

It Is Time to Rethink Parties' 'Right' to Attend Depositions

July 10, 2025 | By  **Benjamin O. Present**

It is commonly understood among lawyers that parties to civil proceedings have an absolute right to attend depositions. Though this “right” is rarely exercised, I always assumed it was codified somewhere in the Pennsylvania Rules of Civil Procedure.

Not so. Not only is this “right” absent from the rules, but case law on the subject is both dated and sparse. While parties should typically be permitted to attend depositions, there are practical, commonsense situations in which their physical presence should be limited or, more rarely, barred altogether.

Consider the impact on a sexual assault survivor forced to sit across from their alleged assailant (now a civil defendant) during a deposition in a small conference room without the structure or protection of a courtroom. The emotional toll of such an encounter is often profound, while any supposed benefit of the assailant’s physical presence is minimal at best, and certainly outweighed by the potential for re-traumatization to the survivor.

The assailant in this situation might argue that he needs to confer with his counsel in real time to inform strategy in light of the plaintiff’s testimony. That concern has strong merit, and fairness dictates that it be accommodated. However, in that case, the assailant’s rights are fully protected by participating via Zoom or telephonically. If the plaintiff’s testimony necessitates the need for a huddle between client and counsel, a break can be called and counsel may confer with the client all the same as if everyone was present in person.

On my review, no Pennsylvania court has ever addressed the issue of whether an alleged assailant may be barred from attending a deposition due to the trauma it could inflict on the plaintiff.

The starting point for any analysis, then, is Pennsylvania Rule of Civil Procedure 4012, which deals with protective orders. The rule authorizes the court, on good cause shown, to make any order to prevent unreasonable annoyance, embarrassment, oppression, burden or expense. Relevant here, such orders include those that a “deposition shall be only on specified terms and conditions ...”

and that the “deposition shall be conducted with no one present except persons designated by the court.”

While no case squarely confronts this issue, Pennsylvania law has long recognized the need to shield vulnerable victims from the full brunt of adversarial proceedings.

For example, the “tender years” exception allows a child under 16 to avoid testifying at trial if certain conditions are met, namely that they have made some out-of-court statement that is both reliable and relevant, and that their testifying would cause serious emotional distress that would substantially impair their ability to communicate.

Similarly, Pennsylvania courts have limited discovery into certain areas where the plaintiff is a sexual abuse victim. In *D.S. v. DePaul Institute*, for example, Judge R. Stanton Wettick prohibited the defense counsel from inquiring into a child sex abuse victim’s history of consensual sex with other partners, where the allegation in the case was one of *nonconsensual* sexual acts and physical assault. In so holding, Wettick stated that “the law should not force plaintiffs—particularly women who will be the primary targets of such discovery—to disclose their entire sexual and reproductive histories whenever they claim that they have sustained psychiatric problems from a traumatic event that is the subject matter of the lawsuit.”

Though there is no Pennsylvania case on point, federal courts have excluded alleged abusers and harassers from depositions when plaintiffs demonstrate a sufficient risk of harm.

For instance, in *Bucher v. Richardson Medical Center*, 160 F.R.D. 88 (N.D. Tex. 1994), though the court denied a motion to entirely quash the deposition of a 15-year-old sexual abuse survivor, it did impose significant procedural safeguards to minimize the plaintiff’s trauma. Chief among them was that the defendant assailant “should be excluded from the deposition site.” Moreover, the court ordered that the deposition take place at a residential treatment center with the child’s mother and therapist present, and required the defense counsel to examine the witness remotely via closed-circuit television, among other restrictions. This compromise balanced the defendants’ right to meaningful discovery with the need to protect a vulnerable witness from further harm.

Likewise, in *Tolbert-Smith v. Bodman*, 253 F.R.D. 2 (D.D.C. 2008), a discrimination case, the court found good cause to exclude the plaintiff’s supervisors from her deposition, where the court found a “clearly defined and serious injury” would result if they were present. In so holding, the court noted that the defense counsel would have every opportunity to prepare with the supervisors to inform counsel’s line of questioning. And, if issues arose during the deposition, those issues could be addressed with the supervisors (who were allowed in the building but not the room) during hourly breaks.

So, where does the purported “right” of parties in Pennsylvania to attend depositions originate?

From this author’s research, the case law appears to date back to *Saul v. Saul* (1 Pa. D. & C.2d 486 (Pa. C.C.P. 1954)). The issue for decision by the Philadelphia County Court of Common Pleas was the plaintiff’s motion for a protective order under Rule 4012 seeking all depositions in the case to occur with only counsel for the parties and no one else present.

The plaintiff argued that the defendants’ presence during depositions would chill truthful testimony in light of her allegations of conspiracy and fraud. While the court acknowledged its discretionary power under Rule 4012 to sequester witnesses, it further stated that then-Rule 4012(a)(5) and (6) “authorizes the court to forbid the presence, at the examination, of any persons except the parties and counsel.”

However, it does not appear that Rule 4012, as it existed in 1954, truly codified any such affirmative right. Today’s version certainly doesn’t. Indeed, current Rule 4012(a)(5) states that the court may make an order requiring that “the scope of discovery or deposition shall be limited,” whereas Rule 4012(a)(6) provides for a possible order “that discovery or deposition shall be conducted with no one present except persons designated by the court.”

This is a far cry from creating an affirmative right for parties to attend all depositions. Indeed, properly read, the Rule appears to contemplate an order barring certain individuals from attending, with no special carveout for the litigants, themselves.

The *Saul* court further noted that parties have a “constitutional” right to attend depositions, though it cited no specific provision of the Pennsylvania or U.S. Constitution. While the court may have had due process in mind, that rationale fails to account for modern practice, where civil parties are almost always represented, typically do not attend depositions in person, and, more importantly, where tools like Zoom preserve their ability to observe remotely, if they wish, without any prejudice.

Running the *Saul* decision through WestLaw’s “KeyCite” feature reveals it has never once been cited by another trial court, let alone an appellate court.

The principle that parties may attend depositions was reaffirmed in *Fields v. Rivera*, 23 Pa. D. & C.2d 650, 651 (Pa. Com. Pl. 1961), where the court noted in the context of oral depositions that “counsel, the parties and other witnesses may all be present.”

Fields has likewise never been cited by another court, though both *Fields* and *Saul* are included in Goodrich-Amram—the longstanding Pennsylvania civil practice treatise—on the subject of “Regulation of persons who may be present at taking and recording of oral deposition.” Goodrich-Amram cites no other cases in this regard.

To be clear, any restriction on a party's ability to attend or participate in their case in the manner they deem fit should be exercised sparingly. That includes requiring a party to observe a deposition via Zoom rather than in person. And only in the most extreme circumstances should courts prevent a party from attending a deposition altogether, as doing so implicates concerns of fairness, due process, and the integrity of the adversarial process. While there is no "presumption of innocence" in civil proceedings, the plaintiff maintains the burden of proof, and the rights of those accused of civil wrongs must be vigorously guarded for the system to work.

Yet, the case law and customary approach as it pertains to parties' attendance of depositions have not kept pace with modern practice, where Zoom depositions—for lawyers, witnesses, and parties alike—were nearly universal for two years during the COVID-19 pandemic and have remained common ever since.

Benjamin O. Present *is a trial attorney at Kline & Specter, where he handles a wide variety of catastrophic personal injury matters, including medical malpractice, products liability, civil rights, sexual abuse, motor vehicle accidents and toxic torts.*