IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Richard Duncan,	:	
		Case No. 2:13-cv-1157
Plaintiff,	:	
		JUDGE ALGENON L. MARBLEY
v.	:	
		Magistrate Judge Kemp
Secretary of State Jon A. Husted,		
Defendant.	:	

OPINION AND ORDER

Plaintiff Richard Duncan, who is representing himself in this matter, is a resident of Ohio who has run for United States President in the last three elections. He has brought this action against Defendant Secretary of State Jon Husted to challenge the constitutionality and legality of amendments to Ohio Rev. C. §§3513.262 & 3513.263. The amendments that he is challenging reduce the time period in which an individual who wishes to run in an Ohio election as an independent candidate may gather nominating-petition signatures.

By order filed on February 23, 2015, the Court set this case for trial on June 22, 2015. Shortly thereafter, Mr. Duncan filed a motion for permission to depose Cuyahoga County Board of Elections Director Pat McDonald (Doc. 52). He had previously been permitted to schedule the deposition of Matt Damschroeder of the Secretary of State's office, and proposed to take the two on the same day at the Attorney General's office in Cleveland. On March 2, 2015, Mr. Duncan moved for permission to record both depositions by non-stenographic means - specifically, by way of a tape recording, with Mr. Duncan as the operator. He also proposed that he be permitted to prepare transcripts himself and file them with the Court. Both motions are now fully briefed. For the following reasons, the Court will grant the second motion in part, and deny the first.

I. Recording Depositions

Mr. Duncan's most recent motion is not the first time he has requested permission to record deposition testimony. As this Court noted in its Opinion and Order of September 17, 2014, the 1993 Advisory Committee Notes to Fed.R.Civ.P. 30 state that the Rule "requires that all depositions be recorded by an officer designated or appointed under Rule 28 and contains special provisions designed to provide basic safeguards to assure the utility and integrity of recordings taken other than stenographically." That Opinion and Order cited to a number of decisions holding that to allow a party to record and transcribe a deposition is at odds with the purpose of the Rule, which is to insure the accuracy and integrity of the recording and transcription process. Defendant Husted points out that the law has not changed since that ruling and that, in any event, even if Mr. Duncan were allowed to operate the recording equipment, he would still have to have an officer or other person appointed by the Court certify the transcript. Mr. Duncan's reply states that he would make the recording "under the direction of the notary" who will be present to administer the oath. Doc. 60, at 1.

It is not clear exactly what Mr. Duncan means by making a recording "under the direction of the notary." Under Rules 28 and 30, the notary - that is, the "officer" who is authorized to administer oaths and take testimony - is the person before whom the deposition is to be taken, and that officer's duties include recording the deposition by an acceptable means (including audio recording) and, if the deposition is to be taken by non-stenographic means, placing certain information on the record at the beginning of each unit of recording. The officer also has duties to be performed at the conclusion of the deposition, as spelled out in Rule 30(b)(5)(C). If what Mr. Duncan contemplates is that the notary or "officer" before whom the deposition is

being taken will perform all of these duties, and will also provide some supervision to Mr. Duncan in his operation of the recording equipment - for example, instructing him when to begin and end the recording - as well as take physical custody of the original recording at the conclusion of the deposition to secure it from tampering - then the procedure may well comply with Rules 28 and 30. As the court said in Ott v. Stipe Law Firm, 169 F.R.D. 380 (E.D. Okla. 1996), if a deposition (in that case, a video deposition) is conducted with a party's attorney as the camera operator, and the Rules are otherwise complied with, the process may be acceptable; the Rules' concern with accuracy and integrity "'has markedly less significance when the attorney is merely making a stationary video recording of a deposition which can be easily duplicated and given to all parties.'" Id. at 382, quoting Rice's Toyota World, Inc. v. Southeast Toyota Distributors, Inc., 114 F.R.D. 647, 651 (M.D.N.C. 1997). The same should be true for an audio recording.

In short, if Mr. Duncan is proposing that he perform a purely mechanical task (i.e. providing the audio tape equipment and turning it on and off at the direction of the notary), and if the notary performs the other duties required by Rules 28 and 30, the Court believes the process is permissible. It is important to recall that Fed.R.Civ.P. 1 states that the Rules of Civil Procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." There is no reason to put parties to additional expense if that serves no purpose. Consequently, the Court grants Mr. Duncan's motion to the extent that it asks for leave for him to provide and operate audio recording equipment at the direction of the officer before whom the deposition is to be taken. The Court will deal with the issue of how the testimony is to be transcribed if and when that issue arises.

II. The McDonald Deposition

In his motion to subpoena and depose Mr. McDonald, Mr. Duncan states, by affidavit, that based on a telephone call to the Cuyahoga County Board of Elections, he concluded that Mr. McDonald has facts relating to the case, particularly because Mr. Duncan had collected about 25% of his signatures from Cuyahoga County. It appears he wishes to inquire about the burden placed on the county boards of election by certain procedures which, according to Defendant Husted, the statutes in question were intended to lessen. In response, Defendant Husted asks the Court to enforce the discovery cutoff date of July 31, 2014, which has been extended only to allow Mr. Damschroeder to be deposed. He also suggests that this issue is foreclosed by the Court's prior ruling quashing a subpoena directed to Mr. McDonald. See Doc. 39 (quashing a subpoena issued to Mr. McDonald because Mr. Duncan had not filed a memorandum opposing Mr. McDonald's motion to quash which raised the issue of undue burden). In his reply, Mr. Duncan attributes some of the delay in filing his motion to the time it took the Court to rule on Defendant Husted's motion for a protective order, plus the fact that Mr. Duncan did not have the information he seeks to elicit from Mr. McDonald about the relative burden caused by the review of 3,000 signatures on nominating petitions.

Extending a discovery cutoff requires a showing of good cause. Fed.R.Civ.P. 16(b). Good cause is determined based on an evaluation of the diligence of the moving party. Deghand v. Wal-Mart Stores, 904 F.Supp. 1218, 1221 (D. Kan. 1995). Deadlines like a discovery cutoff date are important to keeping a case on schedule and reducing both cost and delay. Rouse v. Farmers State Bank, 866 F.Supp. 1191, 1199 (N.D. Iowa 1994).

Here, Mr. Duncan has certainly been aware for some time that the issue of how certain nominating petitions do or do not burden

county boards of election is an issue in this case. He also presumably knew that a significant portion of his signatures were gathered in Cuyahoga County, and in fact he attempted to subpoena Mr. McDonald in the past. There is nothing new in his current attempt other than the fact that he may now have a better idea of what Mr. McDonald would say if deposed, but finding out what a witness has to say is the basis for taking a deposition in the first instance, and, in any event, there is no reason to believe that Mr. Duncan could not have obtained the same information earlier had he simply made the telephone call to which he refers in his motion. Further, the delay in ruling on Defendant Husted's motion for a protective order had nothing to do with other proposed discovery. For all these reasons, the Court agrees that good cause has not been shown to extend the discovery cutoff for purposes of allowing Mr. McDonald to be subpoenaed for a deposition.

III. An Additional Motion

On March 23, 2015, Mr. Duncan filed a document styled "Request for the Secretary of State to Furnish a Public Records Request Prior to any Depositions." Although the body of the document appears to be a public records request, presumably made pursuant to Ohio Rev. Code §149.43, Mr. Duncan also asks the Court to postpone any depositions until he has received the records, which consist of signed nominating petitions for five candidates in the 2012 presidential election.

Given the trial date, there is no room in the schedule to delay the Damschroeder deposition any further. It is unclear how many documents would be responsive to Mr. Duncan's request, or how long it may take for them to be produced. He could have asked for these documents earlier in the case. The Court sees no reason to delay further the completion of discovery to await their production. The Court does assume, however, that Defendant

Husted will comply with Ohio law concerning any public records request.

IV. Order

For all these reasons, the Court grants the motion to allow non-stenographic recording of Matt Damschroeder's deposition (Doc. 53) on the conditions outlined above, denies the motion for permission to subpoena and depose Pat McDonald (Doc. 52), and denies that portion of the motion for public records (Doc. 62) which asks for a delay of the Damschroeder deposition. That deposition shall be taken, if at all, within 21 days of the date of this order.

V. Procedure for Reconsideration

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

/s/ Terence P. Kemp
United States Magistrate Judge