Memorandum

To: SCAC

From: Members of the 167-206 subcommittee

Date: August 31, 2021

Re: 199.2 proposed change

The State Bar court rules committee has suggested a change to 199.2 that partially tracks a 2020 federal rule change to rule 30(b)(6). Because the court rules committee includes a good faith conferral about documents–that the federal rule does not–we include pertinent document rules in this memorandum. In our review of this proposed change we considered:

1. Whether we had a similar problem in state court.
2. Whether it was good idea in general.
3. Whether good faith should be the standard.
4. Whether the requirement should apply to nonparties.
5. Whether the requirement should apply to documents.

A. The state court rule and suggested addition

The proposed addition from the court rules committee is as follows:

199.2(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. 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 and documents requested to be produced, if any.

(5) Request for Production of Documents. A notice may include a request that the witness produce at the deposition documents or tangible things within the scope of discovery and within the witness's possession, custody, or control. If the witness is a nonparty, the request must comply with Rule 205 and the designation of materials required to be identified in the subpoena must be attached to, or included in, the notice. The nonparty's response to the request is governed by Rules 176 and 205. When the witness is a party or subject to the control of a party, document requests under this subdivision are governed by Rules 193 and 196.3

B. The federal rules and commentary

The pertinent language of the Federal Rule:

30(b)(2) ***Producing Documents.*** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34[1] to produce documents and tangible things at the deposition.

30 (b)(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 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 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.

[1] Federal Rule 34 is a request for production of documents and does not include a good faith conferral about documents and applies to parties. It refers nonparty document production to Federal Rule 45. Federal Rule 45 provides for the subpoena to attend a deposition and for the production of documents.

The commentary for the federal rule change:

> 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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> The amended rule directs that the parties confer either before or promptly after the notice or subpoena is served. If they begin to confer before service, the discussion may be more productive if the serving party provides a draft of the proposed list of matters for examination, which may then be refined as the parties confer. The process of conferring may be iterative. Consistent with Rule 1, the obligation is to confer in good faith about the matters for examination, but the amendment does not require the parties to reach agreement. In some circumstances, it may be desirable to seek guidance from the court.
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> When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f) conference may provide an occasion for beginning discussion of these topics. In appropriate cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference under Rule 16.
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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).

(emphasis added)

C. Discussion Points

1. Are there similar problems in state court?

Our subcommittee has not seen similar problems in state court litigation. It appears that most parties do confer. Occasionally a corporate witness will lack knowledge, leading to another deposition. A quick review of caselaw does not show any appellate issues on this section.

2. Whether a conferral is a good idea in general?

The commentary to the federal rule indicates that this conferral could be part of a rule 26 conference. The SCAC has discussed many times the idea of a rule 26 conference in all cases. For all of the reasons previously discussed in this committee, requiring conferences can be unnecessary and cost money in simple cases. However, this conferral seems minimal.

3. Should there be a good faith conferral?

Our subcommittee felt that good faith was a useful standard. Good faith conferral is a component of some of the federal rules. Good faith is also used in the Texas Rules but not in connection with conferral with the other side.

Rule 191.2 contains our conference requirements. "Parties and their attorneys are expected to cooperate in discovery and make any agreements reasonably necessary for the efficient disposition of the case." All motions must certify "that a reasonable effort had been made to resolve the dispute." We may prefer to keep that as the standard instead.

If we changed the rule to require good faith–should we also include similar commentary to the change–especially about what good faith means?

4. Whether this rule should apply to nonparties?

As proposed by the court rules committee the change would apply to a nonparty. It appears that the committee focused solely on parties in their rationale for a change. This is from the committee's proposal:

Brief Statement of Reasons for Requested Amendments and Advantages Served by Them

> The purpose of the proposed change is for parties to discuss issues regarding the scope of the examination of the corporate representative and documents being requested in advance of the deposition and thereby reduce discovery disputes and avoid the need to file motions requiring court intervention. Requiring this conference to occur before the deposition will also help define the scope of the examination so that the organization can identify the proper witness(es) to be designated. Requiring this conference to occur before the deposition will help the parties identify issues which cannot be resolved and while those issues may require motions and court intervention, it can be done prior to the deposition and thereby avoid the necessity of re-deposing a corporate witness. Lastly, the revision would follow FRCP 30(b)(6) requiring the parties to confer with the addition that the parties also confer regarding documents requested, if any.

Our committee felt that nonparties may not understand what a good faith conferral is. We were also concerned about the scope of a conferral before the organization received a subpoena. We also wondered whether a nonparty could be sanctioned for not conferring.

The federal rule does apply to nonparties but perhaps only after they have been served with a subpoena. The federal rule added a second sentence to the requirement, underlined above, indicating that the subpoena to a nonparty must contain the conferral requirement. The rule is silent about any sanction for a failure to confer in good faith.

If the SCAC thinks we should include nonparties, we would need to include additional language and perhaps think about what to do for non-compliance.

5. Whether the conferral should apply to document production?

The federal rule conferral does not include a discussion about documents. Our subcommittee is not opposed to including a conferral about documents in the rule change. But this would not conform to the federal rule. In addition, if the SCAC is supportive of this change, we would want to consider whether such a conferral should apply to both parties and nonparties.