A SOLUTION IN SEARCH OF A PROBLEM: DISCORD OVER PROPOSED CHANGES TO CORPORATE DEPOSITIONS

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At some point, your corporate client will face a notice for a corporate deposition. Federal Rule 30(b)(6), which governs these depositions, is primed for its first substantive change in nearly 50 years. The proposed amendments will affect organizations of all sizes, in all industries, and in all aspects of litigation. Therefore, it is important to understand the implications of the rule and the potential opportunities to level the playing field should the amendment pass as expected.

Businesses initially viewed the committee's willingness to amend the rule as an opportunity to combat abusive discovery tactics. Proponents for change viewed this as the long-awaited opportunity to set limits on the permissible number of topics covered in a corporate deposition and to implement a clear mechanism for objecting to the notice. Unfortunately, in its current proposed form, the suggested amendments do little to address these legitimate concerns. Instead, the proposed changes impose new obligations on organizations, and appear to invite more problems than the amendments aim to fix.

MEET AND CONFER ON TOPICS

The first proposed change would require parties to meet and confer before or shortly after the corporate deposition notice is served and to continue conferring "as long as necessary." The concept of meeting and conferring is not new to attorneys. Indeed, few would argue that efficient litigation is served through reaching a mutual understanding on the scope of topics to be covered.

At the Judicial Conference Advisory Committee's public hearing in January 2019, practitioners argued the meet and confer on topics is largely already taking place. Which begs the question, why try to fix something that is not broken? According to critics, merely mandating the meet and confer is not going to do anything but create an infinite loop and an infinite opportunity for disputes to arise and costs to be incurred. There is no companion framework for raising objections and or a means to have those objections to the notices resolved before the deposition. Add to that, the meet and confer requirement would not only extend to topics, but to the corporate representative's identity.

DISCLOSING THE IDENTITY OF THE 30(B)(6) WITNESS

The drafting committee appears to have lost sight of the purpose of 30(b)(6) – to provide a means to depose a non-person. Indeed, the committee's insistence on the "identity" of the witness overlooks the obvious. The "identity" of the witness is the non-person organization, not the representative speaking on behalf of the entity. Under the current Rule 30(b)(6), organizations have one requirement: to designate a representative who can testify to the matters set forth in the notice. No more, no less. The proposed amendment would require the parties to confer about the identity of the witness in advance. The proposed rule suggests the noticing party has the right (and the obligation) to influence the selection.

This arguably undermines an organization's autonomy and subjects it to new scrutiny.

Indeed, the draft Committee Note suggests that the parties' exchanges will facilitate "identifying the right person to testify" and qualifies an organization's right to select its designee with the word "ultimately." In so doing, the Committee empowers the noticing party to interject its opinion, bias, and gamesmanship into an otherwise straightforward, non-contentious process. According to its critics, this change will invite litigants to weaponize the rule to their advantage, thereby opening Pandora's Box to collateral litigation and increased costs. And ultimately, some warn the change could lead to a resurrection of the "most knowledgeable witness" standard, as is employed in some state courts.

"If you allow the opponent to come in and challenge the person that you have selected to be the spokesman, and inject the deponent into the process of who is to testify, you're creating an interesting and very problematic situation," observed one commentator. To illustrate, consider the following scenario. An attorney notices the corporate deposition of a manufacturing company in a product defects case. Under the proposed rule, opposing counsel would be able to make an argument that the chief R & D of engineering should be designated, not lower engineers. Defending your selection to the judge necessarily would require invading work product and potentially attorney-client privileged information. And regardless of the reason (business related, personal, or strategic), making the change will risk a deposition of the formerly identified representative concerning why he or she could not speak for the company.

IS THE DEPOSITION PERSONAL, CORPORATE, OR BOTH?

Identifying the corporate witnesses muddies the water by confusing the 'individual deposition' right that one may have with the 'corporate deposition'. Indeed, Keith McDaniel, managing partner at McCranie Sistrunk Anzelmo Hardy & Welch has personally experienced this in his practice. "I was defending a corporate deposition for a foreign manufacturer. Plaintiff's counsel came to me and said, 'can you tell me ahead of time who's going to be testifying? We don't know anything about this manufacturer.' I did, because I thought it was the right thing to do. . . . We spent four days of depositions going through [the witnesses'] social media, where they had worked in the past, and all of these things and, quite frankly, hardly touched on any areas of the notice." More time will be spent on personal information with respect to the witness than is warranted in the context of corporate knowledge.

The blurring of personal and corporate information changes the intended nature of the process. Whether the witness personally knows about a specific piece of information is not why the witness is there to testify. Witnesses are made available to answer questions about the company's knowledge on particular topics. Knowing the identity of the witness naturally influences the selection of documents and areas of inquiry. Proponents suggest the change will enable them to see which part of those documents this witness was involved in and to tailor the questions to those documents. But doing so perpetrates the exact muddling that opponents fear. The corporate deposition will now turn towards asking the person about the things they actually know as opposed to the information that they've been made aware of as part of the 30(b)(6) process.

ONE PUNCH AT A TIME, ONE ROUND AT A TIME

So, you meet and confer, yet continue to disagree. What's next? What's the responding party's obligation? The proposed amended is silent on the specific procedures available, thus begging more questions than it answers. While prospects appear bleak for this round, it is not too late to advocate for meaningful change. Now, more than ever, counsel and their clients should urge the committee to adopt changes that level the playing field – particularly with the looming threat of mandatory identity disclosure.

Currently, parties can seek a protective order under Rule 26, but there is no consensus as to its effect. For instance, does the motion delay the deposition until a court rules or must parties move forward and subject the witness to questions about the objectionable topics? And how long must parties confer before one or both conclude they have reached an impasse? No doubt, there will often be one party arguing more conferencing is necessary while the other will declare that it has satisfied the obligation. Indeed, some will utilize this new obligation to seek discovery sanctions against a party that allegedly terminates the conference prematurely.

Critics agree, the current rule fails to provide uniformity. The proposed amendment perpetuates this void. Critics propose that the rule include a framework for the parties to address their objections and to resolve their objections before the depositions go forward. In addition, "a period of time, just like in Rule 45, to meet and confer and work it out, and if you don't, you have ten days to file an objection. So that when you go into the deposition, there is a ruling," suggests McDaniel. "Because, as has been my experience, it's all over the place with respect to what benefit a motion for a protective order brings. In my practice, more times than not they're filed and I don't have a ruling by the time of the deposition, so we go forward with it, sort of not knowing what the outcome is going be."

We leave you with a parting sports analogy. In the past, the NFL had a rule where the clock would not stop when players were injured during the final two minutes of play. Later, the league changed the rule to promote player safety. The unintended consequence? Nearly 50% of all injuries occurred during the last two minutes of a football game. There are always those who take advantage of rule change, no matter how well-founded the change seems to be. Assuming passage of the proposed amendments to Rule 30(b)(6), it remains to be seen how the rules committee will manage the unintended (yet predictable) consequences. Some may ponder if the better option is to leave 30(b)(6) alone.

The advisory committee's public comment period for this round has closed. The Standing Committee will review the findings and make a recommendation to the Supreme Court. It is incumbent upon us to continue advocating for changes that will benefit our clients – and even more so if the Court promulgates the proposed amendments. You may address your suggestions to RulesCommittee_Secretary@ao.uscourts.gov.

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