427 (stating that the court will grant protective orders only to prevent harassment, coercion of witnesses, and dissemination of trade secrets). Although some courts allow protective orders to ensure independent recollection without influence from other witnesses, the *Kerschbaumer* court implied that it would only invoke orders sparingly to preserve openness and procedural fairness of the legal system. See *id.* (citing *Beacon*, 79 F.R.D. at 142). See also *infra* notes 76, 115-18 and accompanying text.

62. *Skidmore*, 90 F.R.D. at 76. But see *Williams*, 68 F.R.D. at 703. In 1975, the Tennessee

sequestration rule, preventing one witness from conforming his testimony to that of another deponent, were not applicable to expert testimony.⁶³ During depositions, good cause permits exclusion in limited circumstances⁶⁴ to protect a party from annoyance, embarrassment, oppression, or undue burden or expense.⁶⁵

district court in *Williams* applied FRE 615 to the taking of depositions. *Id.* In so doing, the court permitted the presence of the plaintiff's expert witness during the depositions to allow him to assist the deposing attorney. *Id.* at 704. Despite the defendant's objection in *Williams*, the court reversed an order sequestering the witness because the expert fulfilled one of the three exceptions to the exclusion rule. *Id.* at 703. However, the *Williams* court did, in fact, acknowledge the authority of courts and litigators to exclude witnesses from depositions. *Id.* at 703-04.

In *Skidmore*, the court required a showing of good cause to exclude the plaintiffs' witnesses pursuant to procedural rules, not evidentiary rules. *Skidmore*, 90 F.R.D. at 76. Nevertheless, both courts acknowledged the application of the exclusionary rule to deposition proceedings and denied the issuance of protective orders. See generally *Cipollone*, 785 F.2d at 1121 (stating that exclusionary authority exists pursuant to FRCP 26(c) when movant demonstrates good cause through specific examples or articulated reasoning involving significant harm); WEINSTEIN & BERGER, *supra* note 38, ¶ 615[02], at 615-12 (discussing the presence of multiple corporate representatives at deposition proceedings).

63. *Skidmore*, 90 F.R.D. at 76. *But see* *Queen v. Wa. Metro. Area Transit Auth.*, 842 F.2d 476, 481 (D.C. Cir. 1988) (noting that sequestration was designed to prevent "the possibility of one witness shaping his testimony to match that given by other witnesses"); WIGMORE, *supra* note 30, § 1837 (stating that the less a witness hears of another's testimony, the more likely the witness is to declare his or her own knowledge simply and unbiased); WEINSTEIN & BERGER, *supra* note 38, ¶ 615[01], at 615-05 (detailing policy reasons in support of exclusion, such as preventing one witness from altering or conforming testimony to another, and ensuring that experts testify according to their opinions and not controverting facts); *supra* note 62.

64. See, e.g., *BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154 (N.D. Ala. 1986), *aff'd sub nom.* *BCI Comm. v. Boeing*, 995 F.2d 236 (11th Cir. 1999). In *BCI*, an Alabama court denied protective orders during depositions. *Id.* at 160. The court held that the defendants did not meet their burden of demonstrating good cause to exclude potential witnesses in civil depositions. *Id.* Although concluding that sequestration is not a right, the court recognized the ability to exclude deponents upon obtaining a court order with proof of good cause. *Id.* at 157-58. The *BCI* court refused to grant a protective order based on ordinary "garden variety or boilerplate 'good cause' facts," which did not rise to the level of compelling or exceptional circumstances. *Id.* at 160.

See also *United Incentives, Inc. v. Sea Gull Lighting Prod., Inc.*, No. 91-0226, 1991 WL 209018, at *1 (E.D. Pa. Oct. 7, 1991) (holding that "[a]n inchoate fear of influence upon deposition testimony does not establish good cause"). For a discussion in support of the compelling or exceptional circumstances threshold for issuance of protective orders, see *infra* note 122 and accompanying text. *But see* FED. R. CIV. P. 26(c); *infra* note 123 and accompanying text (establishing the requisite standard for a protective order as particular and specific demonstrations of fact constituting "good cause," as opposed to compelling or exceptional circumstances).

65. *Skidmore*, 90 F.R.D. at 76 (citing FED. R. CIV. P. 26(c)(5)). The *Skidmore* court also noted that even if FRE 615 applied exclusively, the rule exempts certain witnesses from exclusion. *Id.* When an expert's presence is essential to the presentation of the cause, attendance is permitted. See *id.* See also *BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154, *aff'd sub nom.* *BCI Comm. v. Boeing*, 995 F.2d 236 (11th Cir. 1999).

In *BCI*, the court noted that FRCP 30(c) clearly applies the FRE to depositions, but FRE 615 does not apply because it is trumped by FRCP 26(c). *Id.* at 158. The court also concluded that FRE 615 did not apply between deposition and trial, thereby providing no authority for sealing deposition testimony before trial. *Id.* at 159. The court denied the defendants' the motion for a protective order because they failed to show sufficient good cause, required under FRCP 26(c). *Id.* at 159-60. For a discussion of the

C. The 1993 Amendment to Federal Rule of Civil Procedure 30(c)

As a result of the conflict among the courts regarding the application of the FRE and FRCP to deposition proceedings, Congress amended FRCP 30(c) in 1993. According to the advisory committee, the 1993 amendment addressed the recurring problem of whether potential deponents could attend deposition proceedings.⁶⁶ By applying FRE 615, courts allowed parties to exclude witnesses simply by request.⁶⁷ Yet other courts permitted attendance of witnesses pursuant to FRCP 26(c)(5) unless excluded by a protective order under appropriate circumstances.⁶⁸

To clarify this confusion, Congress amended FRCP 30(c). As a result, direct and cross-examinations in depositions proceeded as permitted at trial under the FRE, the same as before the amendment. The significant textual change in 1993, however, expressly excluded application of FRE 103⁶⁹ and 615⁷⁰ in deposition proceedings.⁷¹ Consequently, FRCP 26(c)(5) clearly regulated the presence of parties and potential witnesses at depositions.⁷²

Recognizing the conflict between FRE 615 and FRCP 26(c)(5), the advisory committee specifically addressed this revision only as to the matter

application of FRE 615 to depositions as well as the courts' reaction to sealing deposition transcripts and records prior to trial, see *supra* notes 7, 27; *infra* notes 144, 161. See also FED. R. EVID. 615 advisory committee's note (allowing attendance of experts when "needed to advise counsel in the management of the litigation"); WEINSTEIN & BERGER, *supra* note 38, ¶615[01]; WIGMORE, *supra* note 30, § 1841. See, e.g., *supra* notes 36-57 and accompanying text (addressing the concerns associated with "good cause" bases as protection during discovery proceedings).

66. See FED. R. CIV. P. 30(c) advisory committee's note. For a discussion of the history of FRCP 30(c) and its amendment, see *supra* notes 23-35 and accompanying text.

67. See, e.g., Lumpkin v. Bi-Lo, Inc., 117 F.R.D. 451 (M.D. Ga. 1987); Naismith v. Prof'l Golfers Ass'n, 85 F.R.D. 552 (N.D. Ga. 1979); Williams, 68 F.R.D. 703 (E.D. Tenn. 1975) (applying FRE 615 to deposition proceedings).

68. See, e.g., Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973); *In re Shell Oil Refinery*, 136 F.R.D. 615 (E.D. La. 1991); BCI Comm. Sys., Inc. v. Bell Atlantic Comm. Sys., Inc., 112 F.R.D. 154 (N.D. Ala. 1986), *aff'd sub nom.* BCI Comm. v. Boeing, 995 F.2d 236 (11th Cir. 1999); Kerschbaumer v. Bell, 112 F.R.D. 426 (D.D.C. 1986); Skidmore, 90 F.R.D. 75 (S.D. Fla. 1981) (applying FRCP 26 to deposition proceedings). See also *supra* notes 6-11, 27 and accompanying text (recognizing the disagreement as to the procedural governance of depositions).

69. FRE 103 prescribes the manner for making and ruling on objections at trial. For a brief discussion of FRE 103, see *supra* note 12.

70. See *supra* note 7.

71. See FED. R. CIV. P. 30(c), which currently states: "Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615." *Id.* (emphasis added).

72. See *supra* notes 66, 68, 70; *infra* notes 73-74 and accompanying text (recognizing discovery exclusions only applicable through FRCP 26(c)(5)). See also WRIGHT ET AL., *supra* note 22, § 2041 (citing FED. R. CIV. P. 30(c) advisory committee's note) (stating that the 1993 amendment no longer permits automatic exclusion under FRE 615 at depositions); FED. PROC. LAW. ED., *supra* note 22, § 26:217 (stating that the amendment simplified procedure and courts are now clear as to which rules govern depositions).

of attendance by potential deponents.⁷³ According to the advisory committee, the revision's purpose provided "that other witnesses are not automatically excluded simply by the request of a party."⁷⁴ Instead, the rule required courts to order exclusion pursuant to FRCP 26(c)(5) when appropriate.⁷⁵ The committee further stated that the revision failed to address issues concerning attendance by members of the public or press.⁷⁶ The amendment, then, simply clarified the procedure necessary to exclude potential witnesses from deposition discovery.

D. Governance After the 1993 Amendment

After the 1993 amendment to FRCP 30(c), federal courts began transforming the "good cause" standard into "extraordinary or compelling" or "particular demonstrations of fact" standards.⁷⁷ Moreover, courts refused to consider the policy concerns that once supported protective orders.⁷⁸ These higher standards impacted the corporate representative context as well.

1. Judicial Denial of Protective Orders to Exclude

a. Standard for Exclusion

Following the 1993 amendment to FRCP 30(c), courts have favored the denial of motions to exclude potential witnesses from depositions.⁷⁹ Recently, *Jones v. Circle K Stores, Inc.*, illustrated this standard for exclusion, denying a protective order in a race discrimination and harassment

73. FED. R. CIV. P. 30(c) advisory committee's notes.

74. *Id.*

75. *Id.* After ordering exclusion, a court may then consider whether to prohibit the excluded witnesses from reading, or being otherwise informed about, the testimony given in earlier depositions. *Id.* For a discussion of the reaction of courts to the sealing of deposition transcripts and discovery communications, see *infra* notes 144, 161.

76. FED. R. CIV. P. 30(c) advisory committee's note. *But see* A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273 (1998); Marcus, *supra* note 21, at 1; Miller, *supra* note 23, at 427. These articles note that discovery is not a public process and the public does not have a right to access such proceedings. Further, information obtained during discovery assists in trial preparation, often on a confidential basis.

77. *See, e.g., infra* notes 82, 96, 104, 122 and accompanying text.

78. *See infra* notes 88-91 and accompanying text.

79. *See, e.g., In re Terra Int'l, Inc.*, 134 F.3d 302 (5th Cir. 1998); *Jones v. Circle K Stores, Inc.*, 185 F.R.D. 223 (M.D.N.C. 1999); *Williams v. Chrysler Fin. Corp.*, No. 98-2931, 1999 WL 221119 (E.D. La. Apr. 9, 1999); *Nyazie v. Kennedy*, No. 97-0120, 1998 WL 398250 (E.D. Pa. June 23, 1998); *Lee v. Denver Sheriff's Dep't*, 181 F.R.D. 651 (D. Colo. 1998); *Visor v. Sprint/United Mgmt. Co.*, No. 96-K-1730, 1997 WL 567923 (D. Colo. Aug. 18, 1997); *Tuszkiewicz v. Allen Bradley Co.*, 170 F.R.D. 15 (E.D. Wisc. 1996).

suit against a former employer.⁸⁰ The North Carolina district court stated that the 1993 amendment to FRCP 30(c) clarified that deposition witnesses were not “subject to sequestration as a matter of course.”⁸¹ Instead, the court required particular and specific facts for a showing of good cause.⁸² Based on the discriminatory nature of incidents leading to the complaint, the plaintiff asserted that good cause existed.⁸³ In addition, the potential factual witnesses were co-workers and supervisors of the defendant-corporation who were allegedly involved in collusion, misrepresentation, and discriminatory conduct.⁸⁴ The court, however, found these allegations to be “ordinary garden variety or boilerplate ‘good cause’ facts which exist in most civil litigation.”⁸⁵ The court concluded that finding good cause in such an instance would mandate the same result in all cases with more than one fact witness and an allegation of prejudice.⁸⁶ Consequently, the court denied the motion

80. *Jones*, 185 F.R.D. at 225.

81. *Id.* at 224. For a discussion of the 1993 amendment to FRCP 30(c), see *supra* notes 66-76 and accompanying text.

82. *Jones*, 185 F.R.D. at 224 (citing *In re Terra Int'l*, 134 F.3d at 306 (quoting *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978))). See also *Chrysler Fin. Corp.*, 1999 WL 221119, at *1 (denying a protective order for a Title VII claim based on the broad and liberal scope of discovery as well as the conclusory statements without particularized demonstrations of fact to support such an order); WRIGHT ET AL., *supra* note 22, § 2035; *supra* note 39 and accompanying text (discussing the requisite burden for granting a protective order under FRCP 26(c)); *infra* notes 92-99 (analyzing *In re Terra International, Inc.*).

83. *Jones*, 185 F.R.D. at 224.

84. *Id.* The plaintiff claimed that her employment was tolerable until the new zone manager was appointed. Before the new manager, her performance reviews were “exceptional” and she consistently received pay raises. After his arrival, the plaintiff never received a favorable review and was both singled out for reprimands and unfairly supervised. In addition, the plaintiff’s supervisor was required to “agree” to the incidents and misrepresent facts against her. The plaintiff’s supervisor even allegedly fabricated an incident to place in the plaintiff’s file. As a result, the new zone manager held “great influence over [the plaintiff’s supervisor].” *Id.*

85. *Id.* (quoting *BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154, 160 (N.D. Ala. 1986)). See *Tuszkiewicz v. Allen Bradley Co.*, 170 F.R.D. 15 (E.D. Wisc. 1996).

In *Tuszkiewicz*, a Wisconsin district court denied a motion for a protective order to prevent three employees from attending each other’s depositions against their employer. *Id.* at 17. The court held that the movant failed to show good cause by alleging a mere threat of prejudice. *Id.* The court stated that simply alleging that a party will be harmed without an order is insufficient to establish good cause. *Id.* at 16. A movant must offer distinct facts jeopardizing truthful or altered testimony. *Id.* at 17.

See also *Nyazie*, 1998 WL 398250, at *3 (finding that no extraordinary factors existed in a wrongful death action based on a detailed analysis of the circumstances, parties, and issues involved, and requiring a specific showing of good cause); WRIGHT ET AL., *supra* note 22, § 2035 (stating that courts insist on particular and specific demonstrations of fact as opposed to stereotyped and conclusory allegations); *infra* note 123 and accompanying text. But see *supra* notes 36-57 and *infra* note 122 and accompanying text.

86. *Jones*, 185 F.R.D. at 224-25. See also *infra* notes 88-95 and accompanying text (discussing *In re Terra International, Inc.*); *supra* notes 36-57, 79-85 and *infra* notes 88-99, 122-24 (detailing the appropriate standards and analysis for imposing a protective order).

for a protective order.⁸⁷

b. Basis for Exclusion

In *Visor v. Sprint/United Management Co.*, a Colorado district court challenged the traditional pre-1993 grounds for exclusion by setting aside a protective order sequestering plaintiff-witnesses.⁸⁸ The court stated that the right to participate in the adjudicatory process is fundamental to our system of justice.⁸⁹ Based on that rationale, the court held that tactical considerations of exclusion to secure independent recollections or to avoid the tailoring of testimony were not *per se* compelling.⁹⁰ The court refused to “restructure” the process for counsel to “catch” witnesses in inconsistent statements.⁹¹

c. Corporate Representative Context

In a 1998 post-amendment hallmark case, *In re Terra International, Inc.*, the Court of Appeals for the Fifth Circuit vacated a protective order sequestering potential deponents.⁹² Following an explosion at an ammonium nitrate facility, the plaintiff-employees brought a product liability action

87. *Jones*, 185 F.R.D. at 225.

88. *Visor v. Sprint/United Mgmt. Co.*, No. 96-K-1730, 1997 WL 567923, at *4 (D. Colo. Aug. 18, 1997).

89. *Id.* at *2. The court further noted that “sequestration, like all forms of secrecy, is inimical” to the principle of open courts. *Id.* See also *Hines v. Wilkinson*, 163 F.R.D. 262 (S.D. Ohio 1995) (denying motion to exclude inmate from attending depositions). But see *supra* notes 61, 76 and *infra* notes 115-17 (concerning the public’s access to depositions and discovery proceedings).

90. *Visor*, 1997 WL 567923, at *3. The purpose of pretrial depositions is to discover facts; the competence and skill of counsel in cross-examination ensures accuracy and truthfulness. *Id.* But see *supra* notes 46-57, 88-89 and *infra* notes 91, 132, 147, 161, 165 and accompanying text (emphasizing the importance of truthful and independent recollections as the basis of testimony in trial and pretrial proceedings).

91. *Visor*, 1997 WL 567923, at *3. See *Lee v. Denver Sheriff’s Dep’t*, 181 F.R.D. 651 (D. Colo. 1998).

In *Lee*, a Colorado district court denied a motion for a protective order during depositions. *Id.* at 653. However, *Lee* involved a highly factual claim of abuse. An inmate brought suit against a police officer and deputy sheriff alleging that he was beaten while in jail. *Id.* at 651. Claiming a factual issue of excessive force, the plaintiff attempted to exclude the defendants due to a “significant risk” that such attendance may influence each defendant’s account of critical facts, thereby impeding an independent, unbiased recollection of events occurring almost four years prior to the deposition. *Id.* at 652. The court concluded that this argument speculated as to what the defendants may testify. As a result, the court found no basis for the defendants to “color or change” their testimony after hearing the others’ accounts. *Id.* at 653. Further, the court noted that the defendants had four years to discuss their testimonies. *Id.* The court held that this time frame and lack of proof failed to demonstrate any extraordinary and exceptional circumstances to exclude defendants from depositions in which they were named parties. *Id.* See also *WRIGHT ET AL.*, *supra* note 22, § 2035; *supra* notes 33, 91 (discussing timeliness and proof requirements under FRCP 26(c)).

92. *In re Terra Int’l, Inc.*, 134 F.3d 302, 307 (5th Cir. 1998).

against the designer of a faulty processing component.⁹³ Without affidavits or other evidence, the defendant claimed that employee solidarity or company pressure might taint the plaintiff-employees' testimony and preclude the witnesses' raw reactions.⁹⁴ The district court, therefore, granted the defendant's protective order sequestering all fact witnesses prior to their depositions. In addition, the court also limited the number of corporate representatives over the course of depositions to six, two of whom the defendant did not depose.⁹⁵

The Fifth Circuit, however, reversed the district court's protective order, holding that the defendant failed to make particular and specific demonstrations of fact to warrant a protective order.⁹⁶ The court reasoned that under FRCP 26(c), the movant must show the necessity of the order by particularized and specific facts rather than stereotyped and conclusory statements.⁹⁷ The court believed that to grant such an order would indicate good cause "any time fact witnesses in a case are employed by the same employer or are employed by a party in the case."⁹⁸ This conclusion would be inconsistent with the court's disapproval of protective orders based solely on stereotyped and conclusory statements.⁹⁹

2. *Granting of Protective Orders to Exclude*

On the other hand, a small number of courts have continued to grant protective orders following the 1993 amendment.¹⁰⁰ For instance, in *Dade v. Willis*, a Pennsylvania district court granted a protective order in a police

93. *Id.* at 304. An explosion at an ammonium nitrate facility killed four people, injured 18 others, and caused substantial property damage in Port Neal, Iowa. *Id.* An investigation committee comprised of Terra employees and consultants reported that the explosion was caused by a faulty apparatus used to feed nitric acid into a neutralizer, which processed liquid ammonium nitrate. *Id.* Terra filed suit against Mississippi Chemical Corporation, designer of the faulty apparatus. *Id.* As a result, the defendant sought a protective order sequestering all of the plaintiff's potential fact witnesses. *Id.*

94. *Id.* at 305. See also *In re Levine*, 101 B.R. 260 (Bankr. D. Colo. 1989); *Dunlap v. Reading*, 30 F.R.D. 129 (E.D. Pa. 1962); *supra* notes 39, 43-46 and accompanying text (indicating these policy concerns as "good cause" justifications for protective orders).

95. *In re Terra Int'l*, 134 F.3d at 305. See also *supra* notes 38, 40, 62 (addressing potential limits on the number of corporate representatives designated in discovery proceedings).

96. *In re Terra Int'l*, 134 F.3d at 306. See also *supra* notes 36-57 and *infra* notes 122-24 and accompanying text (establishing the standard for protective orders under FRCP 26(c)).

97. *In re Terra Int'l*, 134 F.3d at 306 (citing *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978)). See also *WRIGHT ET AL.*, *supra* note 22, § 2035, at 483-86.

98. *In re Terra Int'l*, 134 F.3d at 306.

99. *Id.*

100. See, e.g., *In re Wilkinson*, 137 F.3d 911 (6th Cir. 1998); *Dade v. Willis*, No. 95-6869, 1998 WL 260270 (E.D. Pa. Apr. 20, 1998).

brutality case.¹⁰¹ The plaintiff requested that deposition proceedings be conducted with no one present except the deponent-party and appropriate counsel.¹⁰² In determining whether to grant a protective order to exclude, the court analyzed the circumstances of the parties and the issues involved.¹⁰³ The *Dade* court held that extraordinary circumstances required sequestration of party deponents.¹⁰⁴ Because the claims of brutality were matters solely within the knowledge of three individuals, credibility became a crucial issue.¹⁰⁵ Due to their color of authority and their opportunity to eliminate inconsistencies, the officers' collective presence at each other's depositions generated a significant risk to accurate testimony.¹⁰⁶ The court adopted a "more realistic and practical approach," finding that the search for truth required sequestration to ensure the plaintiff a fully effective day in court.¹⁰⁷

III. ANALYSIS OF THE EXISTING PROBLEM IN DEPOSITIONS

The conflicting trends in the courts and the subsequent amendment to FRCP 30(c) in 1993 did not resolve the issue of when to exclude a corporate

101. *Dade*, 1998 WL 260270, at *2. See also *In re Wilkinson*, 137 F.3d 911 (6th Cir. 1998) (vacating denial of protective order in prisoner action, which allowed prison officials to attend deposition proceedings of inmates).

102. *Dade*, 1998 WL 260270, at *1. Plaintiff alleged that while being arrested at the scene of a burglary one of the officers tripped the plaintiff, caused his pants to fall down, and dragged him to the curb, thereby injuring his genitals, before physically abusing him in the police car. *Id.*

103. *Id.* The well-established principle has become exclusion of a party from a deposition only under a finding of "extraordinary circumstances." *Id.* But see WRIGHT ET AL., *supra* note 22, § 2041 (stating that courts have the power to exclude parties, although such exclusion should be ordered rarely); *infra* notes 122-24 and accompanying text (describing the appropriate showing for protective orders).

104. *Dade*, 1998 WL 260270, at *2. Cf. *Jones v. Circle K Stores, Inc.*, 185 F.R.D. 223 (M.D.N.C. 1999) (containing egregious facts of sexual harassment by plaintiff's supervisor, which the court held did not constitute sufficient "good cause" to exclude).

105. *Dade*, 1998 WL 260270, at *2. The witnesses accused of brutality were partners on the police force and consequently possessed a great interest in the outcome of the case. *Id.* This relationship substantially elevated the risk that the testimony of one would, either consciously or subconsciously, influence the testimony of one of the others. *Id.* See also *supra* notes 47-57, 88-91 and *infra* notes 132, 147, 161, 165 (emphasizing truthful and credible testimony in proceedings).

106. *Dade*, 1998 WL 260270, at *2. But cf. *In re Terra Int'l, Inc.*, 134 F.3d 302 (5th Cir. 1998); *United Incentives v. Sea Gull Lighting Prod., Inc.*, No. 91-0226, 1991 WL 209018 (E.D. Pa. Oct. 7, 1991); *Kerschbaumer v. Bell*, 112 F.R.D. 426 (D.D.C. 1986). See also *supra* notes 47-57, 88-91 and *infra* note 111 (regarding conflicts over the weight given to protecting accurate testimony and the practicability of discovery proceedings).

107. *Dade*, 1998 WL 260270, at *3. The court further held that these circumstances required that defendants' common counsel be prohibited from discussing or transmitting transcripts from the deposition testimony of one witness until the completion of both depositions, thereby preventing a circumvention of the sequestration order. *Id.* at *3-4. See also *infra* notes 144, 161 and accompanying text (addressing the courts' treatment and reaction to sealing deposition transcripts and pretrial communications).

representative from deposition proceedings.¹⁰⁸ Although the 1993 amendment clarified the applicable procedural regulations for addressing the presence of potential fact witnesses, the problems still remain as to when and to whom to exclude from discovery proceedings.¹⁰⁹ Therefore, FRCP 26(c)(5) requires additional clarification.

The application of the 1993 amendment currently clarifies the existing state of the discovery process.¹¹⁰ By requiring a court order, as opposed to a party's simple request to exclude, the amendment reduces the already exorbitant amount of time and money spent in discovery, especially the cost of depositions.¹¹¹ In addition, court orders, providing this extra procedural hurdle, impose a higher standard for exclusion of witnesses. This additional procedural step deters frivolous complaints and conclusory allegations.¹¹² As a result, the current application of FRCP 30(c) increases the efficiency of the judicial system and diminishes clutter throughout the courts.¹¹³

Moreover, some courts have further cultivated the restrictions on deposition attendance.¹¹⁴ These courts proclaim that attendance at depositions is part of a party's fundamental right to participate in the judicial process¹¹⁵ and the exclusion of parties and witnesses promotes secrecy in judicial proceedings.¹¹⁶ Both the judicial system and the public disfavor such

108. See WRIGHT ET AL., *supra* note 25, § 2113. See also *supra* notes 25, 27, 31, 73 and accompanying text (pertaining specifically to corporate representatives in deposition proceedings).

109. See FED. R. CIV. P. 26(c)(5). See also FED. R. CIV. P. 26(c)(5) advisory committee's note; WRIGHT ET AL., *supra* note 25, § 2113; *supra* notes 31, 73, 108 and accompanying text (addressing the existing problem in discovery).

110. See WRIGHT ET AL., *supra* note 25, § 2113. See also FED. PROC. LAW. ED., *supra* note 22, ¶ 26:17. For a discussion of the impact of FRCP on the present discovery process, see *supra* notes 31, 69-72 and accompanying text.

111. See *Havens v. Metropolitan Life Ins. Co.*, No. 94-1402, 1995 WL 234710 (S.D.N.Y. Apr. 20, 1995); *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86 (D.N.J. 1986); WRIGHT ET AL., *supra* note 22, § 2035. See also *supra* note 18 (referring to the amount of time and money spent in discovery and depositions).

112. See, e.g., *La. Educ. Assoc. v. Richland Parish School Board*, 421 F. Supp. 973 (W.D. La. 1976). Cf. *supra* notes 18, 111 (noting that heavier burdens deter frivolous complaints and conclusory allegations).

113. See, e.g., *In re Arbitration Between Intercarbon Beruda, Ltd. and Caltex Trading and Transport Corp.*, 146 F.R.D. 64 (S.D.N.Y. 1993). Cf. *supra* notes 18, 111 (implying an increase in judicial system efficiency).

114. See, e.g., *Hickman v. Taylor*, 329 U.S. 495 (1947); *Visor v. Sprint/United Mgmt. Co.*, No. 96-K-1730, 1997 WL 567923 (D. Colo. Aug. 18, 1997); *Tuszkiewicz v. Allen Bradley Co.*, 170 F.R.D. 15 (E.D. Wisc. 1996); *Kerschbaumer v. Bell*, 112 F.R.D. 426 (D.D.C. 1986).

115. See *Visor v. Sprint/United Mgmt. Co.*, No. 96-K-1730, 1997 WL 567923 (D. Colo. Aug. 18, 1997); *Kerschbaumer v. Bell*, 112 F.R.D. 426 (D.D.C. 1986) (invoking orders sparingly to preserve openness and procedural fairness within the legal system).

116. See *Hickman v. Taylor*, 329 U.S. 495 (1947); *Marcus*, *supra* note 21; *supra* notes 21, 61, 76, 89 and accompanying text.

secrecy and limited access.¹¹⁷ Therefore, by providing a court order for the exclusion of parties and witnesses, the judicial system can oversee and protect open adjudicatory proceedings even during discovery.¹¹⁸

Despite strengthening the discovery process, the 1993 amendment to FRCP 30(c) has also generated problems. Although the amendment clarified the confusion of the courts over the governing rules of depositions by specifying the appropriate procedural rules,¹¹⁹ it failed to provide guidance as to the substantive requirement for exclusion.¹²⁰ The amendment simply directs exclusionary issues at depositions to FRCP 26(c)(5). Courts have, therefore, proceeded to freely interpret the application of FRCP 26(c)(5)'s requirements to corporate representatives and potential fact witnesses attending deposition proceedings, preventing uniformity and predictability in the federal court system.¹²¹

The practical consequences of the 1993 amendment contradict its intended purposes. Certain courts have specifically interpreted the amendment to mean that pursuant to FRCP 26(c)(5), potential deponents may observe other depositions, absent an extraordinary or compelling standard for exclusion.¹²² Other courts now require particular and specific demonstrations of fact under FRCP 26(c)(5) for exclusion, not stereotyped or conclusory statements of prejudice or potential harm.¹²³ Consequently, courts have taken the "good cause" standard set forth in FCRP 26(c)(5) and transformed it into an "extraordinary or compelling" threshold for excluding a witness or party at depositions.¹²⁴ In the process, courts have increasingly

117. See *supra* note 116. *But see* WRIGHT ET AL., *supra* note 22, § 2041 (stating that in reality discovery is closed and the public has no right to attend proceedings); Miller, *supra* note 23, at 450.

118. See *supra* note 116.

119. See FED. R. CIV. P. 30(c) advisory committee's note. For a discussion on the 1993 amendment, see Part II.C.

120. For a discussion of the advisory committee's note to the 1993 amendment, see *supra* note 66 and accompanying text.

121. See, e.g., *In re Terra Int'l, Inc.*, 134 F.3d 302 (5th Cir. 1998); *Jones v. Circle K Stores, Inc.*, 185 F.R.D. 223 (M.D.N.C. 1999); *Williams v. Chrysler Fin. Corp.*, No. 98-2931, 1999 WL 221119 (E.D. La. Apr. 9, 1999); *Nyazie v. Kennedy*, No. 97-0120, 1998 WL 398250 (E.D. Pa. June 23, 1998); *Lee v. Denver Sheriff's Dep't*, 181 F.R.D. 651 (D. Colo. 1998); *Visor v. Sprint/United Mgmt. Co.*, No. 96-K-1730, 1997 WL 567923 (D. Colo. Aug. 18, 1997); *Tuszkiewicz v. Allen Bradley Co.*, 170 F.R.D. 15 (E.D. Wisc. 1996).

122. See, e.g., *In re Wilkinson*, 137 F.3d 911 (6th Cir. 1997); *Dade v. Willis*, No. 95-6869, 1998 WL 260270 (E.D. Pa. Apr. 20, 1998). See also WRIGHT ET AL., *supra* note 22, § 2035.

123. See, e.g., *In re Terra Int'l, Inc.*, 134 F.3d 302 (5th Cir. 1998); *Jones v. Circle K Stores, Inc.*, 185 F.R.D. 223 (M.D.N.C. 1999); *Williams v. Chrysler Fin. Corp.*, No. 98-2931, 1999 WL 221119 (E.D. La. Apr. 9, 1999). See also *supra* notes 82, 85.

124. See, e.g., *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973); *In re Shell Oil Refinery*, 136 F.R.D. 615 (E.D. La. 1991); *In re Levine*, 101 B.R. 260 (Bankr. D. Colo. 1989); *Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451 (M.D. Ga. 1987); *BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154 (N.D. Ala. 1986), *aff'd sub nom. BCI Comm. v. Boeing*, 995 F.2d 236 (11th Cir. 1999); *Naismith*

allowed the use of corporate representatives to achieve tactical results, whether to sharpen consistencies in testimony or to influence the deponent.¹²⁵

The use of corporate representatives and potential fact witnesses as a tactical means to an end poses significant threats given the current importance of discovery and pretrial proceedings.¹²⁶ Depositions increasingly serve as a critical and essential mechanism in civil and sometimes criminal disputes.¹²⁷ Although not the equivalent of trials, depositions are a key stage in lawsuits.¹²⁸ Often the strength of facts and testimony elicited at depositions determine settlements and the expediency of trials.¹²⁹ Furthermore, the Supreme Court's approval of summary judgments as a means to resolve disputes also impacts the discovery process.¹³⁰ Consequently, the interests of justice mandate eliciting accurate, reliable, and full disclosure of facts and information through deposition proceedings.

Pretrial proceedings, such as depositions, are designed to discover facts and issues.¹³¹ Under the current law, however, parties at depositions often taint facts and tailor them in certain situations. For instance, a fact witness may be reluctant to elaborate fully a set of events for fear of the parties in attendance.¹³² Moreover, the parties present may alter the truth later, as deponents themselves, in order to contradict the prior deponent.¹³³ At trial,

v. Prof'l Golfers Ass'n, 85 F.R.D. 552 (N.D. Ga. 1979); *Beacon v. R.M. Jones Apartment Rentals*, 79 F.R.D. 141 (N.D. Ohio 1978); *Dunlap v. Reading Co.*, 30 F.R.D. 129 (E.D. Pa. 1962). *But see, e.g., supra* note 121.

125. *See supra* note 121.

126. *See Dunlap v. Reading Co.*, 30 F.R.D. 129 (E.D. Pa. 1962); *In re Levine*, 101 B.R. 260 (Bankr. D. Colo. 1989); WRIGHT ET AL., *supra* note 22, § 2041. For a discussion of the importance of discovery in legal settings and the threat posed to discovery and other litigation processes by allowing fact witnesses to attend depositions as part of a party's strategy, see *supra* notes 15-19, 21 and accompanying text.

127. *See Visor v. Sprint/United Mgmt. Co.*, No. 96-K-1730, 1997 WL 567923 (D. Colo. Aug. 18, 1997). For a discussion of the importance of depositions in pretrial and judicial proceedings, see *supra* notes 15-19 and accompanying text.

128. *See supra* text accompanying note 17 (noting that depositions are a key stage in lawsuits even though not the equivalent of trial). *See also Visor*, 1997 WL 567923, at *2 & n.2; WRIGHT ET AL., *supra* note 22, § 2041.

129. *See Hickman v. Taylor*, 329 U.S. 495 (1947). *See also supra* note 20 and accompanying text (indicating that facts elicited during depositions determine settlements and scope of trial).

130. *See supra* note 128 and accompanying text and text accompanying note 18 (revealing that summary judgments have an increased impact on the discovery process). *See also Visor*, 1997 WL 567923, at *2 & n.2.

131. *See Hickman*, 329 U.S. at 507-08 (stating the purposes of pretrial proceedings).

132. *See Dade v. Willis*, No. 95-6869, 1998 WL 260270 (E.D. Pa. Apr. 20, 1998); *In re Levine*, 101 B.R. 260 (Bankr. D. Colo. 1989); *Dunlap v. Reading Co.*, 30 F.R.D. 129 (E.D. Pa. 1962); WRIGHT ET AL., *supra* note 22, § 2041; *supra* notes 47-57, 88-91.

133. *See In re Shell Oil Refinery*, 136 F.R.D. 615 (E.D. La. 1991); *Beacon Jones Apartment Rentals*, 79 F.R.D. 141 (N.D. Ohio 1978). For a discussion of a witness's potential to contradict or alter the truth, see *supra* notes 46, 57, 63 and accompanying text.

protection mechanisms exist to eliminate such undesirable circumstances and exclude potentially harmful parties from attendance.¹³⁴ Under current law, however, these protection mechanisms are severely limited in pretrial proceedings.¹³⁵

Opponents of witness exclusion argue that the skill and competence of attorneys on cross-examination sufficiently overcomes these limited mechanisms to protect the accuracy and openness of testimony at depositions.¹³⁶ However, cross-examination may not always alleviate these problems. For example, a summary judgment motion may never reach the cross-examination stage at trial.¹³⁷ Furthermore, FRE may limit the use of extrinsic evidence to impeach or attack the credibility of certain fact witnesses.¹³⁸ Relying on the skill of attorneys in situations where their hands are tied does not sufficiently protect and ensure truth and fairness in judicial proceedings.

Corporate representatives serve a vital function in the litigation process.¹³⁹ Pursuant to state law, corporations are considered self-existing entities.¹⁴⁰ As a result, a corporation has a presumptive right to participate in pretrial depositions and proceedings, just like an individual party.¹⁴¹ Because the interests of time and money necessitate expediency in pretrial and trial proceedings, the use of corporate representatives as deponents makes sense.¹⁴² Supervisors or other fact witnesses, as well as others within the corporation's chain-of-command, often have the most knowledge about the particular issue underlying the lawsuit. Moreover, many times, these depositions occur at different locations across the country and it is more logical for the parties to take advantage of the individuals from a

134. See, e.g., FED. R. EVID. 615.

135. See *Visor*, 1997 WL 567923, at *2 n.2.

136. *Id.* at *3 (stating that the skill and competence of attorneys is sufficient to both overcome deficiencies in testimony and discover facts).

137. Cf. *supra* text accompanying note 18. See also *Visor*, 1997 WL 567923, at *2 & n.2.

138. See, e.g., FED. R. EVID. 607, 608, 613. See also *supra* notes 44, 134 and accompanying text (indicating the evidentiary differences between trial and discovery).

139. See *Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451 (M.D. Ga. 1987); AM. JUR. 2D, *supra* note 23, § 145. See also *supra* notes 31, 38, 57 and accompanying text (emphasizing corporate representatives' vital function in discovery).

140. See AM. JUR. 2D, *supra* note 23, § 145; *supra* note 31 and accompanying text (recognizing corporations as separate entities).

141. See WIGMORE, *supra* note 30, § 1841. For a discussion of a corporation's presumptive right like any other party to attend depositions, see *supra* notes 29-30 and accompanying text.

142. See *Havens v. Metropolitan Life Ins. Co.*, No. 94-1042, 1995 WL 234710 (S.D.N.Y. Apr. 20, 1995); *Cipollone v. Liggett Group*, 113 F.R.D. 86 (D.N.J. 1986). See also WRIGHT ET AL., *supra* note 22, § 2035; *supra* notes 18, 111 and accompanying text (referring to the amount of time and money spent in discovery and depositions).

corporation's regional branch.¹⁴³ Finally, especially considering the courts' unwillingness to seal deposition transcripts and pretrial proceedings,¹⁴⁴ the ability of corporate representatives or witnesses to read prior deposition transcripts circumvents FRCP 26(c)(5), defeating the purpose for seeking exclusion.

IV. PROPOSAL

The issue unresolved before the courts concerns whether, and when, to exclude potential fact witnesses, namely corporate representatives, from deposition proceedings.¹⁴⁵ The 1993 amendment clarified that FRCP 26(c)(5) governed these proceedings and that potential witnesses were not automatically excluded from such discovery.¹⁴⁶ Therefore, a proposal to clarify the current situation must meet two competing objectives: (1) protecting the interests of parties to the litigation and (2) preserving the corporate representative power.

The first objective seeks to protect the interests of parties to the litigation by ensuring a fair and expedient resolution of the conflict. This goal includes the acquisition of full and accurate testimony and facts without fear or intimidation.¹⁴⁷ The second objective must preserve the corporate representative power in judicial proceedings.¹⁴⁸ This power includes attendance at pretrial depositions as well as trial proceedings, as secured by FRE 615.¹⁴⁹ However, this power requires modification at times in order to

143. The FRCP allow such individuals to act as representatives for the corporation. *See Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451 (M.D. Ga. 1987); AM. JUR. 2D, *supra* note 23, § 145. *See also supra* notes 31, 38, 57, 139 and accompanying text (emphasizing corporate representatives' vital function in discovery).

144. *In re Shell Oil Refinery*, 136 F.R.D. 615 (E.D. La. 1991); *Dade v. Willis*, No. 95-6869, 1998 WL 260270, at *3 (E.D. Pa. Apr. 20, 1998); *BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154 (N.D. Ala. 1986), *aff'd sub nom. BCI Comm. v. Boeing*, 995 F.2d 236 (11th Cir. 1999). *But see Naismith v. Prof'l Golfer's Ass'n*, 85 F.R.D. 552 (N.D. Ga. 1979); *WRIGHT ET AL.*, *supra* note 25, § 2113, at 92 n.10.

145. *See* FED. R. CIV. P. 30(c) advisory committee's note. *See also* *WRIGHT ET AL.*, *supra* note 25, § 2113. For a discussion of the unresolved issue before the courts as to when potential fact witnesses may be excluded, *see supra* notes 31, 66, 73, 108-09 and accompanying text.

146. *See* FED. R. CIV. P. 30(c) advisory committee's note. *See also* *WRIGHT ET AL.*, *supra* note 22, § 2014; *FED. PROC. LAW. ED.*, *supra* note 22, § 26:218.

147. *See* *Dade v. Willis*, 1998 WL 260270 (E.D. Pa. 1998); *In re Levine*, 101 B.R. 260 (Bankr. D. Colo. 1989); *Dunlap v. Reading Co.*, 30 F.R.D. 129 (E.D. Pa. 1962); *WRIGHT ET AL.*, *supra* note 22, § 2041; *supra* notes 18, 47-57, 61, 88-91 and text accompanying note 132.

148. *See Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451 (M.D. Ga. 1987); AM. JUR. 2D, *supra* note 23, § 145. *See also supra* notes 31, 38, 57, 139 and accompanying text (emphasizing corporate representatives' vital function in discovery).

149. *See* FED. R. EVID. 615. For discussion of FRE 615 and the power of representatives and parties to attend trial proceedings, *see supra* notes 7, 8 and accompanying text.

protect witnesses and parties in certain situations.¹⁵⁰

The proposal that best achieves these objectives is an amendment to FRCP 26(c)(5). This amendment would simply add the phrase “to ensure the integrity of the proceeding”¹⁵¹ as a ground for which “good cause” must be shown to obtain a protective order.¹⁵² By adding an additional ground of integrity, the amendment would supplement the existing bases of “annoyance, embarrassment, oppression or undue burden or expense.”¹⁵³ Specifically, FRCP 26(c)(5) should be amended to read as follows:

Upon a motion by a party or by the person from whom discovery is sought, . . . the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, . . . undue burden or expense, *or to ensure the integrity of the proceeding*, including one or more of the following¹⁵⁴

Due to the absence of a similar integrity basis, courts have failed to exclude witnesses in certain situations where accurate testimony or truthfulness was a realistic concern.¹⁵⁵ These courts indicated that the grounds of “annoyance, embarrassment, oppression, or undue burden or expense” do not contain such a basis. By expanding the grounds for courts to monitor the fairness of discovery, deposition proceedings can better protect the interests of the parties.

150. See, e.g., *In re Shell Oil Refinery*, 136 F.R.D. 615 (E.D. La. 1991) (requiring representatives to sit outside deposition and consult with attorneys during breaks).

151. Under this proposal, “integrity” would be defined according to the existing meaning associated with the term in each particular jurisdiction. In essence, the definition includes a soundness or ethical principle, as well as character in dealing with others. In addition, this term incorporates honesty and fidelity. See also BLACK’S LAW DICTIONARY 809 (6th ed. 1990).

152. See FED. R. CIV. P. 26(c). See also *In re Shell Oil Refinery*, 136 F.R.D. 615 (E.D. La. 1991); *In re Levine*, 101 B.R. 260 (Bankr. D. Colo. 1989); *Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451 (M.D. Ga. 1987); *BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154 (N.D. Ala. 1986), *aff’d sub nom. BCI Comm. v. Boeing*, 995 F.2d 236 (11th Cir. 1999); *Naismith v. Prof’l Golfers Ass’n*, 85 F.R.D. 552 (N.D. Ga. 1979); *Beacon v. R.M. Jones Apartment Rentals*, 79 F.R.D. 141 (N.D. Ohio 1978); *Dunlap v. Reading Co.*, 30 F.R.D. 129. *But see In re Terra Int’l, Inc.*, 134 F.3d 302 (5th Cir. 1998); *Jones v. Circle K Stores, Inc.*, 185 F.R.D. 223 (M.D.N.C. 1999); *Williams v. Chrysler Fin. Corp.*, No. 98-2931, 1999 WL 221119 (E.D. La. Apr. 9, 1999); *Nyazie v. Kennedy*, No. 97-0120, 1998 WL 398250 (E.D. Pa. June 23, 1998); *Lee v. Denver Sheriff’s Dep’t*, 181 F.R.D. 651 (D. Colo. 1998); *Visor v. Sprint/United Mgmt. Co.*, No. 96-K-1730, 1997 WL 567923 (D. Colo. Aug. 18, 1997); *Tuskiewicz v. Allen Bradley Co.*, 170 F.R.D. 15 (E.D. Wisc. 1996); *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

153. FED. R. CIV. P. 26(c). See also *supra* note 10 and accompanying text (citing FRCP 26(c) and the grounds for the issuance of other protective orders).

154. Italicized words represent new language added to existing portions of FRCP 26(c).

155. See *Visor*, 1997 WL 567923, at *3 (stating that concerns of influencing or tainting deponent’s testimony fall outside the FRCP 26(c) grounds for protective orders).

This amendment to FRCP 26(c)(5) also sends a message to courts. By emphasizing the importance of integrity in pretrial proceedings, courts would be forced to assess the need for accuracy, fairness, and truth even in depositions.¹⁵⁶ This emphasis should also assist in reinforcing the “good cause” standard for obtaining a protective order,¹⁵⁷ instead of the higher “extraordinary or compelling” threshold of review that courts have used to apply this standard.¹⁵⁸

Aside from emphasizing the integrity concern, this proposal also requires an additional component, namely an advisory committee note. This note would detail the purpose behind the rule and its intended application. In addition, this note would instruct the courts to properly interpret discovery procedure, highlighting the “good cause” standard set forth in the rule.¹⁵⁹ Although not mandatory, this advisory note would direct courts away from the high judicial threshold. Further, this note would promote the preservation of corporate representatives in depositions¹⁶⁰ while emphasizing the importance of a careful consideration of the qualifications of the individuals acting on the corporation’s behalf. While failing to seal prior deposition transcripts may appear to circumvent FRCP 26(c)(5), this proposal alleviates the dangers of intimidation and immediate fabrication in depositions.¹⁶¹ Moreover, with these changes, courts should be more willing to seal transcripts in certain situations.¹⁶²

This proposal satisfies the two primary objectives detailed above. First, the proposal protects the interests of the parties to the litigation. The amendment empowers courts to grant protective orders to ensure the integrity

156. See *Solar Turbines, Inc. v. United States*, 14 Cl. Ct. 551, 553 (1988). See also *supra* note 46.

157. For a discussion of the original “good cause” standard for granting a protective order, see *supra* notes 39, 122-24 and accompanying text.

158. See *supra* notes 85, 122-24 and accompanying text (covering the transformation of the proper standard for granting protective orders).

159. FED. R. CIV. P. 26(c). See *supra* notes 39, 122-24, 157-58 and accompanying text (referring to the “good cause” and proper standard discussions).

160. See *Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451 (M.D. Ga. 1987); AM. JUR. 2D, *supra* note 23, § 145. See also *supra* notes 31, 38, 57, 139, 143 and accompanying text (emphasizing corporate representatives’ vital function in discovery).

161. See *Dade v. Willis*, No. 95-6869, 1998 WL 260270 (E.D. Pa. Apr. 20, 1998); *In re Levine*, 101 B.R. 260 (Bankr. D. Colo. 1989); *Dunlap v. Reading Co.*, 30 F.R.D. 129 (E.D. Pa. 1962); WRIGHT ET AL., *supra* note 22, § 2041; *supra* notes 47-57, 88-91, 132, 147. See also *In re Shell Oil Refinery*, 136 F.R.D. 615 (E.D. La. 1991); *BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154 (N.D. Ala. 1986), *aff’d sub nom. BCI Comm v. Boeing*, 995 F.2d 236 (11th Cir. 1999) (discussing the courts’ unwillingness to restrict transcripts and communications between depositions and trial).

162. See *In re Shell Oil Refinery*, 136 F.R.D. 615 (E.D. La. 1991); *Dade*, 1998 WL 260270, at *3; *BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154 (N.D. Ala. 1986), *aff’d sub nom. BCI Comm. v. Boeing*, 995 F.2d 236 (11th Cir. 1999). *But see Naismith v. Prof’l Golfer’s Ass’n*, 85 F.R.D. 552 (N.D. Ga. 1979); WRIGHT ET AL., *supra* note 25, § 2113, at 92 n.10.

of deposition proceedings. This new basis, combined with the advisory committee note emphasizing the “good cause” standard, allows courts the freedom to preserve accurate, full, and fair testimony.¹⁶³

Second, the proposal preserves the corporate representative power in pretrial proceedings. The advisory committee note reaffirms the significance of having a representative present during judicial proceedings.¹⁶⁴ However, the impact of a particular individual attending judicial proceedings on behalf of the corporation factors into the court’s decision.¹⁶⁵ The time and cost of depositions influence the selection of representatives. With these factors in mind, courts can assess the circumstances and ensure the integrity of the proceedings while simultaneously permitting effective corporate representation.

V. CONCLUSION

Prior to 1993, courts experienced confusion as to the federal rules governing the attendance of corporate representatives and potential fact witnesses at discovery proceedings.¹⁶⁶ As a result, courts generally favored excluding persons from depositions, whether parties or potential witnesses. In 1993, however, an amendment to FRCP 30(c) expressly prohibited the application of FRE 615 to depositions.¹⁶⁷ Consequently, courts may only grant a protective order excluding individuals from depositions if the party

163. See *Dade v. Willis*, No. 95-6869, 1998 WL 260270 (E.D. Pa. Apr. 20, 1998); *In re Levine*, 101 B.R. 260 (Bankr. D. Colo. 1989); *Dunlap v. Reading Co.*, 30 F.R.D. 129 (E.D. Pa. 1962); WRIGHT ET AL., *supra* note 22, § 2041; *supra* notes 18, 47-57, 61, 88-91, 132, 147.

164. See *Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451 (M.D. Ga. 1987); AM. JUR. 2D, *supra* note 23, § 145. See also *supra* notes 31, 38, 57, 139, 148 and accompanying text (emphasizing corporate representatives’ vital function in discovery).

165. See *Dade v. Willis*, No. 95-6869, 1998 WL 260270 (E.D. Pa. Apr. 20, 1998); *In re Levine*, 101 B.R. 260 (Bankr. D. Colo. 1989); *Dunlap v. Reading Co.*, 30 F.R.D. 129 (E.D. Pa. 1962); WRIGHT ET AL., *supra* note 22, § 2041; *supra* notes 47-57, 88-91, 132. Cf. *Havens v. Metropolitan Life Ins. Co.*, No. 94-1042, 1995 WL 234710 (S.D.N.Y. Apr. 20, 1995); *Cipollone v. Liggett Group*, 113 F.R.D. 86 (D.N.J. 1986); WRIGHT ET AL., *supra* note 22, § 2035. See also *supra* note 18 and 111 (referring to the amount of time and money spent in discovery and depositions).

166. See, e.g., *Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451 (M.D. Ga. 1987); *Naismith v. Prof’l Golfers Ass’n*, 85 F.R.D. 552 (N.D. Ga. 1979); *Williams v. Elec. Control Sys., Inc.*, 68 F.R.D. 703 (E.D. Tenn. 1975) (applying FRE 615 to deposition proceedings). *But cf.* *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973); *In re Shell Oil Refinery*, 136 F.R.D. 615 (E.D. La. 1991); *BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154 (N.D. Ala. 1986), *aff’d sub nom.* *BCI Comm. v. Boeing*, 995 F.2d 236 (11th Cir. 1999); *Kerschbaumer v. Bell*, 112 F.R.D. 426 (D.D.C. 1986); *Skidmore v. Northwest Eng’g Co.*, 90 F.R.D. 75 (S.D. Fla. 1981) (applying FRCP 26 to deposition proceedings).

167. See FED. R. CIV. P. 30(c); FED. R. CIV. P. 30(c) advisory committee’s note; WRIGHT ET AL., *supra* note 25, § 2113. See also FED. PROC. LAW. ED., *supra* note 22, § 26:17; *supra* notes 31, 110 and accompanying text (referring to 1993 amendment). For a thorough discussion of the 1993 amendment, see Part II.C.

moving for the order shows “good cause” as required under FRCP 26(c)(5). Currently, absent extraordinary or compelling circumstances, corporate representatives are allowed to alternate even though they may be potential witnesses or possess supervisory authority.¹⁶⁸

Due to the current state of the law, an amendment to FRCP 26(c)(5) should supplement the protection of integrity in discovery proceedings. Combined with an advisory committee note expressing the intended purpose and application, the amendment would best protect the interests of parties to the litigation as well as preserve the corporate representative power in judicial proceedings. Consequently, the proposed amendment would enhance the vital role of discovery in the adjudicatory process.

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168. See, e.g., *Williams v. Chrysler Fin. Corp.*, No. 98-2931, 1999 WL 221119 (E.D. La. Apr. 9, 1999); *In re Wilkinson*, 137 F.3d 911 (6th Cir. 1997); *In re Terra Int’l, Inc.*, 134 F.3d 302 (5th Cir. 1998); *Jones v. Circle K Stores, Inc.*, 185 F.R.D. 223 (M.D. N.C. 1999); *Dade v. Willis*, No. 95-6869, 1998 WL 260270 (E.D. Pa. Apr. 20, 1998). See also *WRIGHT ET AL.*, *supra* note 22, § 2035; *supra* notes 82, 86, 122-23.

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