A Different Standard for Different Stages: Why Parties Must Be Allowed to "Invoke the Rule" During Oral Depositions

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* J.D. Candidate, Vanderbilt Law School 2024. I would like to thank Professor Suzanna Sherry for her help in developing this Note topic and for her encouragement throughout the writing process. I would also like to thank the editors of Vanderbilt Law Review En Banc for their hard work and dedication to my Note during the entire editing phase. Finally, I thank my wonderful fiancé, parents, and sisters for being my biggest cheerleaders.

INTRODUCTION

Two attorneys from the same law firm are representing plaintiffs in two whistleblower qui tam lawsuits against different pharmaceutical companies. One suit has been going on for years and is finally at the trial stage; the other will likely settle after depositions are complete. Attorney A appears at trial ready to question the plaintiff, but there is a problem—the plaintiff's former supervisor, who is set to testify later in the trial, is sitting in the back of the courtroom. This attorney speaks up: "Your Honor, I invoke the Rule." The judge, without asking any questions, directs the plaintiff's former employer to leave the courtroom.

On the same day, just a few blocks away, Attorney B and her client arrive at the small conference room in opposing counsel's office. Sitting on either side of the deposing attorney, taking up half the room, are the CEO of the defendant company and his henchmen—all of whom had a history of harassing the plaintiff. Attorney B politely requests that the men leave. Opposing counsel refuses—alleging that they have a right to be there. The attorneys argue back and forth before phoning the judge, who responds by accurately reciting the current law: If plaintiff's attorney wants to exclude any fact witness from the deposition, she must file a motion for a protective order in court.[2] To do so, the plaintiff would have to suspend the deposition and wait for the judge's ruling before continuing—causing further delay and risk of inaccurate testimony if the order is not granted.[3]

If the deposition is not suspended and the questioning in both cases goes forward, whose testimony is more likely to be accurate? The testimony from the plaintiff who is free from external pressures in the courtroom, or the testimony from the plaintiff who is stuck in a small room with the very people she is accusing of breaking the law?

The rule of witness sequestration is the exclusion of witnesses from a courtroom to bar them from hearing other witness testimony.[4] It is one of, if not the most, powerful rules in American trial proceedings—so much so that it is commonly referred to as "*the Rule*" of evidence.[5] This rule does not apply to depositions.[6] The disparity between the

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2. *See* FED. R. CIV. P. 30(c); FED. R. CIV. P. 26(c).

3. *See* WRIGHT & MILLER, 8A FED. PRAC. & PROC. CIV. § 2035 (3d ed.).

4. Ralph Slovenko, *Sequestration of Lay Witnesses and Experts*, J. AM. ACAD. PSYCHIATRY L. 447 (2004).

5. *See* CHRISTOPHER B. MUELLER, LAIRD C. KIRKPATRICK & LIESA L. RICHTER, EVIDENCE § 6.71 (6th ed. 2018) ("In courtroom parlance, excluding or sequestering witnesses is known as invoking 'the rule on witnesses.' ").

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

different standards to obtain witness sequestration—based solely on the stage of litigation—is enormous and unjustified. Because of the difficulty in obtaining a protective order during depositions, witness testimony can easily become tainted[7]—the very evil that proponents of witness sequestration seek to remedy in the first place.[8] Dangers such as witness intimidation, coercion, or testimony matching rarely happen during trials because there are rules in place to protect against them.[9] But it can, it does, and it will continue to happen at depositions.[10] No such rule exists to protect deponents, despite the weight our judicial system places on depositions in contemporary litigation.[11]

The difference in sequestering witnesses at trial as compared to depositions was not always so drastic. Fact witnesses were excluded from depositions as quickly and easily as they were excluded from trials until an unexplained, unjustified 1993 Amendment to Rule 30 of the Federal Rules of Civil Procedure ("The Amendment").[12] Prior to 1993, Federal Rule of Civil Procedure Rule 30 ("Rule 30") stated that *all* Federal Rules of Evidence applied to depositions. Notably, this included Federal Rule of Evidence 615 ("FRE 615")—the rule of automatic witness sequestration during trial.[13] In a single stroke, the Amendment removed FRE 615 from the enumerated rules of evidence applicable to depositions[14]—and with it went the strongest protection against tainted witness testimony.

This Note will discuss the change to Rule 30 and the resulting disparity between the two witness sequestration standards in depth,

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7. *See* discussions *infra* Part II.B(i).

8. *See* FED. R. EVID. 615 advisory committee's notes; Slovenko, *supra* note 3, at 477; Richard H. Underwood, *Following the Rules: Exclusion of Witness, Sequestration, and No- Consultation Orders*, 35 AM. J. TRIAL ADVOC. 515 (2012).

9. *See* FED. R. EVID. 615; Slovenko, *supra* note 3.

10. *See* discussion *infra* Part III.B(i); *see e.g.,* In re Terra Int'l, Inc., 134 F.3d 302 (5th Cir. 1998) (denying a motion for a protective order because movants did not establish good cause, thereby allowing deponent employees to sit in on one another's depositions before their own depositions, creating the risk of collusion opposing counsel feared).

11. *See* FED. R. CIV. P. 30(c) ("…except Rule 615…"); THOMAS D. SAWAYA, 6 FLA. PRAC., PERSONAL INJURY & WRONGFUL DEATH ACTIONS § 25:3 (2023 ed.) ("[Depositions] importance in trial preparation and use in trial proceedings cannot be overstated."); LEON WOLFSTONE, 4 AM. JUR. TRIALS 119 (1966); KEVIN J. DUNNE, DUNNE ON DEPOSITIONS IN CAL. § 8:1 ("Few pre-trial procedures have as much impact on the direction and outcome of litigation as the deposition of the adverse expert.").

12. *See* Lumpkin v. Bi-Lo, Inc., 117 F.R.D. 451 (M.D. Ga. 1987) (applying FRE 615 to depositions); FED. R. CIV. P. 30(c). At the time the amendment was promulgated, the Rules Committee and general legal scholarship alike were more focused on the impact of another amendment to Rule 30—an amendment limiting the number of depositions that could be taken. Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure –A Critical Analysis*, 12 TOURO L. REV. 3, 110 (1995).

13. FED. R. CIV. P. 30 (West 1992).

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

demonstrating the need to bring Rule 30 and FRE 615 back into congruence. *Part I* discusses the history of the rule of witness sequestration—tracing its roots to Biblical times—the history of Rule 30, their ultimate intersection, and the change effected in 1993. *Part II* analyzes how this change impacted the law—namely, an unreasonably high standard for protective orders and the subsequent implications on individual trials. Finally, *Part III* argues that FRE 615 must apply to depositions as well as to trials and calls on the Rules Committee to reamend the Amendment.

I. HISTORY OF THE RULES

To fully understand the necessity of applying the rule of witness sequestration to depositions—and how sequestration and depositions intersect—one must first understand the background of both practices. As such, this Part does the following: *Part I.A* analyzes the history of witness sequestration and the rationale behind it; *Part I.B* gives a brief overview of depositions in the American legal system and an overview of Rule 30; *Part I.C* discusses the relevant pre-1993 case law regarding the intersection of witness sequestration and depositions; and finally, *Part I.D* outlines the law today in light of changes created by the Amendment.

A. The History and Rationale of FRE 615

Dean John Henry Wigmore, a leading authority on the laws of evidence,[15] wrote that "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," second only to cross examination.[16] Today, an attorney can simply state "I invoke the Rule," and witnesses will be sequestered.

Sequestering witnesses is not an invention of modern jurisprudence. Indeed, the Rule stems from the Biblical story of Susanna and the Elders.[17] Found in the Book of Daniel, this story begins with Susanna, a beautiful disciple of Jesus of Nazareth, being "lusted" after by two Elders.[18] After Susanna rejected their advances, the Elders publicly accused Susanna of having an adulterous meeting

15. Slovenko *supra* note 3, at 447.

16. 6 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE: EVIDENCE IN TRIALS AT COMMON LAW § 1838 (ARTHUR BEST ED., 4th ED. 2021); *see id.*

17. *See Daniel* 13:1–65 (Catholic Version).

18. *Id.* at 13:8.

with a young man in her husband's garden.[19] Just before Susanna was convicted, Daniel spoke up and said "[s]eparate [the Elders] far from each other, and I will examine them."[20] Upon separation, Daniel asked each of the Elders the same question: "tell me under what tree you saw them being intimate with each other?"[21] The first Elder answered, "[u]nder a mastic tree" while the second Elder reported, "under an evergreen oak."[22] Daniel convicted the Elders of bearing false witness—illustrating for perhaps the first time the power of witness sequestration.[23]

The story of Susanna has been cited by numerous courts in support of witness sequestration,[24] and likely found its way to the United States through our "inheritance of the common Germanic law."[25] For example, in *James v. Heintz*, a Wisconsin State Court of Appeals noted that witness sequestration is "at least as old as the Bible" and, more specifically, that "[t]he Story of Susanna and the Elders was relied upon almost from the beginning of recorded trials…."[26] There is a reason a Biblical story continues to be cited today—it demonstrates the clear importance of witness separation: to prevent fabrication and collusion.[27] Had the Elders in the Bible been given the opportunity to hear each other's testimony, they could have matched one another's story. Were it not for the Rule, poor Susanna would likely have hanged.

While today the consequences of failing to sequester witnesses might not be as drastic, courts across the country seek to protect against the same risk of fabricated testimony.[28] This rationale was adequately explained by the Supreme Court in *Geders v. United States*: "The aim

19. *Id.* at 13:35–40.

20. *Id.* at 13:35–64.

21. *Id.*

22. *Id.*

23. *See id.*

24. *See, e.g.*, McGill v. Gore Dump Trailer Leasing, Inc., 586 A.2d 829, 831 (1991) ("One of the earliest references to this practice appears in the Bible in the story of Susanna and the elders."); Braswell v. Wainwright, 330 F. Supp. 281, 283 n.1 (S.D. Fla. 1971), *modified*, 463 F.2d 1148 (5th Cir. 1972) ("Daniel's effective use of the practice in the trial of Susanna suggests the genesis of this practice."); James v. Heintz, 478 N.W.2d 31, 36 (Wis. Ct. App. 1991); Skidmore v. Nw. Eng'g Co., 90 F.R.D. 75 (S.D. Fla. 1981).

25. Geders v. United States 425 U.S. 80, 87 (1976) (quoting WIGMORE, *supra* note 15, § 1838) (discussing the origins of the rule of witness sequestration).

26. *James*, 478 N.W.2d at 36.

27. *See Daniel* 13:1–65 (Catholic Version).

28. *See* FED. R. EVID. 615; *see also* L.S. Ayres & Co. v. N.L.R.B., 551 F.2d 586 (4th Cir. 1977) ("[FRE 615] makes sequestration a matter of right rather than discretion."); U.S. v. Ell, 718 F.2d 291 (9th Cir. 1983) (holding FRE 615 is a matter of right and not discretion); U.S. v. Engelmann, 701 F.3d 874 (8th Cir. 2012) (holding the purpose of sequestration is to prevent witnesses from tailoring their testimony to that of prior witnesses and to aid in detection of dishonesty); United States v. Pollack, 640 F.2d 1152 (10th Cir. 1981) (upholding a lower court's granting of a mistrial after a prosecution witness refused to follow sequestration order).

of imposing the rule on witnesses, as the practice of sequestering witnesses is sometimes called, is twofold. It exercises a restraint on witnesses tailoring their testimony to that of earlier witnesses, and it aids in detecting testimony that is less than candid."[29] To the Court's second point, allowing witnesses to testify without first hearing a different recounting of the same event will not only protect against fabrication but will also lead to more candid responses.[30] Forcing witnesses to tell a story without the ability to tailor it to another's testimony "will make available the raw reactions and the individual recollection of each witness unaided by the stimulation of the evidence of any other witness."[31]

In addition to outright fabrication or coercion, this Rule also acts to protect against the *subconscious* alteration of testimony.[32] Imagine two witnesses are present during the same robbery. One remembers the perpetrator wearing a yellow mask, while the other remembers him wearing an orange mask. Each witness is present while the other testifies in court, and the second hears the first mention the mask was yellow. Due to the stress of the situation, and likely length of time between the robbery and the trial, the second witness may subconsciously second guess his own memory. Suddenly, he will remember the perpetrator wearing yellow and testify as such, all without realizing that his memory just changed. "Such shaping [would be] an unconscious reaction to suggestion rather than a deliberate attempt at collusion."[33]

In the same year *Geders* was decided, witness sequestration was codified in FRE 615.[34] In implementing this rule, the Advisory Committee invoked the same common law rationales:

> The efficacy of excluding or sequestering witnesses has long been recognized as a *means of discouraging and exposing fabrication, inaccuracy, and collusion*. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position.[35]

To achieve this goal, FRE 615 today *mandates* witness sequestration at trial upon any party's mere request (and also authorizes the court to do so sua sponte).[36] While the origins of witness

29. 425 U.S. 80, 87 (1976).

30. *See id*.

31. Dunlap v. Reading Co., 30 F.R.D. 129, 131 (E.D. Pa. 1962).

32. *See* James v. Heintz, 478 N.W.2d 31, 36 (Wis. Ct. App. 1991).

33. *Id*.

34. *See* 425 U.S. at 87; FED. R. EVID. 615 (West 1976).

35. FED. R. EVID. 615 Advisory Committee's note (emphasis added).

36. Fed. R. Evid. 615 ("At a party's request, the court must order witnesses excluded so that they cannot hear other witness' testimony. Or the court may do so on its own. But this rule does not authorize excluding: (a) a party who is a natural person; (b) an officer or employee of a party

sequestration may be Biblical in nature, its practice and rationale—to avoid fabrication—is alive and well in American jurisprudence; today, the Rule applies in all federal and state courts across the United States.[37]

B. The History of Depositions and Rule 30

Depositions are a relatively recent discovery tool. Prior to 1938, when the FRCP were first promulgated, pretrial discovery was strictly limited; in cases at law there was no right to oral examination of parties or witnesses before trial.[38] In June 1934, Congress passed the Rules

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that is not a natural person, after being designated as the party's representative; (c) a person whose presence a party shows to be essential to presenting the party's claims or defense; or (d) a person authorized by statute to be present."); *see* U.S. v. Ell, 718 F.2d 291 (9th Cir. 1983) (holding FRE 615 is a matter of right and not discretion). There are three mandatory exceptions and one discretionary exception to this Rule. *See* FED. R. EVID. 615. A party who is a natural person, even upon request from the opposing party, may not be excluded from the courtroom as "[e]xcluding such a person would raise questions of fundamental fairness and, in criminal cases, constitutional issues relating to confrontation and effective assistance of counsel." *Id.* Additionally, if the party is not a natural person, such as the government or a company, the Rules allow one designated representative of that entity to remain in the courtroom. *Id.* The Advisory Committee explains this exception as the "equivalent right" of the natural-party exception —these entities would be at a disadvantage compared to parties who were natural persons. *Id.* Finally, the last mandatory exception states, added in response to the Victim's Rights and Restitution Act of 1990, any person authorized by statute to be present in the courtroom cannot be excluded. This mainly applies to victims in criminal cases. *Id.* In addition, subsection (c) of Rule 615 gives the court discretion to refuse to exclude any person whose presence is deemed "to be essential." *Id.* In theory, this exception could apply to any person, however, in practice, it is most commonly applied to expert witnesses. *See id.*

37. *See* Braswell v. Wainwright, 330 F. Supp. 281, 283 n.1 (S.D. Fla. 1971), *modified*, 463 F.2d 1148 (5th Cir. 1972); *see e.g.*, U.S. v. Engelmann, 701 F.3d 874 (8th Cir. 2012); ALA. R. EVID. 615; ALASKA R. EVID. 615; ARIZ. ST. REV. R. 615.; A.R.E. 615; CAL. EVID. CODE § 777 (West 2017); COLO. R. EVID. 615; CONN. GEN. STAT. § 54-85a (2018); DEL. R. EVID. 615; FLA. STAT. §90.616(1) (2007); GA. CODE ANN. § 24-6-615 (West 2017); HAW. REV. STAT. ANN. § 626-1 (West 2017); IDAHO R. EVID. 615; IND. R. EVID. 615; IOWA R. EVID. 5.615; KAN. STAT. ANN. § 22-2903 (West 2017); KY. R. EVID. 615; ME. REV. STAT. ANN. tit. 6, § 615 (2017); MD. R. EVID. 5-615; MASS. R. CRIM. P. 21; MICH. R. EVID. 615 (West 2017); MINN. STAT. ANN. § 6.615 (West 2017); MISS. CODE ANN. § 6-615 (West 2017); State v. Shay, 339 S.W.2d 799 (Mo. 1960); MONT. CODE ANN. § 26-10-615 (2017); NEB. REV. STAT. ANN § 27-615 (West 2017); NEV. REV. STAT. ANN § 50.155 (West 2017); N.H. R. EVID. 615; N.J. R. EVID. 615; N.M. STAT. ANN. § 11-6-615 (West 2017); People v. Novak, 971 N.Y.S.2d 403 (N.Y. Cnty. Ct. 2013); N.C. R. EVID. 615; N.D. CENT. STAT. ANN § 6-615 (West 2017); OHIO REV. STAT. ANN. § 6.615 (West 2017); OKLA. STAT. tit. 12, § 2615 (West 2017); OR REV. STAT. ANN. § 40.385 (West 2017); PENN. R. EVID. 615; R.I. GEN. LAWS ANN. R. EVID. 615; State v. Jackson, 217 S.E.2d 794 (S.C. 1975); TENN. CODE ANN. § 40-10-103 (West 2017); TEX. CIV. PRAC. & REM. CODE ANN. 615; UTAH CODE ANN. ST. CT. RULES §6-615 (West 2017); VT. STAT. ANN. R. EVID. § 6-615 (West 2017); VA. CODE ANN. § 19.2-265.1 (West 2017); Wash. REV. STAT. ANN. § 6-615 (West 2017); W. VA. CODE ANN. § 6-615 (West 2017); WIS. STAT. ANN. § 906.15 (West 2017); WYO. STAT. ANN. R. EVID. § 6-615 (West 2017).

38. *See* 28 U.S.C. § 635 (1928) (this citation is from the original 1928 bill, although it's been recodified, contemporary legal scholarship still uses the original citation or parallel citations such as U.S. Rev. Stat. § 861, or U. S. Comp. Stat. 1901, p. 661) ("[T]he mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court

Enabling Act, which authorized the Supreme Court to establish rules of procedure for district courts.[39] The purpose of such rules was "to ensure the just, speedy, and inexpensive determination of every action and proceeding" for district courts (these rules would later become the FRCP).[40] Edson Sunderland, one of the primary drafters of the FRCP, was a strong proponent of expansive discovery.[41] He believed that discovery would eliminate surprise at trial and in turn increase efficiency—especially by encouraging settlement when both parties knew the strength of each other's cases.[42] Sunderland argued that the pretrial phase of litigation should be "reformed" such that procedures governing discovery before trial "mimicked those in use at trial itself."[43]

When the FRCP were promulgated, the Advisory Committee accomplished Sunderland's goal by "redefining" the function of a pretrial oral examination[44] and authorizing the practice by rule: "[T]he testimony of any person . . . may be taken at the instance of any party by deposition upon oral examination . . . for the purpose of discovery or for use as evidence in the action or for both purposes."[45] As such, with the promulgation of the FRCP came the birth of the modern deposition.[46]

A deposition is the sworn testimony of any person given before trial.[47] Today, depositions are the most effective[48] and most widely used[49] discovery devices. It is effectively a question-and-answer session between the "witness" (that is, the deponent) and one party's attorney, so the attorney can obtain information in preparation for trial.[50] Under

except as hereinafter provided."); Ezra Siller, *The Origins of the Oral Deposition in the Federal Rules: Who's in Charge?*, 10 SETON HALL CIRCUIT REV. 43, 45 n.11, 47–48 (2013). The Supreme Court held that only federal statutory law could authorize oral examination for discovery—at that time, there was no such federal statute, Hanks Dental Ass'n v. Int'l Tooth Crown Co., 194 U.S. 303, 309 (1904) (citing Nat'l Cash Register Co. v. Leland, 94 F. 502 (1st Cir. 1899) (holding that the provision prohibits serving interrogatories upon an adverse party and oral examinations of parties and witnesses in advance of the trial, except when permitted by federal statutes), *cert. denied*, 175 U.S. 724 (1899)).

39. The Rules Enabling Act, 28 U.S.C. § 2071–77.

40. FED. R. CIV. P. 1.

41. *See* Siller, *supra* note 37, at 64.

42. *Id.*

43. *Id.*

44. *Id.*

45. FED. R. CIV. P. 26(a) (1938) (now FED. R. CIV. P. 30(a)(1) with some changes in phrasing).

46. For an extremely expansive, in-depth overview of the history of depositions, see Siller, *supra* note 37.

47. *Id.*

48. 6 FLA. PRAC., *supra* note 10.

49. WOLFSTONE, *supra* note 10, at § 2.

50. *See id.*; *What Happens During a Deposition?,* Law Offices of Seth Kretzer (Apr. 29, 2021, 15:35 PM), https://kretzerfirm.com/what-happens-during-a-deposition/.

certain circumstances, deposition transcripts may be used as a stand-in for trial testimony.[51] Still, the primary purpose of a deposition is to give counsel an opportunity to ascertain the deponent's knowledge, gauge what the witness's testimony would be at trial, and allow counsel to flesh out the strengths and weaknesses of her case.[52] In fact, deposition testimony may often determine whether a case is settled or tried.[53] Because approximately ninety-nine percent of civil actions never reach trial, depositions are often the only opportunity to obtain sworn oral testimony from witnesses and the adverse party.[54] Consequently, the impact of depositions on settlement negotiations is invaluable.[55] Depositions have become so vital to civil litigation that "any attorney who does not make adequate use of the rules governing oral depositions may commit the egregious sin of failing to represent his client effectively and diligently."[56]

Rule 30 governs all aspects of depositions,[57] although this Note focuses on Rule 30(c)(1). This subsection addresses witness examination and cross examination.[58] As currently written, the subsection reads: "The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, *except Rules 103 and 615*."[59] In other words, per federal law, deponents—even those who may later testify at trial—are not required to be sequestered from other

51. WOLFSTONE, *supra* note 10, at § 10.

52. *Id.* at § 2.

53. *Id.* ("Information revealed on oral depositions may determine whether the case should be settled or tried."). Moreover, deponents are required to answer virtually any question they are asked during depositions. This allows the opposing attorney to gain much more information than if the witness were to be questioned at trial—giving opposing counsel even more of an advantage. *When Can You Refuse to Answer A Deposition Question?*, Binnall Law Group (January 12, 2023), https://perma.cc/3NL8-X9J6.

54. Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 28 (2014) ("Today, approximately 1 percent of all civil cases filed in federal court are resolved by trial."); LONNIE E. GRIFFITH, JR., MARY BABB MORRIS, & ERIC C. SURETTE, 23 AM. JUR. 2D DEPOSITIONS AND DISCOVERY § 104.

55. *See* DUNNE, *supra* note 10 ("Few pre-trial procedures have as much impact on the direction and outcome of litigation as the deposition of the adverse expert."); 2 N.Y. PRAC., COM. LITIG. IN N.Y. ST. CTS. § 6:53 (5th ed.) ("Depositions of witnesses may significantly impact settlement evaluation."); *Can a Deposition Lead to a Settlement?,* DEP. ACAD., https://depositionacademy.com/do-depositions-lead-to-settlement/ (last visited Oct. 28, 2022).

56. SAWAYA, *supra* note 10.

57. Subsection (a) of Rule 30 governs when depositions may be taken; subsection (b) governs the Notice of Deposition; subsection (c) governs Examination and Cross-Examination and other related matters; subsection (d) governs Duration; subsection (e) governs Review by the witness; subsection (f) governs certification and delivery. FED. R. CIV. P. 30.

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

59. *Id.* (emphasis added). FRE 103 governs various aspects of trial-court rulings to admit or exclude evidence and is not relevant to this Note.

witnesses' depositions and cannot be excluded from them by a mere party request.[60]

If a party wishes to sequester a particular witness from a particular deposition, their only recourse lies with a protective order.[61] Governed by FRCP Rule 26(c), protective orders allow the judge to "designat[e] the persons who may be present while discovery is conducted" to protect a party or person from "annoyance, embarrassment, oppression, or undue burden or expense."[62] They are granted only upon the showing of good cause.[63]

C. The Intersection of FRE 615 and Rule 30

Prior to 1993, Rule 30(c) did not have exceptions.[64] It simply read: "examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence."[65] Because of the broad scope of 30(c) and a lack of appellate guidance on the matter, the majority of district courts held that FRE 615 applied to depositions, thereby allowing witnesses to be sequestered just as they would at trial.[66] A minority of courts, however, construed 30(c) narrowly and determined that "the witness rule" did not apply to depositions.[67] This Note examines the reasoning behind each position in the subsection that follows.

1. The Majority Practice vs. Minority Practice

Although no appellate court addressed the issue of whether FRE 615 applied to depositions before the Amendment was promulgated, many district courts took to the task.[68] The majority of courts found that

60. *Id.*

61. *Id.* at advisory committee's note.

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

63. *Id.*

64. FED. R. CIV. P. 30 (West 1992).

65. *Id.*

66. Steven M. Zager, *Invoking the Rule of Sequestration of Witnesses During Discovery in Civil Litigation*, 52 TEX. B. J. 662, 662 (1989) ("The court held that Rule 615 applies to depositions . . . and a majority of other courts have arrived at the same conclusion.").

67. *See id.* ("A minority of courts have held that the [FRCP] allow the exclusion of person from depositions only upon showing good cause…"); Michael D. Moberly, *Can't We All Just Play by "The Rule"? Sequestering Witnesses During Pretrial Discovery,* 33 AM. J. TRIAL ADVOC. 447, 456 (2010) ("[M]ost courts considering the issue adopted the Lumpkin court's view and held that Rule 615 applied in federal depositions.").

68. *See, e.g.*, Lumpkin v. Bi-Lo, Inc., 117 F.R.D. 451 (M.D. Ga. 1987); Naismith v. Pro. Golfers Ass'n, 85 F.R.D. 552 (N.D. Ga. 1979); In re Shell Oil Refinery, 136 F.R.D. 615 (E.D. La. 1991); Dardashti v. Singer, 407 So.2d 1098 (Fla. Dist. Ct. App. 1982); In re Marks, 135 B.R. 344 (Bankr. E.D. Ark. 1991); Williams v. Elec. Control Sys., Inc., 68 F.R.D. 703 (E.D. Tenn. 1975).

FRE 615 did in fact apply to depositions and, consequently, sequestered witnesses upon party request.[69] One of the leading case was *Lumpkin v. Bi-Lo, Inc.*, a case out of the Middle District of Georgia.[70] In *Lumpkin*, defense counsel arrived at the plaintiff's deposition with two company employees.[71] Both employees claimed to be party representatives and insisted on being present for the plaintiff's deposition.[72] Plaintiff's counsel opposed and requested the employees leave, arguing that per FRE 615 only one party representative was allowed to attend.[73] The court agreed, holding that "Federal Rule of Evidence 615 [*did*] apply to depositions," and therefore, per the rule, the plaintiff was entitled to sequestering the defense's witness during his deposition.[74]

Nevertheless, a few courts during this time held that FRE 615 did not apply to depositions.[75] The leading case for the minority practice was *BCI Communication Systems, Inc. v. Bell Atlanticom Systems, Inc.*[76] In *BCI*, the defendant sought to exclude potential plaintiff witnesses from the depositions of other defendants in the case.[77] Although presented with the holding of *Williams v. Electric Control Systems, Inc.*—which followed the majority practice—the court in *BCI*

69. *See* Zager, *supra* note 65; *see, e.g.*, *In re Shell Oil Refinery*, 136 F.R.D. at 617 ("If a deponent does not fall within one of Rule 615's three exceptions to sequestration, then Rule 615's mandatory rule of sequestration applies."); *In re Marks*, 135 B.R. at 356 ("This Court follows the reasoning set forth *Lumpkin v. Bi–Lo, Inc* . . . and finds that Rule 615, Federal Rules of Evidence, applies during depositions."); *Williams*, 68 F.R.D. at 703 (holding that because FRE 615 does applies to depositions, and experts are not permitted to be sequestered at trial under Rule 615, the expert witness was not permitted to be excluded from the deposition); *Lumpkin*, 117 F.R.D. at 457 ("[T]his court finds that Rule 615 of the Federal Rules of Evidence does apply to depositions."); *Naismith*, 85 F.R.D. at 567 ("It is clear that the Federal Rules of Evidence apply at depositions.").

70. *Lumpkin*, 117 F.R.D. at 457. *Lumpkin* is one of most cited cases pre-1993 when referencing automatic witness sequestration during depositions. *See* Moberly, *supra* note 66; BARRY A. LINDAHL, 11 IA. PRAC., CIVIL & APPELLATE PROCEDURE § 26:4 (2022 ed.); JEFFREY S. KINSLER, VA. PRAC. CIV. DISCOVERY § 5:10.

71. *Lumpkin*, 117 F.R.D. at 457.

72. *Id.*

73. *Id.*

74. *Id.* Per one of FRE 615's exceptions, non-natural parties are allowed one party representative to be always present in the courtroom, however only one. FED. R. EVID. 615(b).

75. *See* BCI Commc'n Sys., Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D. 154 (N.D. Ala. 1986); Smith v. S. Baptist Hosp. of Fla., Inc., 564 So.2d 1115 (Fla. Dist. Ct. App. 1990); Kerschbaumer v. Bell, 112 F.R.D. 426 (D.D.C. 1986); Pryor Auto. Supply, Inc. v. Est. of Edwards, 815 P.2d 202 (Okla. Ct. App. 1991).

76. Moberly, *supra* note 66, at 545 ("*[BCI]* is the federal case most often cited by courts refusing to sequester witnesses during discovery."); *see BCI*, 112 F.R.D. at 154. Other cases that follow the minority view include *Kerschbaumer*, 112 F.R.D at 426, all of which seemingly ignores the well-established rationale given for witness sequestration.

77. *BCI*, 112 F.R.D. at 154.

"respectfully decline[d]" to accept *Williams* as persuasive.[78] *BCI* held a "party is not entitled to invoke 'The Rule of Sequestration'. . . as a matter of right, in oral depositions. . .."[79] Thus, the defendants were required to show good cause to exclude the requested witnesses—which, the court held, they had not.[80] Importantly, *BCI* lacked sufficient explanation for their minority practice.[81] The flaws in their reasoning are further discussed in *Part II.B*.

D. How the 1993 Amendment to Rule 30 Changed the Law

The majority practice of excluding witnesses upon request during depositions became irrelevant after the 1993 Amendment.[82] As amended, Rule 30(c) states: "The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, *except* Rules 103 and *615*…."[83] This removes the rule of automatic witness sequestration from the rules governing depositions.[84] Additionally, the Amendment instructed judges to order exclusions only "under Rule 26(c)(5) [now 26(c)(1)(E)] when appropriate."[85] Under current law, parties must therefore obtain a protective order if they wish to exclude any witness.[86] Indeed, FRCP 26(c)(1)(E) states:

> A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending… The court may, for *good cause*, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (E) designating the persons who may be present while the discovery is conducted….[87]

Notably, the standard for granting a protective order is a showing of "good cause."[88] It requires the moving party to establish "the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory

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78. *Id.*; Williams v. Elec. Control Sys., Inc., 68 F.R.D. 703 (E.D. Tenn. 1975) (holding that because FRE 615 does applies to depositions, and experts are not permitted to be sequestered at trial under Rule 615, the expert witness was not permitted to be excluded from the deposition).

79. *BCI*, 112 F.R.D. at 154.

80. *Id.*

81. *See* discussion *infra* Part II.B.

82. *See* FED. R. CIV. P. 30(c) advisory committee notes. By removing FRE 615 from the rules governing depositions, these courts were no longer *allowed* to sequester upon mere request. *See id.*

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

84. *See id.*

85. *Id.* at advisory committee's notes.

86. *Id.*

87. FED. R. CIV. P. 26(c)(1)(E) (emphasis added).

88. *Id.*

statements"—a standard far more demanding than the mere attorney request prior to 1993.[89]

The Advisory Committee failed to provide an explanation for this change.[90] The Committee only noted it was "addresses[ing] a recurring problem as to whether other potential deponents can attend a deposition."[91] Notably, in addition to the lack of true explanation, the Committee "resolved" the problem contrary to the rulings of a majority of courts. An alteration in standard of such magnitude requires an explanation to make it legitimate—otherwise, the change seems arbitrary. Without this, the disparity between the two different standards to sequester witnesses is unjustifiable and perhaps should not have been made.[92]

II. WHY THE RULES COMMITTEE GOT IT WRONG

Given the impact depositions have on modern civil litigation, and the subsequent significance of truthful deposition testimony, the same protection against untruthful or otherwise tainted testimony should exist at both trials and depositions.[93] The Rules Committee resolved the conflict regarding the application of FRE 615 to depositions the wrong way—and gave no reason for doing so.[94] *Part II.A* begins by discussing the lack of justification for this change in standard, especially when compared to the justification given for other major decisions by the Rules Committee. Even more suspect is the Committee's decision to resolve a conflict by siding with the *minority* practice.[95] *Part II.B* will explain how the new standard imposed is too high—protective orders under this rule are granted far less than the automatic requirement of sequestration under FRE 615, likely leading to tainted testimony.[96] Additionally, even when orders are granted, it is

89. *See* United States v. Garrett, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978).

90. *Id.*

91. FED. R. CIV. P. 30(C) advisory committee notes.

92. *See infra* Part II.A–C; Santos v. Crowell, No. CV GLR-15-3907, 2016 WL 6068082 (D. Md. Oct. 17, 2016); In re Terra Int'l, Inc., 134 F.3d 302 (5th Cir. 1998); Smith & MacQueen, *supra* note 53; ANDREA KUPERMAN, COMM. R. PRAC. & P., CASE LAW ON ENTERING PROTECTIVE ORDERS, ENTERING SEALING ORDERS, & MODIFYING PROTECTIVE ORDERS 1 (2010).

93. *See* Smith & MacQueen, *supra* note 53; DUNNE, *supra* note 10; SAWAYA, *supra* note 10.

94. *See* Fed. R. Civ. P. 30(c) advisory committee notes; *infra* Part III.A(i).

95. Removing FRE 615 from the rules governing depositions is consistent with the minority practice seen in cases such as BCI Commc'n Sys., Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D. 154 (N.D. Ala. 1986), that did not apply FRE 615 to depositions before the amendment.

96. *See* Fed. R. Evid. 615; Moberly, *supra* note 66.

done so unevenly[97] and causes undue delay of the litigation process.[98] Finally, *Part II.C* will discuss a materializing theory on the public's right to attend a deposition and why a protective order may not be needed because of it.

A. Lack of Rationale for Deciding with Minority

1. No Legislative History to Be Found

In the notes accompanying Rule 30's Amendment, the Advisory Committee gave little explanation for why it removed FRE 615 from the list of rules governing depositions.[99] The notes also lacked any legal or policy justification behind the change; they simply stated:

> . . . [T]he revision addresses recurring problem as to whether other potential deponents can attend a deposition. Courts have disagreed, some holding that witnesses should be excluded through invocation of Rule 615 of the evidence rules, and others holding that witnesses may attend unless excluded by an order under Rule 26(c)(5). The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate.[100]

These notes are notably less explanatory than notes accompanying other FRCP amendments. Generally, the Rules Committee explains the rationale or justification behind amendments.[101] For example, the notes accompanying an amendment to Rule 30(d)—written the same year as Rule 30(c)'s amendment—state that "unduly prolonged" or "unfairly frustrated" depositions were the reason for the amendment, which limited the duration of depositions.[102] Here, however, there was no such language. While resolving a circuit split is a legitimate rational for amending a rule,[103] the Committee gave no rational or policy argument as to why the split was resolved *in this way*.

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97. WRIGHT & MILLER, *supra* note 2.

98. *See* discussion *infra* Part III.B(ii); Ashley A. Kutz, *Rethinking the "Good Cause" Requirement: A New Federal Approach to Granting Protective Orders Under F.R.C.P. 26(c)*, 42 VAL. U. L. REV. 291 (2007) (discussing the nature of good cause and protective orders); WRIGHT & MILLER, *supra* note 2.

99. *See* FED. R. CIV. P. 30(c) advisory committee's notes.

100. *Id.*

101. *Id.*

102. *Id.*; *see also* FED. R. APP. PRAC. 4 advisory committee's notes (notes to the 2002 Amendment to this rule discussed the circuit splits at length, highlighting the disagreement and the reason for deciding for one interpretation rather than the other).

103. Moreover, it seems the Advisory Committee misstated the jurisprudence in the courts—obtaining witness sequestration by request was the majority practice among the lower courts. There was only a handful of contrary cases.

There is also little discussion of the rationale behind the change to Rule 30(c) in the rest of its legislative history.[104] Normally, the legislative history behind proposed amendments is extensive.[105] The Rules Committee meets two or three times a year to discuss pending amendments to current rules, propose certain changes, and review draft amendments.[106] During these meetings, minutes of each topic of discussion and proposals are recorded and made available to the public.[107] Committee Reports, Preliminary Drafts, and outside commentary for each proposed amendment are all published as well.[108] Indeed, the promulgation of new amendments is carefully documented—in part because of the complicated nature of the process.[109] From start to finish, the process of amending the FRCP takes approximately three years.[110] Because the process is so thorough, it is

104. *See e.g.*, *Records of Rules Committee,* US COURTS, https://perma.cc/B79A-JP99 (last visited Mar. 9, 2023); *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (July 4, 1990), https://perma.cc/U4ZG-NAZJ; *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (Nov. 1990), https://perma.cc/YA45-RZCE; *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (Feb. 1991) https://perma.cc/HBK9-EDC2; *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (May 1991), https://perma.cc/3MET-TJBD; *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (Nov. 1991), https://perma.cc/AHT9-XL6K; *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (Feb. 1992) https://perma.cc/66DV-4MJY; *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (May 1992), https://perma.cc/ML34-89DU; *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (Nov. 1992), https://perma.cc/YUX3-VP9Z; *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (May 1993), https://perma.cc/ML34-89DU; *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (Oct. 1993), https://perma.cc/M85Z-S8U7; *Committee Report*, ADVISORY COMM. R. PRAC. & P. (January 1990), https://perma.cc/6MCX-WZ33; *Committee Report*, ADVISORY COMM. R. PRAC. & P. (January 1990), https://perma.cc/7FW2-P2YJ; *Committee Report*, ADVISORY COMM. R. PRAC. & P. (May 1991), https://perma.cc/HZ4R-BPV3; *Committee Report*, ADVISORY COMM. R. PRAC. & P. (May 1992), https://perma.cc/6GRZ-ERPZ; *Committee Report*, ADVISORY COMM. R. PRAC. & P. (Nov. 1992), https://perma.cc/7VB5-4ACF. It is important to note that while all the Advisory Committee Meeting Notes and Committee Reports are available for years 1989–1993 (the relevant years), Rules Suggestions, Rules Comments, Preliminary Drafts of Proposed Rule Amendments are not publicly available for all dates. Thus, the data set is incomplete. While some documentation is not available, the analysis will proceed with the documents available.

105. *See e.g.*, note 131 and accompanying discussion; *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (July 4, 1990), https://perma.cc/3RV9-KS29; *Committee Report*, ADVISORY COMM. R. PRAC. & P. 73 (May 1992), https://perma.cc/SY5N-DM47 (note the extensive discussion in this report surrounding Rule 30(b), and other proposed amendments).

106. *Open Meetings and Hearings of the Rules Committee,* US COURTS, https://perma.cc/SLB5-G8H8 (last visited Mar. 9, 2023).

107. Minutes of the meetings are posted on the US Courts' website. See *Meeting Minutes,* US COURTS, https://perma.cc/H2XN-UEN4 (last visited Mar. 9, 2023).

108. *See e.g.*, *Records of Rules Committee,* US COURTS, https://perma.cc/ZK6J-VA6K (last visited Mar. 9, 2023).

109. *See supra* text accompanying note 104.

110. The process of promulgating an amendment is as follows. First, the Advisory Committee on the Civil Rules of Procedure evaluates suggestions and proposals for rule amendments in the

natural for the purpose or intent behind the amendment to become apparent through looking at this documentation. Here, no purpose or explanation emerges.

Despite the complexity of discussions, opportunity for outside commentary, and the multitude of stages an amendment must go through during this process, there are only vague mentions of Rule 30(c) in the hundreds of pages of documents available for the four years prior to 1993.[111] In contrast, other amendments, such as those to Rule 30(a)(2)(A), have multiple paragraphs (and in some cases, pages) of discussion across different minutes and committee reports.[112] Rule 30(c) is only mentioned the handful of times outlined below. Moreover, of the minimal substantial commentary regarding this amendment, it is all negative—disfavoring removing FRE 615 from the original rule.[113] Other amendments have commentary both in support of and against their promulgation.[114]

The most significant references to Rule 30(c) in the legislative history are found in the May 1992 Committee Report; the report includes a partial description of what the amendment will entail.[115]

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first instance. Next, if the Advisory Committee decides to purse a proposal, it may seek permission from the Standing Committee—which oversees all five rules advisory committees—to publish a draft of the contemplated amendment. The Advisory Committee can also change their proposed amendment based on comments from the bench, bar, and the general public. The Standing Committee then independently reviews the findings of the Advisory Committee, and if satisfied, recommends changes the Judicial Conference, which in turn recommends changes to the Supreme Court. Finally, if the Supreme Court concurs with the proposed amendments, it officially promulgates the revised Rule by May 1 of that year, to take effect no earlier than December 1 of that year. *How the Rulemaking Process Works,* US COURTS, https://perma.cc/HW6A-B7GD (last visited Mar. 9, 2023).

111. *See supra* text accompanying note 104; *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (July 4, 1990), https://perma.cc/S2HF-GUWK ("Revision will be needed to conform Rule 30 to Rule 26 on the point of beginning."); *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (May 1992), https://perma.cc/LG5G-GLLG ("The mechanics of protective orders sought during deposition was considered.").

112. *See supra* notes 103–110 and accompanying text; *Committee Report*, ADVISORY COMM. R. PRAC. & P. 198–213 (May 1992), https://perma.cc/5CA6-FFXC.

113. *See Committee Report*, ADVISORY COMM. R. PRAC. & P. (May 1992), https://perma.cc/G39H-SDMR ("ATLA opposes this revision, arguing that any limitations on discovery depend on defendants' compliance with Rule 26 which they do not expect to occur . . . ABTNCY supports the alternative methods of recording depositions. With respect to subdivision (c), it urges that Rule 615 should apply to depositions intended for use at trial, and that experts should be permitted to attend depositions of opposing experts . . . Hunton & Williams of Richmond questions the exclusion of Evidence Rule 615 . . . The Los Angeles Chapter of the Federal Bar Association . . . [objects] to the Note stating that anyone can attend a deposition unless the court orders otherwise…").

114. *See supra* notes 103–110 and accompanying text; *Committee Report*, ADVISORY COMM. R. PRAC. & P. 198–213 (May 1992**),** https://perma.cc/H9TJ-UMND.

115. *See Committee Report*, ADVISORY COMM. R. PRAC. & P. 73 (May 1992), https://perma.cc/G39H-SDMR. ("The revision requires that before filing a motion for a protective order the movant must confer—either in person or by telephone—with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the

Additionally, the Committee Report includes a Summary of Comments from the Bar.[116] In this section, all various Rule 30 subsection comments are grouped together.[117] The Summary labels the amendments to Rule 30 as "controversial."[118] Of the over 400 comments submitted to the proposed Amendment, the vast majority focused their comments on the limits to length and number of depositions.[119] Only four of the commentators, however, mentioned the removal of FRE 615 to the application of depositions.[120] Each opposed the exclusion of FRE 615 and expressed concern about its application.[121] The Rules Committee ignored this unanimous opposition and recommended the proposal.[122]

While it is possible the Committee deemed these comments irreverent, as they only made up approximately one percent of the total commentary, they were, importantly, the only commentary regarding 30(c)—and each of them opposed the amendment. Despite the small percentage of total comments, these consisted of one hundred percent of the commentary regarding *this* amendment. It seems the legal community was generally not talking about, nor thinking about, this issue.[123] Even if this issue was not as controversial at the time the amended was passed, the lack of thought by the Committee may be the problem itself. Perhaps the Rules Committee did not fully understand the implications the amended would have—and in turn, resolved the dispute the wrong way. Either way, we still do not know why the Committee resolved the conflict in the way they did, because they did not give an explanation.

Other references to the proposed amendment to Rule 30(c) were vague and failed to address the motivation for this rule change.[124] The

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movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated in the certificate."). Note, while this does give a brief description of part of the amendment, it still does note any justification or debate about the amendment. *See id.*

116. *Id.* at 198.

117. *Id.*

118. *Id.*

119. *Id.* at 198–213.

120. *Committee Report*, ADVISORY COMM. R. PRAC. & P. 198-213 (May 1992), https://perma.cc/G39H-SDMR.

121. *See supra* note 113.

122. *See id.* at 214 ("The Committee is unanimous in recommending adoption of the proposed amendment of Rule 30."); FED. R. CIV. P. 30(c) (promulgating the amendment).

123. It seems even after the Rule was promulgated, legal commentators did not understand the implications of the argument. *See* Kelleher, *supra* note 11.

124. *See supra* text accompanying note 104; *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (July 4, 1990), https://perma.cc/GJQ5-VYG5 ("Revision will be needed to conform Rule 30 to Rule 26 on the point of beginning."); *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (May 1992), https://perma.cc/8L9L-A873 ("The mechanics of protective orders sought during deposition was considered.").

Advisory Committee on the Rules of Civil Procedure's May 1992's meeting minutes stated: "The mechanics of protective orders sought during deposition was considered."[125] Other than this, the only other mention of Rule 30(c) was a casual comment in 1992 stating: "Revision will be needed to conform Rule 30 to Rule 26 on the point of beginning."[126] Rule 30(c) was never mentioned as an amendment to be revised or discussed at a later meeting, nor was there any commentary about the substance or rationale for resolving this conflict in a particular way.[127]

While the lack of legislative history pertaining to Rule 30(c) is not entirely dispositive, a near absence of discussion over five years is a cause for concern—raising doubt about the Amendment's legitimacy. First, making substantive amendments without debate was not, and is not, normal practice for the Rules Committee.[128] Second, the only substantive mentions of Rule 30(c) were unanimously in *opposition* to the Amendment.[129] Third, there was vast commentary on different amendments to the *same* rule in the *same* year; while equally important, only the changes pertaining to the other subsections were discussed at length.[130] The lack of discussion lends to the argument that

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125. *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES 4 (May 1992), https://perma.cc/8L9L-A873.

126. *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (July 4, 1990), https://perma.cc/MLE9-RLHK.

127. *See supra* text accompanying note 104.

128. *See id.*

129. *See supra* note 113.

130. For example, the Rule 30(d) Amendment regarded the permissibility of video recording during depositions. This was discussed at length, across many meetings over the course of many years prior to the amendment. *Minutes of Civil Rules Committee Meeting*, ADVISORY COMM. ON THE CIV. RULES (July 4, 1990), https://perma.cc/LLJ6-6UD6 ("Mr. Waga made a presentation with respect to Rule 30. He observed that almost all the judges in America had rejected electronic recording. He objected to the FJC study on the ground that his group had not been invited to participate in the study. He noted that electronic recording or videotape can fail. Why can't we leave the rule the way it is?"). This is just one comment of many of its kind, found among the legislative history of Rule 30 from 1990–1993. Additionally, another proposed amendment during this same time period was limiting the length and number of depositions. A summary of the Committees thoughts, rationale, and justification can be found in the May 1992 Committee report:

> "As published, the draft imposed presumptive limits on the number (10 per side, including depositions under Rule 31) and on the length (6 hours per deposition). While many of the comments supported these limits, many opposed any limits, many opposed any presumptive limits (asserting that limits should be imposed only by the court on a case-by-case analysis), and many opposed either or both of the limits as too restrictive, particularly in certain types of cases. The Advisory Committee continues to believe that the presumptive limit on the number of depositions—which can, and in many case should, be changed by the court in the scheduling order or by written stipulation of the parties—is workable and desirable as a means for forcing litigants to be more selective in their deposition practice. A majority of the Committee, however, concluded that any presumptive limit on the length of depositions is a matter more properly left at this

the Committee may not have thought this amendment was important and in turn did not fully consider its potential consequences.

The purpose of the FRCP is to "secure the just . . . determinations of every action and proceeding." If the procedure in which the amendment was promulgated is not legitimate, how is an attorney to trust that this rule is truly in furtherance of a "just determination" for the plaintiffs? Ultimately, we will never know the true rationale behind the Amendment to Rule 30(c) or whether its ramifications were ever truly considered. This should be cause for concern.

2. Common Law Rationale Answers No Questions

Seeing as the legislative history provides no answers, perhaps the common law will. This section analyzes case law at the time the Amendment was passed to discern why the Committee's amended Rule 30(c) is in accordance with the minority position. Ultimately, the reasoning of the minority courts is weak; an in-depth analysis reveals contradictory holdings and a complete rejection of well-established principles for witness sequestration.[131]

Indeed, the most evident contradiction can be found almost immediately in the leading case for the minority practice—*BCI*.[132] The court in *BCI* rested its holding on *Skidmore v. Northwest Engineering Co.,* a case that arguably *does* apply FRE 615 to depositions.[133] *Skidmore* acknowledged that even if FRE 615 applied to depositions, certain witnesses—expert witnesses—are exempt from sequestration.[134] Accordingly, the court in *Skidmore* held a plaintiff must show good cause to exclude an expert witness from a deposition,

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time for experimentation under the Civil Justice Reform Act, and the draft has been changed to effect this result."

Committee Report, ADVISORY COMM. R. PRAC. & P. 210 (May 1992), https://perma.cc/6GRZ-ERPZ. No such summary of explanation for the amendment to Rule 30(c) was found in *any* of the available documentation.

131. *See* BCI Commc'n Sys., Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D. 154 (N.D. Ala. 1986) (citing Skidmore v. Nw. Eng'g Co., 90 F.R.D. 75 (S.D. Fla. 1981); Kerschbaumer v. Bell, 112 F.R.D. 426 (D.D.C. 1986).

132. *See BCI*, 112 F.R.D. at 154.

133. *See id.* (citing *Skidmore*, 90 F.R.D. at 76); Lumpkin v. Bi-Lo, Inc., 117 F.R.D. 451 n.1 (M.D. Ga. 1987). *Skidmore* relied upon the theory of ejusdem generis, a common tool of statutory interpretation meaning "of the same kind," to allow a plaintiff's expert to attend the deposition of defendant's employee, ignoring a request that the expert be excluded. The court believed Rule 26(c)(5) superseded Rule 30(c) because of the expansiveness of Rule 26. It held that "the Federal Rules of Civil Procedure allow exclusion of persons from discovery only in exceptional circumstances, and then only upon motion and order of the court.".

134. See *Skidmore*, 90 F.R.D. at 75; FED. R. EVID. 615. At trial, the plaintiff must make a showing their presence is essential to the presentation of the case. *Id.*

in accordance with FRE 615.[135] By contrast, the court in *BCI* expanded *Skidmore*'s theory beyond expert witnesses, stating that counsel must make a showing of good cause to sequester *any* witness.[136] It gave no explanation for doing so, beyond the idea that depositions should be "open" as a policy matter.[137] This alone makes *BCI*'s reliance on *Skidmore* as a reason *not* to apply FRE 615 invalid. *BCI* never recognized that *Skidmore* was in fact *applying* the rule that *BCI* was intending to reject.[138] The case was decided on an incorrect reading of precedent and its holding is therefore illegitimate—meaning that following the majority practice, the practice the Rules Committee deemed incorrect, was clearly the correct course of action.

Another court that adopted the minority position attempted to provide a more in-depth rationale.[139] In *Kerschbaumer v. Bell*, the court expanded on *BCI*'s idea of leaving discovery "open" for policy reasons.[140] It stated that the exclusion of witnesses "should be invoked sparingly, else the openness on which our legal system properly prides itself would be impaired," and it feared a slippery slope that could ultimately destroy that openness.[141] Additionally, the court suggested in dicta that the presence of other deponents actually promotes truthful testimony––by allowing opposing parties to react to the recollections of their opponents and thus offer a fresher version of their own.[142]

Each of these arguments is unfounded. To the first point, the Supreme Court has ruled there is a difference between an open *trial* proceeding and an open *discovery* process.[143] In *Seattle Times Co. v. Rhinehart*, the Court held that a protective order excluding a reporter from a deposition did not violate any of the reporter's rights because there is no public right to attend a deposition.[144] Further, the Court

135. *Skidmore*, 90 F.R.D. at 75. At trial, per FRE 615, a party can, upon a showing of good cause, refuse to sequester an expert witness. Although the burden of sequestration in *Skidmore* was opposite that of trial, the sentiment of expert witnesses being an exception to the rule on sequestration and the requirement of a showing of good cause, remains intact. The court requiring good cause to exclude expect witnesses is not inconsistent with FRE 615—it is actually *applying* the Rule. *See id.*; *Lumpkin*, 117 F.R.D. at 451 n.1 (M.D. Ga. 1987).

136. *See BCI*, 112 F.R.D. at 154; *Lumpkin*, 117 F.R.D. at 451, n.1.

137. *BCI*, 112 F.R.D. at 154.

138. *Id.* Ultimately, BCI is a bad case with weak, contradictory reasoning. It should not have created a standard for other courts to follow—and in fact, most courts did not follow it— and the reasoning certainly should not have been the basis for an amendment to the FRCP.

139. *See* Kerschbaumer v. Bell, 112 F.R.D. 426 (D.D.C. 1986) (focusing only on the applicability and standard for invoking 26(c) and does not discuss the applicability of 615 itself).

140. *Id.* at 430.

141. *Id.*

142. *Id.*

143. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

144. *Id.*

stated that "[p]retrial depositions and interrogatories *are not public components* of a civil trial. Such proceedings were not open to the public at common law…and, in general, they are *conducted in private* as a matter of modern practice."[145] The *Kerschbaumer* court's fear of "impairing" the openness of the legal system through sequestration is thus an illegitimate one.[146] According to the Supreme Court, depositions are not intended to be open to the public to begin with.[147]

To the *Kerschbaumer* court's second point, witness sequestration during testimony is a longstanding practice in our legal system precisely because viewing another's testimony does *not* promote more accurate testimony.[148] Hundreds of years of common practice and jurisprudence demonstrate that a lack of sequestration leads to (or at least creates the risk of) collusion and story matching, whether or not it is done consciously.[149] It certainly does not lead to more truthful testimony.[150] It is unclear why the court ignored hundreds of years of legal practice to make this point.

The foundational case for the minority view misapplies precedent, making this approach shaky at its best and illegitimate at its worst.[151] Nevertheless, the reasoning present in *BCI* is the only possible explanation available as to why the Committee may have resolved the conflict in its favor.[152] Ultimately, however, this is not enough. After looking into the legislative history and the rationale lower courts stated for following the minority practice, we still do not have a clear explanation for why the Rules Committee resolved the conflict in the way it did.[153] The change in standard remains unjustified and contrary to the common practice of the Rules Committee themselves.[154] An amendment that makes such a drastic change to the majority practice of courts—and one that has such significant ramifications on the truthfulness of testimony—warrants an adequate explanation. Yet, it remains absent today.[155]

145. Amato v. City of Richmond, 157 F.R.D. 26 (E.D. Va. 1994) (citing *id.*) (emphasis added).
146. *See id.*
147. *See id.*
148. *See* MUELLER, *supra* note 4; Slovenko *supra* note 3, at 447.
149. *See supra* Part I.A; James v. Heintz, 478 N.W.2d 31, 36 (Wis. Ct. App. 1991).
150. *See* MUELLER, *supra* note 4; Slovenko *supra* note 3, at 447.
151. *See supra* note 154 & accompanying text.
152. *See supra* Part II.B.
153. *See id.*
154. *See supra* Part II.A.
155. *See* FED. R. CIV. P. 30(c).

B. Protective Order Standard Too High

Under the 1993 Amendment, parties must obtain a protective order to exclude potential deponents or witnesses from depositions.[156] As discussed previously, protective orders require a showing of good cause—requiring the movant to provide a "particular and specific demonstration of facts."[157] Because of this high standard protective orders are rarely granted, thus opening the door to the tainting of testimony.[158] And even when they are granted, protective orders cause undue delay in the litigation process.[159]

1. Tainting Testimony

Because of the high standard of good cause, protective orders are very difficult to obtain.[160] Even if these orders were granted semi-frequently, protective orders to sequester witnesses are certainly granted less often than witnesses are sequestered at trial.[161] As such, too many witnesses remain at others' depositions, risking the very evils

156. *Id*.

157. United States v. Garrett, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978).

158. *See* JEFFREY S. KINSLER & JAY E. GRENIG, VA. PRAC. CIV. DISCOVERY § 2:53 ("[P]rotective orders restricting attendance are rarely granted."); *see also* In re Terra Int'l, Inc., 134 F.3d 302 (5th Cir. 1998) (protective order for exclusion denied, citing the high standard of good cause); Ford Motor Co. v. Edgewood Properties, Inc., No. 06-1278, 2010 WL 3001211 (D.N.J. July 28, 2010) (protective order for exclusion denied); David v. Signal Int'l, LLC, Nos. 08-1220, 12-557, 13-612, 13-6219, 13-6220, 13-6221, 2014 WL 2581319 (E.D. La. May 14, 2014) (protective order for exclusion denied); Tuszkiewicz v. Allen Bradley Co., 170 F.R.D. 15, 17 (E.D. Wis. 1996) (request for protective order based on fact that several fact witnesses were employed by defendant worked together denied).

159. *See* Stafford v. Brink's, Inc., No. CV141352MWFPLAX, 2014 WL 12639087 (C.D. Cal. Oct. 21, 2014); *In re Terra Int'l, Inc.*, 134 F.3d at 302; *Ford Motor*, 2010 WL 3001211; *David*, 2014 WL 2581319.

160. While there is currently no empirical data on how often motions for protective orders to exclude other deponents from depositions are granted or denied, case law demonstrates that, because of the high standard for good cause, protective orders are difficult to obtain. *See, e.g.*, *In re Terra Int'l, Inc.,* 134 F.3d at 302 (denying a protective order for lack of affidavits or other evidence supporting motion for a protective order when the plaintiff alleged potential camaraderie between deponents); *Ford Motor*, 2010 WL 3001211(denying a protective order holding a letter stating evidence of intimidation did not meet the standard of good cause); *David*, 2014 WL 2581319; *Tuszkiewicz*, 170 F.R.D. at 17 (request for protective order based on fact that several fact witnesses were employed by defendant worked together denied). Logically, when there is a high standard to achieve something, less of them occur. *See also* KINSLER & GRENIG, *supra* note 158 ("[P]rotective orders restricting attendance are rarely granted.").

161. Witnesses are sequestered at trial upon mere request, meaning unless the witness falls under one of the exceptions to FRE 615, the judge has no discretion to deny the request. *See* FED. R. EVID. 615; U.S. v. Ell, 718 F.2d 291 (9th Cir. 1983) (holding FRE 615 is a matter of right and not discretion).

that sequestering was designed to prevent: collusion, testimony matching, and intimidation.[162] What follows are just a few examples.[163]

Even in cases where parties demonstrate legitimate potential for collusion or tainted testimony—reasons that witness sequestration exists to begin with—courts routinely fail to grant protective orders. Instead, they allow depositions to proceed with multiple deponents witnessing the testimony.[164] In *In re Terra*, the defendant requested a protective order to sequester the employees of plaintiff's company from each other's depositions.[165] He feared that if the employees were in the presence of each other while giving testimony, they would feel a sense of "camaraderie" towards one another or pressure from their company to change their testimony.[166] The defendant argued that this would taint each employee's testimony and preclude defense counsel from obtaining the witness's raw reactions to questioning.[167] A magistrate judge initially granted the protective order, ruling the witnesses were subject to "substantial influence" and subtle pressures from their relationship with their company, and therefore had good cause to sequester the witness.[168] The district court, however, overturned this ruling—holding that the standard for good cause was not met.[169] The court stated that the defendant made conclusory allegations instead of "particular and specific demonstration of fact."[170] As a result, all the plaintiff's employees were present at each other's depositions—allowing them an opportunity to alter testimony in favor of their company.[171] For the court in *Terra*, a high chance of collusion was not enough for a

162. *See, e.g.*, *In re Terra Int'l, Inc.,* 134 F.3d at 302; *Ford Motor*, 2010 WL 3001211; *David*, 2014 WL 2581319.

163. The movants in these three cases all shared the fear of collusion, testimony matching, or changes in testimony due to intimidation by other deponents. And in each case, their concerns were overlooked by the court. The risk of tainted testimony is what FRE 615 protects against. While it is unknown whether the testimony in the cases mentioned here was actually tainted, the point is that the *risk* of inaccurate testimony was present in each of these cases because the standard was too high. *See Ford Motor*, 2010 WL 3001211; *Stafford*, 2014 WL 12639087; *In re Terra Int'l*, *Inc.*, 134 F.3d 302; FED. R. CIV. P. 26(c). Whether the risk is present in a trial or deposition should not require a different evidentiary standard to obtain the same result. Parties have the right to receive genuine testimony—and in turn an accurate resolution of the case—regardless of the stage of litigation. *See Ford Motor*, 2010 WL 3001211; *Stafford*, 2014 WL 12639087; *In re Terra Int'l, Inc.*, 134 F.3d at 302.

164. *See, e.g.*, *In re Terra Int'l, Inc*., 134 F.3d at 302; *Ford Motor*, 2010 WL 3001211; *David*, No. CIV.A. 08-1220, 2014 WL 2581319.

165. 134 F.3d at 302.

166. *Id.*

167. *Id*.

168. *Id*.

169. *Id*.

170. 134 F.3d at 302.

171. This never would have occurred in trial. *See* FED. R. EVID. 615.

protective order; actual concrete evidence of collusion was needed.[172] Although there may not be direct evidence or substantive facts specific to these types of employee situations, this case is an example where subtle, unconscious pressures do exist, but may not meet the high standard required for a protective order. Refusing to grant a protective order when clear influences are at play, simply because there is no direct evidence of it, leaves common sense at the courtroom door.

Another example is *Stafford's v. Brink's, Inc.*[173] There, the company defendant arrived to its 30(b)(6) deposition with three different witnesses, including the in-house counsel, an HR director who was also to be deposed in her personal capacity, and the 30(b)(6) chosen representative.[174] Defense counsel insisted that all three deponents be present during each of the three depositions that were to take place that day.[175] Consequently, none of the depositions proceeded.[176] Plaintiff's counsel instead filed a motion for a protective order, stating there was a "substantial likelihood of collusion between the witnesses—or, at the very least, the strong potential for each witness to influence each other's testimony."[177] Yet, despite a legitimate, articulated fear of collusion—which is common between employees who feel pressure to protect each other or match stories—the court denied the plaintiff's motion.[178] It stated the plaintiff did not support the allegations with specific facts that collusion was likely to occur—falling short of the standard for good cause.[179] Ultimately, all company deponents were able to attend one another's depositions, thus leaving the plaintiff vulnerable to the detrimental effects of collusion by defense witnesses.[180]

Parties may even be denied a protective order when they have provided evidence of witness intimidation or collusion.[181] In *Ford Motor Co. v. Edgewood Properties, Inc.* the plaintiffs sought to exclude one of

172. In re Terra Int'l, Inc., 134 F.3d 302 (5th Cir. 1998).

173. *See* Stafford v. Brink's, Inc., No. CV-141352-MWFPLAX, 2014 WL 12639087 (C.D. Cal. Oct. 21, 2014).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* Plaintiff wanted to question each deponent separately about their independent recollection of a certain set of emails pertaining to liability; this would be impossible with them all in attendance. He contended that dependents would "undoubtedly" be "internally" or "subconsciously" influenced by the testimony of other witnesses. *Id.*

178. *Id.*

179. *Id.*

180. *See id.*; U.S. v. Engelmann, 701 F.3d 874 (8th Cir. 2012) (holding the purpose of sequestration is to prevent witnesses from tailoring their testimony to that of prior witnesses and to aid in detection of dishonesty).

181. *See* Ford Motor Co. v. Edgewood Properties, Inc., No. 06-1278, 2010 WL 3001211 (D.N.J. July 28, 2010).

the defendant's company witnesses, their supervisor, from the depositions of all other deponents.[182] They contended there was potential for collusion and intimidation of the other deponents if the deposition occurred in the presence of their employer.[183] Plaintiffs brought evidence that in a prior deposition the supervisor had sat directly within the deponent's line of sight to intimidate him.[184] Additionally, during the deposition of the supervisor's wife and business partner, the supervisor acted "agitated" and caused his wife to curtail her answers.[185] The court nevertheless held these incidents were merely "conclusory allegations."[186] According to the court, such articulated evidence is not strong enough to constitute good cause, meaning the supervisor was allowed to attend any depositions he wished.[187] The court ignored the commonsense evidence in front of it—that employees are more likely to testify favorably about their employer when their employer sits in front of them—because such evidence fails to satisfy "good cause."[188]

Moreover, the tainting of testimony could be unintentional or subconscious.[189] It is impossible to have prior evidence of subconscious testimony matching—deponents do not know it is going to happen, or even that it has already happened.[190] It is a psychological phenomenon that is seldom avoidable.[191] Indeed, in a recent study conducted by Anjali Nandan, only forty-one percent of test subjects between the ages of twenty and thirty maintained their original testimony—in large part due to conversations with co-witnesses about their recollection of

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *See* Ford Motor Co. v. Edgewood Properties, Inc., No. 06-1278, 2010 WL 3001211 (D.N.J. July 28, 2010).

188. *See id.* Another problem with requiring specific facts to sequester witnesses in depositions, aside from the disparity in standards, is, most of the time, if collusion is a possibility, there is little concrete evidence of it. Parties will do everything they can to avoid being detected. Because of the nature of collusion, any allegations would likely *have to be* conclusory; deponents rarely send emails to one another discussing breaking the law. The absence of discrete evidence of collusion is not evidence of the absence of collusion—it more likely means the collusion is well hidden.

189. *See* David v. Signal Int'l, LLC, Nos. 08-1220, 12-557, 13-612, 13-6219, 13-6220, 13-6221, 2014 WL 2581319 (E.D. La. May 14, 2014); Stafford v. Brink's, Inc., No. CV-141352-MWFPLAX, 2014 WL 12639087 (C.D. Cal. Oct. 21, 2014); James v. Heintz, 478 N.W.2d 31, 36 (Wis. Ct. App. 1991).

190. *James*, 478 N.W.2d at 36 ("unconscious reaction").

191. See Anjali Nandan, *Eyewitness Testimony: A Psychological And Legal Perspective*, 6 J. POSITIVE SCH. PSYCH. 5446, for a study on the psychological perspective of eyewitness testimony and how often witnesses change their initial statements based on external factors.

events.[192] The Supreme Court and the Federal Rules of Evidence sought to protect against this type of testimony matching in implementing FRE 615.[193] As discussed earlier, a district court in Wisconsin even explicitly mentioned fears of subconscious matching.[194] The court stated this type of tainted testimony may be an "unconscious reaction to suggestion rather than a deliberate attempt at collusion."[195] As such, there may not be evidence tainting once it occurs, for witnesses may not realize when it happens.[196] A lack of evidence does not delegitimize this risk, and nor should it prevent parties from obtaining accurate testimony during discovery.

While, arguably, a witness who is actually at risk for intimidation or testimony matching would easily meet the exacting standard of a good cause requirement, the above cases illustrate that this is not always so.[197] Indeed, such evidence is hard to come by; an intent to intimidate can easily be hidden, whereas an intent to match testimony may not even exist (as the latter is often subconscious).[198] Even if such evidence existed for *some* parties seeking witness sequestration, it does not follow that a blanket sequestration rule is therefore inappropriate. First, many other over-inclusive rules exist for all parties' protection.[199] Second, both the risk and harm of tainted testimony are too great to justify selective sequestration; hence, a blanket trial rule must exist to protect *all* parties and witnesses.[200]

In general, "good cause" is too high of a standard for exclusion of witnesses during depositions. Because of the often inability to provide concrete evidence of tainted testimony before it actually happens, protective orders are not granted often enough—thereby subjecting parties to the risk of inaccurate resolution.[201] The standard for sequestering witnesses from each other's depositions should be consistent with that of FRE 615—a simple request.

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192. *See id.* (also discussing the impact of anxiety, stress, reconstructive memory, leading questions, and weapon focus on eyewitness memory and testimony).

193. *See* Geders v. United States 425 U.S. 80, 87 (1976); FED. R. EVID. 615.

194. *James*, 478 N.W.2d at 36.

195. *Id*.

196. *See id*.

197. In re Terra Int'l, Inc., 134 F.3d 302, 302 (5th Cir. 1998); Ford Motor Co. v. Edgewood Properties, Inc., No. 06-1278, 2010 WL 3001211 (D.N.J. July 28, 2010); David v. Signal Int'l, LLC, Nos. 08-1220, 12-557, 13-612, 13-6219, 13-6220, 13-6221, 2014 WL 2581319 (E.D. La. May 14, 2014).

198. See Nandan, *supra* note 192; *Geders*, 425 U.S. at 87.

199. *See, e.g.*, Fed. R. Evid. 615.

200. *See id.*

201. See *id.*; DUNNE, supra note 10; 2 N.Y. PRAC., COM. LITIG. IN N.Y. ST. CTS. § 6:53 (5th ed.) ("Depositions of witnesses may significantly impact settlement evaluation.").

2. Causing Delay

Another negative consequence of the 1993 Amendment is how protective orders cause undue delay to the litigation process.[202] Oftentimes, parties do not know unwanted witnesses will attend a deposition until just before the questioning begins.[203] This catches parties by surprise. If opposing counsel does not agree to voluntarily exclude the witness, the deposition will not proceed on the day it was planned—it must be postponed until the request for a protective order is filed and ruled on. Depositions take hours of preparation, not just for the lawyer, but for the client as well.[204] Attorneys prepare questions, theorize what opposing counsel is going to ask, and brainstorm responses. Moreover, they must teach their client how to act for an effective deposition. All this work is for naught, and must be repeated, when depositions are postponed.

A protective order, like any other discovery request, must be made through a motion to the court.[205] And before a motion for a protective order can be filed, the movant's attorney must first try to cooperate with opposing counsel to find a resolution without judicial intervention.[206] If this attempt yields no results, the movant must file a noticed motion for the protective order, a memorandum in support of the protective order, a declaration stating the inability of the parties to compromise on the issue, and a proposed order.[207] Opposing counsel has the opportunity to respond, and, if desired, to file an opposing motion ordering discovery to proceed.[208] Only then—and quite possibly after oral argument on the motion—the judge takes time to deliberate.[209]

As with all pretrial motions, deliberation may take *weeks, even months*.[210] Commenting on the length of time judges take to make a ruling, one study found: "In a perfect world, clients could generally

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202. *See* FED. R. CIV. P. 30(c); *David*, 2014 WL 2581319; Stafford v. Brink's, Inc., No. CV-141352-MWFPLAX, 2014 WL 12639087 (C.D. Cal. Oct. 21, 2014).

203. See, for example, *Stafford*, 2014 WL 12639087, where plaintiff did not know defense counsel would try to have all company employees present at each other's depositions, until the actual day of the deposition.

204. *See id.*

205. WRIGHT & MILLER, *supra* note 2; *see also* KUPERMAN, *supra* note 92, for an in-depth study of procedures to enter protective orders in each circuit.

206. *Protective Order*, US LEGAL, https://perma.cc/YG6E-RT9D (last visited Mar. 9, 2023).

207. *Id*.

208. *Id*.

209. *See id.*; KUPERMAN, *supra* note 92.

210. The whole process might be lengthened if a magistrate makes the first ruling, which is then appealed to the district court. *See* WRIGHT & MILLER, *supra* note 2 ("As is true of other discovery matters, motions for protective orders may be referred by a judge to a United States magistrate judge.").

expect a decision about their pending motion within six months of its filing date. But our world is not perfect."[211] Another found the average time from filing to ruling was forty-eight days—a total of seven weeks from the filing date.[212] Thus, protective orders drag out other stages of the litigation—including summary judgment, potential settlement or trial—none of which are likely to occur without the completion of key depositions.[213] Parties have no choice but to wait, as protective orders are their only protection against tainted testimony.[214] At the end of the day, however, the protective order might not be granted—leaving parties in exactly the same spot as they were the day of the originally scheduled deposition.[215]

Indeed, *Stafford* offers a classic example of undue delay.[216] On September 10, 2014, Plaintiff scheduled depositions of two key defense witnesses.[217] Defense counsel, however, arrived with three unexpected parties and insisted that they attend each deposition.[218] As a result, Plaintiff's counsel canceled the depositions and promptly filed a motion for a protective order—only for the court to deny Plaintiff's motion on October 21, 2014.[219] Not only did the district court err in denying the protective order,[220] but the requirement that the plaintiff seek an order delayed the proceeding by over a month.[221] Even if the court had granted the protective order, the delay would still have been

211. Corinne L. McCann, *Federal Courts Corner: When Will The Court Make A Decision About My Motion?,* FOX ROTHSCHILD, https://perma.cc/F5G7-A44S (Apr. 1, 2016).

212. INST. ADVANCEMENT AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 5 (2009).

213. *See* 2 N.Y. PRAC., COM. LITIG. IN N.Y. ST. CTS. § 6:53 (5th ed.) (discussing the importance of depositions on settlement). A motion for summary judgment made before the depositions of parties, or when discovery is incomplete, is considered premature and may be overturned. *See* Wilson v. Yemen Realty Corp., 903 N.Y.S.2d 42 (N.Y. App. Div. 2010).

214. *See* U.S. v. Engelmann, 701 F.3d 874 (8th Cir. 2012); *supra* Part II.B; FED. R. CIV. P 30(c) advisory committee's notes.

215. KINSLER & GRENIG, *supra* note 158.

216. Stafford v. Brink's, Inc., No. CV-141352-MWFPLAX, 2014 WL 12639087 (C.D. Cal. Oct. 21, 2014).

217. *Id.*

218. *Id*.

219. *Id.*

220. If this were trial, these allegations would have been more than enough to sequester the unwanted witnesses. *See* FED. R. EVID. 615; U.S. v. Engelmann, 701 F.3d 874 (8th Cir. 2012).

221. *Stafford*, 2014 WL 12639087.

inevitable.[222] The requirement of a protective order therefore wastes the time and expenses of parties.[223]

Importantly, such a delay violates the FRCP Rule 1.[224] Rule 1 states: "[The Rules] should be construed, administered, and employed by the court and the parties to ensure the *just, speedy, and inexpensive* determination of every action and proceeding."[225] By requiring a protective order for sequestration, the Rules Committee is denying the very values it imposes on all proceedings.[226] Relative to the previous majority rule, the Amendment makes litigation longer[227] and more expensive.[228] The method currently in place for sequestering witnesses at trial—FRE 615— embodies the values of FRCP 1 and has exhibited no significant drawbacks.[229] In addition, obtaining a protective order wastes the parties', attorneys', and the courts' time in violation of the FRCP Rule 1.[230]

C. No Public Right to Attend a "Private" Deposition

Developing theories about the common law right to attend a deposition may provide as another an argument against the necessity of a protective order for sequestration.[231] Although the jurisprudence in this area is not fully developed, the Supreme Court in *Seattle Times* has distinguished between the public nature of trials and the private nature

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222. *See* E.E.O.C. v. Original Honeybaked Ham Co. of Georgia, No. 11-CV-02560-MSK-MEH, 2012 WL 3472281 (D. Colo. 2012) (granting a motion for protective order requiring the exclusion of the offender in a sexual harassment case from the depositions of his victims almost 4 months after the depositions were supposed to take place).

223. *See Stafford*, 2014 WL 12639087. The more time attorneys—specifically defense attorneys—spend on a case, the more money it costs the defendant company. *See Everything You Need to Know About the Billable Hour*, CENTERBASE, https://perma.cc/M82X-7ABP (last visited Mar. 9, 2023).

224. FED. R. CIV. P. 1.

225. *Id*. (emphasis added).

226. Conversely, the requirement actually causes undue delay. *Stafford*, 2014 WL 12639087.

227. *See id*.

228. *See Everything You Need to Know About the Billable Hour*, *supra* note 224; *see also The Truth About the Billable Hour*, YALE L. SCH. CAREER DEV. OFFICE, https://perma.cc/4GFY-W6LX (last visited Jan. 9, 2023) (discussing the more hours attorneys bill, the more money the firm makes, and therefore, the more clients have to pay in total).

229. *See* MUELLER, *supra* note 4; Slovenko, *supra* note 3, at 447; Underwood, *supra* note 7. If "The Rule" of sequestration was not already so established, maybe the delay caused by an additional motion would matter less and form a weaker argument. However, since almost the dawn of this country, lawyers have been successfully sequestering fact witnesses from other's testimony by simple request, and there are no significant drawbacks to this practice. Underwood, *supra* note 7; Geders v. United States 425 U.S. 80, 87 (1976) (quoting WIGMORE, *supra* note 15, at § 1838) (discussing the origins of the rule of witness sequestration).

230. *See* FED. R. CIV. P. 1.

231. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

of depositions; it held that there is no constitutional right to attend the latter, and subsequently excluded reporters from disseminating deposition transcripts.[232] Other courts have interpreted this ruling to mean there is no *public* right to attend a deposition[233] and use this theory as a basis when granting protective orders.[234] Most courts, however, have not expanded upon the decision's initial implication—excluding only reporters as a result.[235]

This theory can, and should, be expanded beyond the sphere of reporters. *Seattle Times* did not state that only reporters lacked a right to attend depositions—it held members of the public did not have this right, as depositions were private.[236] This holding weakens the argument for a requirement of good cause. If there is no "right" to attend a deposition, why must a court require "good cause" to keep someone out? In *EEOC v. Original Honeybaked Ham Co.*, the court cited *Seattle Times* in its sua sponte order excluding a perpetrator from his victim's depositions in a sexual harassment lawsuit.[237] It noted that pretrial depositions are not public components of a civil trial, and the man was not "entitled" to attend the "private depositions" at hand.[238]

More importantly, however, the *Honeybaked* court held that there was good cause to exclude the man without even applying a proper good cause analysis.[239] While the evidence mirrored "conclusory

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232. *Id.* at 25. As discussed previously, in *Seattle Times,* respondents (a group of newspapers) appealed the granting of a protective order enjoining them from disseminating the deposition transcript and other information gained through discovery. *Id.* The Court held that the public lacks a First Amendment right to this information because "[p]retrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law . . . and, in general, they are conducted in private as a matter of modern practice." *Id.*

233. Kimberlin v. Quinlan, 145 F.R.D. 1 (D.D.C. 1992) ("The defendants have not filed a motion for a protective order to exclude the media from attendance at depositions. *Such a motion is not needed to exclude a person who is not a party to the litigation from attending a pretrial deposition.*" (emphasis added)); Times Newspapers Ltd. (Of Great Britain) v. McDonnell Douglas Corp., 387 F. Supp. 189 (C.D. Cal. 1974) ("[depositions] are not a judicial trial, nor a part of a trial, but a proceeding preliminary to a trial, and neither the public nor representatives of the press have a right to be present at such taking."); *see also* Wright & Miller, *supra* note 2, at § 2041 ("It has been held that neither the public nor representatives of the press have a right to be present at the taking of a deposition.").

234. Amato v. City of Richmond, 157 F.R.D. 26 (E.D. Va. 1994).

235. *See id.*

236. 467 U.S. 20, 25 (1984).

237. E.E.O.C. v. Original Honeybaked Ham Co. of Georgia, No. 11-CV-02560-MSK-MEH, 2012 WL 3472281 (D. Colo. Aug. 13, 2012) (*hereinafter* "Honeybaked"). It is important to note this man was not a party to the lawsuit. Unlike fact or lay witnesses, parties do have a right to attend all depositions. *See* FED. R. CIV. P. 30(b)(1). It is rare for parties to be excluded from depositions and is beyond the scope of this note. *See id.*; *see generally* HANDBK. FED. CIV. DISC. & DISCLOSURE § 5:29 (4th ed.).

238. *Id.*

239. *Honeybaked,* 2012 WL 3472281.

allegations" that defeated protective orders in other courts,[240] the court stated: "[T]he Court can perceive deponent's feelings of intimidation" and excluded the man from all future depositions.[241] Here, the court did not have a "specific demonstration of fact" to support good cause, yet it still granted the exclusion.[242] Perhaps this was because "good cause" was never necessary to begin with—another reason why the Rules Committee's decision to remove FRE 615 from depositions was unsound.[243]

Alternatively, one could argue that the *Honeybaked* good cause analysis implies that litigants are not truly harmed by the removal of FRE 615 protection from depositions; after all, a court could simply find "good cause" through mere conclusory allegations without specific demonstrations of fact.[244] This argument, however, ignores the reality that courts other than *Honeybaked*—say, *Stafford*,[245] *In re Terra*,[246] and *Ford*[247]—applied a more rigorous good cause analysis. This proposition stands not to demonstrate that *Honeybaked* is an outlier, but that a determination of good cause may very well be a matter of judicial discretion. Ultimately, if there is no public right to attend a deposition,[248] judicial discretion on whether good cause exists to *remove* members of the public from depositions is highly improper.

III. SOLUTION—REAMEND THE AMENDMENT

The current standard to sequester witnesses during depositions is too high.[249] It causes tainted and inaccurate testimony and an undue delay of litigation proceedings.[250] Moreover, it is inconsistent with

240. The only evidence was that one deponent looked visibly frightened during her deposition while the man was present.

241. *Honeybaked,* 2012 WL 3472281.

242. *See id.*; In re Terra Int'l, Inc., 134 F.3d 302, 302 (5th Cir. 1998).

243. The Committee does mention in their Notes following the Amendment that this rule was meant to clarify the rules for fact witnesses and explicitly not for lay people, such as reporters, the sentiment still stands. FED. R. CIV. P. 30 advisory committee's notes. Considering the rationale for sequestering other fact witnesses compared to ordinary lay people is stronger than for mere lay people, it follows again that the standard should not be so high, thus not completely distinguishing the Supreme Court's holding in this case.

244. *Honeybaked,* 2012 WL 3472281.

245. Stafford v. Brink's, Inc., No. CV-141352-MWFPLAX, 2014 WL 12639087 (C.D. Cal. Oct. 21, 2014).

246. *In re Terra Int'l, Inc.,* 134 F.3d at 302.

247. Ford Motor Co. v. Edgewood Properties, Inc., No. 06-1278, 2010 WL 3001211 (D.N.J. July 28, 2010).

248. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

249. *See supra* Part II.B.

250. *See supra* Part II.B(ii).

current Supreme Court precedent.[251] What is surprising about the ongoing problem with depositions, however, is the fact that there has been a solution to these very problems that has been practiced since Biblical times.[252] Throughout common law in the United States—and especially since the Federal Rules of Evidence were promulgated—witness sequestration during trial has been automatic.[253] Attorneys simply have to invoke "the Rule."[254] This Part discusses how the same theories behind automatic witness sequestration during trial should apply to depositions as well. Accordingly, the Rules Committee should reamend Rule 30(c) to state that FRE 615 *does* in fact apply to depositions.

A. Depositions Similar to Trial — Same Rule Should Apply

Just as one of the original writers of the FRCP hoped, depositions "mimic[] . . . trial itself"[255] and have even arguably overshadowed trials in importance in modern times.[256] Trial testimony and deposition testimony are parallel in nature and importance[257]—it only makes sense that the same procedural protection governs them both. During trial, witness testimony is some of the most significant evidence presented.[258] Indeed, eyewitness testimony occasionally provides the only account for what happened.[259] Because of the weight judges and juries place on in-court testimony, procedures are in place to ensure the testimony presented is accurate.[260] Without accurate testimony, the verdict may not reflect the truth.[261]

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251. *See Seattle Times Co.*, 467 U.S. at 20.

252. *Daniel* 13:1–65 (Catholic Version).

253. *See* Underwood, *supra* note 7; Braswell v. Wainwright, 330 F. Supp. 281, 283 n.1 (S.D. Fla. 1971), *modified*, 463 F.2d 1148 (5th Cir. 1972); *see e.g.,* U.S. v. Engelmann, 701 F.3d 874 (8th Cir. 2012).

254. *See* Slovenko, *supra* note 3.

255. *See id.* at 64.

256. *See* DUNNE, *supra* note 10; Smith & MacQueen, *supra* note 53; *see also* Richard I. Levin, Trial Starts with the Depositions, CBA Rec., FEBRUARY/MARCH 1996, at 16 (discussing the importance of taking depositions seriously and the necessity of an effective deposition).

257. *See supra* Part I.A–B.

258. *See* Britton Douglas, *"That's What She Said": Why Limiting the Use of Uncorroborated Eyewitness Identification Testimony Could Prevent Wrongful Convictions in Texas*, 41 TEX. TECH L. REV. 561 (2009) ("No physical evidence linked Walls to the crime . . . this was not enough to overcome Marilyn's eyewitness identification testimony."); *see also* Matthew S. Foster, *I'll Believe It When You See It*, 60 LOY. L. REV. 857 (2014) (discussing the importance of accurate eyewitness testimony).

259. *See* Douglas, *supra* note 259 (discussing instances when the only evidence connecting the defendant to the crime is eyewitness testimony).

260. *See* FED. R. EVID. 615; Siller, *supra* note 37, at 64.

261. *Cf.* Foster, *supra* note 259 ("Eyewitness misidentification testimony leads to a large number of wrongful convictions…"); DUNNE, *supra* note 10; Smith & MacQueen, *supra* note 53.

Truthful testimony and accurate witness statements are equally vital during depositions.[262] Depositions are the most commonly used discovery tool, and weighed heavily in settlement negotiations and motions for summary judgment.[263] Considering how ninety-nine percent of cases do not reach trial, the presence of truthful testimony during depositions is vital to ensuring a just outcome for both parties.[264] Alas, "any attorney who does not make adequate use of the rules governing oral depositions may commit the egregious sin of failing to represent his client effectively and diligently."[265]

The fundamental nature and respect for FRE 615 begs the question, why is there no such rule for depositions? In enacting FRE 615, the Rules Committee for the Federal Rules of Evidence mentioned the importance of witness sequestration, stating: "The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion."[266] The cases above display these exact fears—"intimidation," "collusion," "pressure," or "subconscious influence," of witnesses during depositions.[267] Yet, instead of applying the automatic sequestration rule build so neatly into the legal system, the FRCP requires a protective order with a showing of "good cause."[268] In short, such a variation in standards is unjustified.[269]

Moreover, the lack of legislative history, or explicit justification in the rule itself, leaves something to be desired. Though the Rules Committee explicitly removed FRE 615 from the list of Rules, making clear that their change was deliberate, their lack of rational makes the change seem illegitimate. While it is impossible to know exactly why the Rules Committee removed FRE 615 from Rule 30(c), one can make the following educated guesses: (1) depositions are less important than trial testimony, and therefore do not require the same protections; (2)

Alternatively, the lack of sequestration in depositions will likely affect the final outcomes of cases never reaching verdict—through premature settlement or incorrect bases for summary judgment motions. *See* Smith & MacQueen, *supra* note 53.

262. *See supra* Part I.B; ANDREW J. RUZICHO, LOUIS A. JACOBS & ANDREW J. RUZICHO II, 1 LIT. AGE DISCRIM. CASES § 7:14 (discussing the importance of complete and accurate deposition testimony though this question being asked multiple times throughout the deposition).

263. *See* WOLFSTONE, *supra* note 10.

264. *See* Smith & MacQueen, *supra* note 53.

265. *See* SAWAYA, *supra* note 10.

266. FED. R. EVID. 615 advisory committee's notes.

267. *See* Ford Motor Co. v. Edgewood Properties, Inc., No. 06-1278, 2010 WL 3001211 (D.N.J. July 28, 2010); Stafford v. Brink's, Inc., No. CV141352MWFPLAX, 2014 WL 12639087 (C.D. Cal. Oct. 21, 2014); In re Terra Int'l, Inc., 134 F.3d 302 (5th Cir. 1998).

268. FED. R. CIV. P. 30(c) advisory committee's notes; *see In re Terra Int'l,* 134 F.3d at 302.

269. This is especially clear considering the importance of accurate testimony in both of these stages of litigation.

any issues with inaccurate deposition testimony could be remedied at trial through cross examination; (3) because depositions are less formal than trials, they do not require a blank rule of protection.

Each of these reasons can be rebutted, however. First, depositions are crucial because cases seldom reach trial, leaving depositions as the only source of witness testimony for the majority of cases.[270] Second—and along the same vein—inaccuracies in deposition testimony *cannot* be corrected precisely because of the rarity of trial. Third, the lack of formality among some depositions is neither a norm nor a good reason to allow inaccuracy into the fray.[271] Informality does not necessarily create inaccuracy, but intimidation and collusion do.[272]

None of this is to imply depositions are exactly the same as trials—clearly, they are not.[273] These differences, however, only propel the argument for the application of the same standard for witness sequestration.[274] First, deponents must answer almost all questions, even if counsel has an objection; the scope of questioning at depositions is therefore much broader than at trial.[275] Watching other people testify to matters regarding others, including another potential deponent, surely creates a greater likelihood of story shaping than watching a witness simply testifying about their own experience.[276] Additionally, there is no judge present at depositions—they are run completely by the attorneys and the court reporter.[277] Thus, there is no neutral party watching over the testimony to ensure intimidation or collusion does not occur.[278] This lack of oversight only bolsters the argument that unwanted witnesses should be automatically removed upon request.[279]

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270. *See* Smith & McQueen, *supra* note 53.

271. *See generally* WOLFSTONE, *supra* note 10; *What Happens During a Deposition?,* Law Offices of Seth Kretzer (Apr. 29, 2021, 15:35 PM**),** https://perma.cc/LU2Z-D82N**.**

272. *See supra* Part II.B(i).

273. *See* Jared Staver, *How is a Deposition Different Than Testifying at Trial?*, https://perma.cc/GD6M-RUNL (last visited Mar. 10, 2023); *What You Should Know About Testifying at a Trial or Deposition*, O'DONNELL L. OFFS., https://perma.cc/4N5B-4TLV (last visited Jan. 9, 2023).

274. *Id*.

275. *Id*. If a privilege, such as attorney-client privilege, is invoked in the question, the deponent doesn't have to answer. Deponents may be asked about things other people have told them, or events from other people's perspective—questions like these would be considered inadmissible hearsay at trial, but are fair game in depositions. *Id.*

276. *See* Nandan, *supra* note 192.

277. *See* Siller*, supra* note 37.

278. *See id*.

279. *See id*. Judges offer a source of formality in the courtroom; thus parties are likely to take their oath more seriously. *Strategic Plan for the Federal Judiciary*, US COURTS (2000) https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf. There is also no judge (or impartial party) to watch out for signs of collusion, intimidation, or other source of inaccurate testimony. *See id*.

Ultimately, the difference between depositions and trial fails to justify such a discrepancy in standards—it only proves how the Rules Committee decided the wrong way.

B. Amend the Amendment

Since it was an amendment that caused these problems, only an amendment can fix them. The Rules Committee meets two or three times a year to discuss proposed amendments to the FRCP.[280] Revising this Amendment must be a topic during its next meeting; this injustice must be undone. The process for an amendment is a long one, as discussed in *Part II*, but it is a necessary one.[281] Without correction, our justice system faces the enormous risk of improper, inaccurate litigation.[282]

Notably, reamending Rule 30 and clarifying that FRE 615 *does* apply to depositions allows the Rules Committee to still meet its initial rationale for the original amendment—to resolve a "conflict" among the courts.[283] Indeed, the Rules Committee could simply side with the pre-1993 majority and shape the procedural law to mirror what most attorneys and judges were doing in practice. After all, courts across the country refuse to follow the rule and sequester witnesses without a legally necessary showing of good cause.[284] Many are even shocked upon reading the law.[285] Overall, the requirement of a protective order for

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280. *Open Meetings and Hearings of the Rules Committee,* US COURTS, https://perma.cc/D6L6-HABX (last visited Mar. 9, 2023).

281. *See supra* Part II.A.

282. *See supra* Part II.B.

283. *See* FED. R. CIV. P. 30(c) advisory committee's notes.

284. *See e.g.*, Ely v. Uptown Grille, LLC, No. 12-13376, 2013 WL 6183108 (E.D. Mich. Nov. 26, 2013) (holding, in 2013, "this Court holds, *that under [FED. R. EVID.] 615*, should Uptown desire, Richardson is permitted to attend the depositions as Uptown's designated representative."); Kruse v. Regina Caeli, Inc., No. 16-10304, 2016 WL 11609087 (E.D. Mich. Aug. 22, 2016) (holding, in 2016, "Following the lead of *Lumpkin* and *Williams*, I find that Fed. R. Ev. 615 applies to depositions, and that Mr. Varchetti will be excluded from Ms. Beckman's deposition."); Kimberlin v. Quinlan, 145 F.R.D. 1 (D.D.C. 1992) ("The defendants have not filed a motion for a protective order to exclude the media from attendance at depositions. *Such a motion is not needed to exclude a person who is not a party to the litigation from attending a pretrial deposition.*"); *see generally* HANDBK. FED. CIV. DISC. & DISCLOSURE § 5:29 (4th ed.) (noting the individuals who may be present during depositions; list does not include other fact witnesses).

285. Many practicing trial and litigation attorneys do not know this is the current law. *See e.g.*, Interview with Maria Mancini Scott, Founding Partner, Mancini Scott Law, in Mattapoisett, Mass. (Aug. 2022); Interview with Anonymous, Partner, Butler Snow LLP, in Nashville, Tenn. (June 2022); Interview with Anonymous, Adjunct Professor, Vanderbilt Law School, in Nashville, Tenn. (Jan. 2023). While there is currently no empirical evidence on practicing attorneys view on this law, the author of this Note has personally spoken with dozens of attorneys located in various states across the country. *See id*. Each of them was very surprised to learn this was the law currently in place and stated that it wasn't followed in practice. The law must mirror what is occurring in practice.

witness sequestration is completely out of touch with the reality of modern litigation. Whatever reasons exist for supporting such a protective order—mysterious as they are due to the Rules Committee's utter lack of legislative history—are outweighed by the need for accurate testimony.[286]

Perhaps the Rules Committee does not want to amend Rule 30 in a way that merely reverts to an older version of the rule. Perhaps the Rules Committee wants to save face. Or perhaps, the Rules Committee seeks to maintain a transparent legal process (which begs an answer to the question: Why choose to make depositions public where the rest of discovery remains private?). Were this the case, an alternative amendment would be to flip the current standard on its head. Rather than requiring good cause to *remove* persons from attending depositions,[287] good cause should be required to *allow* certain persons to attend depositions. Such a proposal is supported by the rationales discussed in Part II—tainting and a lacking right to attend depositions in the first place.[288] Should a party want to introduce inaccuracy into critical deposition testimony by way of intimidation or subconscious testimony matching,[289] it must have good cause, demonstrated by specific facts, to do so. Of course, this scaled-down application of FRE 615 to depositions would still create undue delay; a judge must determine the existence of good cause after briefing by both parties. Nevertheless, a partial solution is better than none at all.

Ultimately, the only way to protect against the risk of tainted testimony—the very risk that has been continually shielded against since Biblical times—is to amend the amendment, reinstating FRE 615 to the governance of depositions. Amending the FRCP is not a process foreign to the Committee.[290] In fact, it is this very same process that created this issue to begin with.

CONCLUSION

The rule of witness sequestration is deeply rooted in American legal jurisprudence. It is so fundamental to our trial processes that attorneys need only "invoke the rule" to send other witnesses out of the

286. *Cf.* FED. R. EVID. 615.

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

288. *See supra* Part II.

289. *See* FED. R. CIV. P. 30(c); In re Terra Int'l, Inc., 134 F.3d 302 (5th Cir. 1998).

290. *See supra* Part II.A(i)(a member of the Rules Committee raises an issue or proposes a new idea; the Committee discusses and creates a proposed amendment; the public is allowed to comment on the new amendment; the final rule is drafted based on the public's comments and forwarded to the Supreme Court; finally, the Supreme Court votes on whether to promulgate the rule).

courtroom. The risks the Rule protects against—witness fabrication, collusion, intimidation, etc.—are all present in depositions. A careful analysis of pre-1993 common law reveals that before the Rules Committee removed FRE 615 from the rules governing depositions, the majority of courts in our country followed the practice of excluding deponents upon request. At the very least, depositions are entitled to protection as much as trial testimony; considering the significance of discovery and rarity of cases reaching trial, depositions are arguably entitled to *more* protection. Requiring a showing of good cause in a protective order does the opposite. It is simply too high of a burden, resulting in inaccurate testimony and undue delay of litigation.

Federal Rule of Evidence 615 should therefore apply to depositions; the Rules Committee resolved this conflict the wrong way. They did so without justification and against the majority practice of courts. Indeed, the Rule they created is contrary to hundreds of years' worth of rationale for witness sequestration. Until and unless the Rules Committee can produce a compelling argument to impose a different standard for sequestering deponents, the law is incorrect and violates the Rules Enabling Act. In short, the solution is simple. The Rules Committee must reamend their amendment.