Depositions and Subpoenas of Organizations
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The Federal Rule

Federal Rule of Civil Procedure ("FRCP") 30 governs depositions in Federal court proceedings. Adopted in 1970, Rule 30(b)(6) requires a party seeking the deposition of a business organization, or governmental agency, or other entity to serve a notice or subpoena describing the matter for examination with "reasonable particularity." The burden is then on the deponent entity to designate one or more representatives to testify on behalf of the organization.

The Federal Judicial Conference Committee on Rules of Practice and Procedure has perennially studied the issue of depositions of entities.[1] At its meeting on April 15-16, 2017, a subcommittee advanced a proposed change to FRCP 30(b)(6), that would require continuing interaction between a party seeking to depose an entity and the deponent entity to agree on the witnesses to be presented at the deposition and the topics to be discussed. *Id.* A subcommittee report details the pros and cons regarding possible changes. *See* Report of Advisory Committee on Civil Rules (April 25–26, 2017 meeting) ("Report").[2]

In August of 2018, the Committee published a Preliminary Draft of proposed rule changes and solicited public comment.[3] The Draft indicated that the Committee had been considering a change to FRCP 30(b)(6) since April of 2016, discussed a proposed rule change at its November 2017 meeting, restated the proposal at its January 2018 meeting, then arrived at its preliminary proposal after the April 2018 meeting. That proposal added the following language to Rule 30(b)(6): "Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person the organization will designate to testify. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party" (the new language is underlined). Excerpt from the May 11, 2018 Report of the Advisory Committee on Civil Rules (revised August 2, 2018) ("Report").[4]

This seemingly minor change triggered a massive response, for when the Committee issued a request for comment on the proposed amendment, the Committee reported that it received 1,780 written comments and more than 80 witnesses testified in two public forums.[5] Organizations criticized the meet-and-confer requirement as time-consuming, and argued that it would permit requesting parties to influence the choice of witnesses and would spawn a motion practice over vague terms in the proposed rule. The public input can be reviewed at uscourt.gov.[6] In response, the Committee softened the language to the following: "Before or promptly after the notice or subpoena is served, ~~and continuing as necessary~~, the serving party and the organization must confer in good faith about ~~the number and description of~~ the matters for examination ~~and the identity of each person the organization will designate to testify~~."

The Committee Note to Rule 30 said in part:

> Rule 30(b)(6) is amended to respond to problems that have emerged in some cases.

> Particular concerns raised have included overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses. This amendment directs the serving party and the named organization to confer before or promptly after the notice or subpoena is served about the matters for examination. The amendment also requires that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify. It facilitates collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).
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> Candid exchanges about the purposes of the deposition and the organization's information structure may clarify and focus the matters for examination, and enable the organization to designate and to prepare an appropriate witness or witnesses, thereby avoiding later disagreements. It may be productive also to discuss "process" issues, such as the timing and location of the deposition, the number of witnesses and the matters on which each witness will testify, and any other issue that might facilitate the efficiency and productivity of the deposition.
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> Because a Rule 31 deposition relies on written questions rather than a description with reasonable particularity of the matters for examination, the duty to confer about the matters for examination does not apply when an organization is deposed under Rule 31(a)(4).[7]

On October 23, 2019, the Committee Chair forwarded a group of rule changes to the U.S. Supreme Court, including the proposed change to FRCP 10(6)(b).[8] He made this comment about the proposed change to FRCP 30(b)(6):

> The proposed amendment as published for public comment was broader than the proposal ultimately approved by the Advisory Committee in that it required that the parties confer about the number and description of matters for examination and the identity of each witness the organization will designate to testify. In addition, the conferral process was to "continu[e] as necessary." The robust public comments revealed strong opposition to the proposed requirement that the parties confer about the identity of each witness, as well as the directive that the parties confer about the "number and description of" the matters for examination. While divisions among practitioners existed on various aspects of the published proposal, many commenters supported a requirement that the parties confer about the matters for examination. After carefully reviewing the comments and testimony, the Advisory Committee approved a modest amendment that requires the parties to confer about the matters for examination. The amendment codifies a best practice and practitioners across the bar support it.[9]

On April 27, 2020, the U.S. Supreme Court adopted the amendment to FRCP 30(b)(6) and transmitted it to Congress for review. Congress did not overrule the amendment, so to it became effective on December 1, 2020. FRCP 30(b)(6) now provides:

> (6) **Notice or Subpoena Directed to an Organization.** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a

> governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to make this designation. to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules

Parties to a lawsuit in Federal court have a duty to meet and confer to develop a discovery plan for the case under FRCP 26(f). The amendment to FRCP 10(b)(6) applies the same concept of meeting and conferring to the party and the deponent, organization even when the deponent organization is a nonparty.

Evidentiary or Judicial Admissions

Another issue considered by the Federal Committee was whether testimony of a witness at an entity deposition should constitute a judicial admission or an evidentiary admission. The Committee noted in a Report on its deliberations:

> Conclusions: Courts are not monolithic as to whether Rule 30(b)(6) deponents' statements bind corporations in the sense of "judicial admissions." The strong majority position is that they do not, and may be contradicted at trial like any other evidentiary admission. The courts holding otherwise have done so to effectively "sanction" organizations for failing to prepare their witnesses.

Report, p. 253. The Report explained:

> The distinction between "judicial admissions" and "ordinary evidentiary admissions" is critical. ... "Evidentiary admissions" are statements "by a party-opponent [that] are excluded from the category of hearsay." See FED. R. EVID. 801(d)(2). Practically speaking, evidentiary admissions have been "made by a party" and therefore "can subsequently be used in a trial against that party." ... At trial, the party can "put himself on the stand and explain his former assertion." On the other hand, "[j]udicial admissions are not evidence at all." ... They go further than evidentiary admissions toward establishing a fact, in that "[a] judicial admission concedes a fact, removing [it] from any further possible dispute." [Citations omitted.]

Report, p. 253. The Committee Memo contains extensive analysis of the cases coming down on either side of the issue. Report, pp. 253 - 261.

The Texas Rules

> Texas Rule of Civil Procedure (TRCP) 176.6(b) relates to subpoenas directed to entities. It says:

TRCP 176 Subpoenas

176.6 Response

(b) **Organizations.** If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.

TRCP 199.2(b)(1) applies to deposition notices to entities. It provides:

(b) **Content of notice.**

(1) **Identity of witness; organizations.** The notice must state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization. If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must - a reasonable time before the deposition - designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify as to matters that are known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules.

Although TRCP 199.2(b)(1) relating to deposition notices has similar language to TRCP 176.6 relating to subpoenas, Rule 199.1(b)(1) additionally requires the deponent organization to designate its representative "a reasonable time before the deposition." Rule 199.1(b)(1) also gives the noticing party the option to name a specific person as a witness, or to name the organization as the witness which then triggers the deponent organization's duty to designate representative(s). Rule 199.1(b)(1) additionally requires the deponent organization to indicate which matters each representative will testify to. (FRCP 30(b)(6) makes this specification optional)

TRCP 205, which governs discovery from nonparties, requires a party seeking to depose a nonparty to serve on the nonparty both a notice and a subpoena. Rule 205 does not have a provision relating to disclosure to organizations of matters on which examination is requested nor does it give the deponent entity an obligation to designate representatives. However, TRCP 205.3 says that a deposition notice duces tecum to a nonparty must describe "the items to be produced or inspected, either by individual items or by category, describing each item and category with reasonable particularity ...." And Rule 176.6(b)'s requirement that the deposing party's subpoena state the matters on which examination is requested, and the deponent entity's obligation to designate persons to testify, would apply to the subpoena. TRCP 205.3(d) requires the nonparty to respond to the notice and subpoena "in accordance with Rule 176.6."

Depositions on written questions are governed by Rule 200. A notice for deposition on written questions addressed to an entity must comply with Rule 199.2(b), and "[i]f the witness is an

organization, the organization must comply with the requirements of that provision." (This is not true of a deposition on written questions in Federal Court.)

If an organization is requested to produce digital information, TRCP 196.4, Electronic of Magnetic Data," applies.

Unlike newly-amended FRCP 30.6(b)(6), under Texas procedure there is no requirement to meet and confer over a subpoena or deposition notice to an organization.

For a comprehensive CLE article on depositions of entities, see Paul N. Gold, *Deposing the Ventriloquist's Dummy: A Discussion of Fed. R. Civ. P. 30(b)(6) and Texas State Practice*, State Bar of Texas' Prosecuting & Defending Truck & Auto Collision Cases Course 2019.[10]

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1. David G. Campbell, *Summary of Proposed Amendments to the Federal Rules*, p. 2 <https://www.uscourts.gov/sites/default/files/2019-10-23_scotus_package_final_for_posting_0.pdf>.

2. *Report of the Advisory Committee on Civil Rules* (April 25-26, 2017) <https://www.uscourts.gov/sites/default/files/2017-04-civil-agenda_book.pdf>

3. *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure, andthe Federal Rules of Evidence* <https://www.uscourts.gov/sites/default/files/2018_proposed_rules_amendments_published_for_public_comment_0.pdf>.

4. See Endnote 3, p. 33.

5. Thomas Regan, *Only Fix What's Broke: A Guide to the Proposed 2020 Amendments to FRCP 30(b)(6)* <https://lewisbrisbois.com/newsroom/legal-alerts/only-fix-whats-broke-a-guide-to-the-proposed-2020-amendments-to-frcp-30b6>.

6. Public Hearing on Proposed Amendments to The Federal Rules of Civil Procedure <https://www.uscourts.gov/sites/default/files/testimony_package_for_2-8-19_hearing_as_of_2-6-2019.pdf>.

7. Campbell, Endnote 1, pp. 56-68.

8. Campbell, Endnote 1, p. 1.

9. Campbell, Endnote 1, p. 3.

10. < https://www.agtriallaw.com/papers/DeposingVentriloquistDummy_020119.pdf >.