



Rule 30(b)(6)'s New (and Welcome) Changes

By Michael S. Finkelstein

At the end of an otherwise traumatic 2020, a welcome change to the Federal Rules of Civil Procedure became effective that will slightly alter the procedural requirements for taking corporate and organizational depositions under Rule 30(b)(6) in federal cases. The Rule's new "meet and confer" requirements will require parties to at least attempt to confer before taking organizational depositions. In this way, the amended rule endeavors to streamline this practice and the resolution of conflicts that could arise during what can otherwise be a wildly diverse process.

Mechanics of FRCP 30(b)(6) and LACCP 1442

For the uninitiated, FRCP 30(b)(6) is the federal equivalent to article 1442 of the Louisiana Code of Civil Procedure. The Rule is a powerful procedural tool in allowing parties to take the depositions of companies, governments and other organizations, and have the testimony offered bind the entity as if the entity itself is testifying.¹

To proceed with the deposition under either the federal or Louisiana rule, the party seeking to take the deposition must propound areas of inquiry on which it seeks testimony from the organization. These topics are provided in a Notice of Deposition issued to the organization.

The organization then, in its sole discretion, designates individuals to testify on the topics listed, prepares them on the relevant subjects, and the testimony is taken. Depending on the topics identified, multiple individuals can be required. The organizational deposition does not prevent a party from separately taking the personal depositions of the individuals the organization designates for certain topics.

As a practical matter, there is no standard of specificity regarding areas of inquiry, lending towards great discrepancies from case to case depending on the counsel involved. While some prepare detailed notices, others are inherently ambiguous. Further problems arise as to the timing and location of the depositions. Attorneys will frequently attempt to notice organizational

depositions at an organization's headquarters. This is done in case the testifying entity does not provide a witness competent to testify on the relevant areas of inquiry. In that circumstance, a replacement representative can be gathered with relative ease. However, attorneys representing the testifying entity often prefer for any such depositions to take place at their own offices. This can make getting a replacement representative a daunting, time-consuming and expensive task for all involved.

With no duty to confer regarding the testimony being sought, it is commonplace for there to exist a gap between the subjects on which the deposing party intends for their notice to cover and what the testifying party understands the notice to require. Normal litigation gamesmanship does not help the situation.

It is easy to see how problems can arise which would impose significant time and expense on both parties. Amidst this backdrop, the new Rule 30(b)(6) attempts to fix at least some of these problems.

The Meet and Confer Requirement

The amended rule includes the following language imposing the new mandatory meet and confer requirement:

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.²

On April 27, 2020, U.S. Supreme Court Chief Justice John Roberts wrote to Congress regarding the changes to the Rule, which were to be made effective Dec. 1, 2020.³ The transmission included Committee notes discussing the amendment's ambitious goal to "facilitate[] collaborative efforts," candidly exchange information, and "avoid[] later disagreements."⁴ Indeed, the Committee note encourages parties conferring *prior to exchanging the notice* to "facilitate the efficiency and productivity of the deposition."⁵

As articulated by the Committee on Rules of Practice and Procedure, the new confer requirement is aimed at improving the practice of engaging in organizational depositions. "The duty [of the meet and confer requirement] adds to the rule what

is considered a best practice — conferring about the matters for examination will certainly improve the focus of the examination and preparation of the witness."⁶

With its new requirement, the amended rule would indeed seem to fix the communication gap regarding the testimony being sought. The subpoenaing or deposing party is able to articulate directly to the testifying entity (or its counsel) exactly what testimony is sought. While the meet and confer requirement will certainly not resolve all disputes regarding deposing organizations, it is a welcome change to streamline the Rule 30(b)(6) deposition process.

Duty to Advise Non-Parties of Requirements

It is important to note that the new Rule 30(b)(6) imposes an additional duty on parties seeking to depose non-parties. The amended Rule requires that the subpoenaing party advise non-parties of their duty to confer with the subpoenaing party and to designate persons to testify accordingly:

A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify.⁷

Federal court practitioners should take note to incorporate this provision into their subpoenas issued to non-parties.

Unincorporated Changes to the Amended Rule

The 2020 changes to the Rule were years in the making. While these two changes were incorporated, others were passed over. In its 2019 report, the Advisory Committee on Civil Rules discussed that the Committee had considered a witness identification requirement, which was not included due to what it noted as being "[v]ery strong opposition."⁸ The opposition included attorneys not being able to control who an organization would designate to testify and the fact that the organization alone has the sole right to choose its witnesses.⁹

The Committee had also considered a 30-day notice requirement for 30(b)(6) depositions, but ultimately deferred that

requirement to allow for re-publication and public comment.¹⁰ So, for now, there is no 30-day notice requirement — but working with opposing counsel to select an agreeable date or otherwise giving opposing counsel or the deposed party notice well in advance is always the most professional and best practice.

Looking to the Future

While it seems doubtful that a witness identification provision will be forthcoming, the 30-day notice requirement may well come to fruition. Keep an eye out for the public comment period for a change to Rule 30(b)(6) incorporating a 30-day notice requirement.

In the meantime, this author would support an analogous change to Louisiana article 1442 to follow the lead of the federal rules.

FOOTNOTES

1. For an excellent guide on Rule 30(b)(6) and deposing organizations, see *30(b)(6): Deposing Corporations, Organizations & the Government* by Mark R. Kosieradzki, available at: www.trialguides.com/products/30b6-second-edition.
2. Fed. R. Civ. Proc. art. 30(b)(6).
3. Accessible at: www.supremecourt.gov/orders/courtorders/frcv20_2dp3.pdf. See also www.uscourts.gov/sites/default/files/cdoc-116hdoc145_0.pdf.
4. Accessible at: www.uscourts.gov/sites/default/files/cdoc-116hdoc145_0.pdf, at p. 10.
5. *Id.*
6. Excerpt of September 2019 Report of the Committee on Rules of Practice and Procedure, accessible at: www.uscourts.gov/sites/default/files/cdoc-116hdoc145_0.pdf.
7. Fed. R. Civ. Proc. art. 30(b)(6).
8. Accessible at: www.uscourts.gov/sites/default/files/cdoc-116hdoc145_0.pdf, at p. 18-19.
9. *Id.*
10. *Id.*

Michael S. Finkelstein is a partner with the New Orleans office of Sternberg, Naccari & White, LLC, where he focuses his practice on business litigation. He was awarded the 2016 Louisiana State Bar Association Stephen T. Victory Memorial Award for most outstanding article in the Louisiana Bar Journal. (michael@snw.law; Ste. 2020, 935 Gravier St., New Orleans, LA 70112)

