

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 5219 / November 3, 2017

Administrative Proceeding
File No. 3-17950

In the Matter of
David Pruitt, CPA

**Order Granting Deposition
of Expert Witness**

Respondent David Pruitt, CPA, moves to depose one expert witness in addition to the five witnesses he is currently permitted to depose. More specifically, he asks for a determination that depositions of experts do not count against the deposition limit in Securities and Exchange Commission Rule of Practice 233(a).¹ The Division of Enforcement opposes Pruitt's motion.

In 2016, the Commission amended its rules of practice.² Among other changes, the Commission amended Rule 233(a) to permit respondents in single-respondent, 120-day cases to take three depositions as of right and two additional depositions on a showing of sufficient need.³ Amended Rule 233 does not address whether depositions of expert witnesses count against the limit in Rule 233(a).

In its adopting release, the Commission noted that one commenter proposed that the deposition limit should not apply to expert witnesses.⁴ The Commission, however, did not specifically address this suggestion. Instead, the Commission more generally discussed and rejected suggestions that its

¹ 17 C.F.R. § 201.233(a).

² See Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212 (July 29, 2016).

³ *Id.* at 50,236 (codified at 17 C.F.R. § 201.233(a)).

⁴ *Id.* at 50,215 & n.36.

deposition rule be modeled after Federal Rule of Civil Procedure 30(a), which permits a party to depose ten witnesses as of right, and more with leave of court.⁵

In rejecting suggestions to allow ten depositions, the Commission compared discovery in district court proceedings with discovery in administrative proceedings.⁶ The Commission stated that although in district court proceedings neither party can compel discovery before a complaint is filed, in Commission administrative proceedings the Division develops an evidentiary record during its investigation prior to the time allegations are lodged.⁷ Following this logic, the Commission stated that unlike in district court, depositions in administrative proceedings serve to “supplement the record, not create it.”⁸ In light of “these different starting points,” and the “Commission’s strong interest in establishing a timely and efficient administrative forum,” the Commission declined to provide respondents in administrative proceedings with the ability to notice ten depositions.⁹

The Commission’s reason for rejecting a ten-deposition limit does not apply to experts, however. Because the Division does not depose its own experts as part of its investigation, expert depositions in administrative proceedings do more than “supplement the record.” This suggests that expert depositions do not count against the limit.

The inapplicability to this situation of the Commission’s reason for adopting the current deposition limit, in combination with the fact that neither the current rules nor the adopting release address whether expert

⁵ *Id.* at 50,216.

⁶ 81 Fed. Reg. at 50,216.

⁷ *Id.* This is necessarily a comparison between district court proceedings in which the Commission is *not* a party and administrative proceedings in which the Division is a party; the Division’s ability to develop an evidentiary record does not vary depending on whether the Commission institutes an administrative proceeding or a civil action. *See* 15 U.S.C. § 78u.

⁸ 81 Fed. Reg. at 50,216.

⁹ *Id.*

depositions count against the limit in Rule 233(a), support considering how this issue would play out in district court.¹⁰

While Rule of Civil Procedure 30(a) authorizes a party to depose ten witnesses as of right and more with leave of court, Rule 26(b)(4)(A) provides that “[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial.” There is a dearth of authority concerning the question of how the specific provision for expert depositions applies in the context of the general ten-witness limit.¹¹ The authority that exists suggests that expert depositions do not fall within Rule 30(a)’s ten-witness limit, although admittedly, the broad language of Rule 26(b)(4)(A) has no analogue in the Commission’s Rules of Practice.¹²

¹⁰ Cf. *Jay Alan Ochanpaugh*, Securities Exchange Act of 1934 Release No. 54363, 2006 WL 2482466, at *5 n.24 (Aug. 25, 2006) (noting that although the Federal Rules of Civil Procedure do not apply in Commission proceedings, “in certain circumstances [the Commission is] guided by the principles of the Federal Rules”); *Carl L. Shipley*, Exchange Act Release No. 10870, 1974 WL 161761, at *4 n.16 (June 21, 1974) (relying on a rule of civil procedure that concerned an issue governed by a similar Commission rule).

¹¹ See *Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254, 265 (D. Mass. 2010) (“There is an open question, unaddressed by the First Circuit, concerning whether the Rule 30 limit on depositions applies to depositions of experts”); *Express One Int’l, Inc. v. Sochata*, No. 3-97 CV 3121-M, 2001 WL 363073, at *3 (N.D. Tex. Mar. 2, 2001) (“Neither the cases, nor the commentary shed any light on this issue.”). It may be that this scarcity of authority results from the fact that parties often simply agree that the deposition limit in Rule 30(a) does not apply to expert depositions under Rule 26. See *Loops LLC v. Phoenix Trading, Inc.*, 2010 WL 786030, at *2 n.1 (W.D. Wash. Mar. 4, 2010); *Rayco Mfg., Inc. v. Deutz Corp.*, 2010 WL 183866, at *3 (N.D. Ohio Jan. 14, 2010); *In re DaimlerChrysler AG Secs. Litig.*, 216 F.R.D. 395, 405 n.18 (E.D. Mich. 2003).

¹² See *Safeco Ins. Co. of Am. v. City of Jacksonville*, No. 3:08-CV-338-J-25JRK, 2011 WL 13176635, at *3 (M.D. Fla. Apr. 20, 2011); *Rayco Mfg.*, 2010 WL 183866, at *3; Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure—A Critical Analysis*, 12 *Touro L. Rev.* 7, 106 & n.600 (1995); see also *Martin v. Trott Law, P.C.*, No. CV 15-12838, 2016 WL 9444403, at *3 & n.4 (E.D. Mich. Dec. 20, 2016) (permitting plaintiffs to take 16 depositions and noting that “[t]his figure does not include the depositions of any experts designated by Defendants”); cf. *Presidio Components, Inc. v.*

(continued...)

The comparison to the Federal Rules, however, does not unambiguously help Pruitt. When considering interplay of Rules 26(b)(4)(A) and 30(a), federal courts focus on textual cues that do not exist in Rule 233, including language indicating that the witness limit applies to depositions “taken under [Rule 30] or Rule 31” without any similar reference to expert depositions.¹³ The Rules of Practice contain no analogue to Rule 26(b)(4)(A), which expressly permits a party to depose *any* person identified as an expert,” even though the rules governing expert witnesses in Commission proceedings largely mirror the expert-witness provisions in the Federal Rules.¹⁴

The overall direction of the federal court decisions—if not their rationale—nevertheless provides enough additional support to Pruitt to lead me to conclude that he has the better argument. As discussed above, the Commission’s concern about depositions unnecessarily recreating the record, do not apply to expert witnesses.¹⁵ Moreover, counting expert depositions against the deposition limit could lead to gamesmanship.¹⁶ And even absent gamesmanship, 120-day proceedings frequently involve complicated issues of professional accounting or auditing standards, industry practice, and valuation, all of which could warrant expert witnesses. Construing Rule 233 to allow for such circumstances does not undermine the Commission’s

Am. Tech. Ceramics Corp., No. 08CV335 IEG NLS, 2009 WL 861733, at *2 n.4 (S.D. Cal. Mar. 25, 2009) (“The ten deposition limit in Rule 30(a)(2)(A)(i), however, is directed to depositions taken under Rule 30 and 31; not depositions of experts taken under Rule 26(b)(4). Expert depositions may or may not be subsumed in Rule 30(a)(1)’s broad reference to ‘any person.’”); *Seiffer v. Topsy’s Int’l, Inc.*, 69 F.R.D. 69, 72 (D. Kan. 1975) (“The crucial point is that Rule 26 of the Federal Rules of Civil Procedure overrides and limits the more general provisions of the remaining discovery machinery described in Rules 27 through 37.”).

¹³ Fed. R. Civ. P. 30(a)(2)(A)(i); see Kelleher, 12 Touro L. Rev. at 106 n.600.

¹⁴ *Safeco Ins.*, 2011 WL 13176635, at *3; compare 17 C.F.R. § 201.222(b) with Fed. R. Civ. P. 26(a)(2), (b)(4)(B)–(C).

¹⁵ See 81 Fed. Reg. at 50,216.

¹⁶ Accord *Safeco Ins.*, 2011 WL 13176635, at *3 (“a party could be prevented from taking depositions of any facts witnesses in a case simply by the act of an opposing party calling ten or more experts to testify at trial”).

interest in “resolving administrative proceedings promptly and efficiently.”¹⁷ Pruitt’s deposition of the Division’s expert will not delay the start of the hearing.

For the reasons above, Pruitt’s motion is GRANTED.

James E. Grimes
Administrative Law Judge

¹⁷ 81 Fed. Reg. at 50,216.