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IN THIS ISSUE

Albert G. Bixler and Immon Shafiei highlight proposed changes to Federal Rule of Civil Procedure 30(b)(6) that could significantly alter practice under that Rule.

Proposed Changes to Federal Rule of Civil Procedure 30(b)(6)

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The Drug, Device and Biotechnology Committee serves as an educational and networking resource for in-house counsel employed by pharmaceutical, medical device and biotech manufacturers and the outside counsel who serve those companies. The Committee is active in sponsoring major CLE programs at the Annual and Midyear Meetings as well as internal committee programs. The Committee also publishes a monthly newsletter that addresses recent developments and normally contributes two or more articles to the *Defense Counsel Journal* annually. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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As we all know, discovery in any type of litigation can be long, drawn out, and tedious, and one of plaintiffs' favorite devices is the "corporate representative" deposition under Federal Rule of Civil Procedure 30(b)(6). All of us can undoubtedly tell horror stories involving misuse of this Rule. We are often confronted with long, detailed lists of "topics" to be addressed over unreasonable time periods, and then accused at depositions of failing to produce the "right" witness or of having inadequately prepared the witness. And we are all aware of the possible negative ramifications of poorly prepared or poorly chosen 30(b)(6) witnesses. So there are plenty of reasons to review the Rule and many ways to improve it.

The Advisory Committee on Civil Rules ("Committee") has recently proposed a series of revisions to Rule 30(b)(6) with the stated objectives of expediting the process of identifying corporate representatives for depositions and reducing disputes arising from those depositions. Regardless of those stated objectives, the Committee's efforts will more than likely have the opposite effect.

As a brief background, we are all familiar with Rule 30(b)(6). As it is presently written, the Rule states:

> 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. A subpoena must advise a nonparty organization of its duty to make this designation. 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.

Fed. R. Civ. P. 30(b)(6).

In April of 2018, the Committee proposed two major changes to the Rule. These proposed changes would require parties to "meet and confer" regarding the number and scope of topics to be covered at the deposition and the identity of the witnesses to be deposed. The full text of proposed Rule 30(b)(6) is below with amendments emphasized in bold:

> 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 **[proposal deletes present word "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, 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 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.

These amendments would create major changes in the way corporate representative depositions occur.

First, the new Rule would create a mandatory "meet and confer" process. By requiring a "meet and confer" before the actual deposition, the Committee's stated goal is to reduce disagreements over the number of and types of topics witnesses would be questioned about. The Committee also believes that candid exchanges about discovery goals and organizational information structure may reduce the difficulty of identifying the right person to testify and the materials needed to prepare that person. The Committee believes this rule change could streamline the deposition process. However, it will almost certainly prove costly for both parties if the meet and confer process is extended and if disagreements arise during that process that cannot be resolved.

Second, under the proposed amendment, although the noticed party would retain sole discretion over who would testify on its behalf, it would be required to disclose the identities of its 30(b)(6) witnesses *in advance* of the actual deposition during this meet and confer process. This change would inject a dialog about the identity of the proposed witness early on and could potentially force organizations to prepare witnesses well ahead of time or create issues if the witness designated changes his or her position within the organization or is no longer employed by the organization by the time the deposition takes place.

The Draft Committee Note states that the proposed amendments to Rule 30(b)(6) are in response to problems that it perceives have emerged in some cases. See May 11, 2018 Report of the Advisory Committee on Civil Rules (revised Aug. 2, 2018), p. 34. These concerns include overlong and ambiguously worded lists of matters for examination and inadequately prepared witnesses. The Draft Committee also noted that this amendment "directs the serving party and the named organization to confer before or promptly after the notice or subpoena is served, and to continue conferring as necessary, regarding the number and description of matters for examination and the identity of the persons who will testify." Id. The Committee stated that the changes would facilitate

collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).

The Committee Note further states that "[c]andid exchanges about discovery goals and organizational information structure may reduce the difficulty of identifying the right person to testify and the materials needed to prepare that person." Id. By conferring prior to the deposition, the Committee hopes that the parties can iron out the details about what topics will actually be discussed, allowing the parties to avoid unnecessarily long depositions. Essentially, the Committee believes a more "collaborative" effort between both parties *prior* to the deposition regarding what topics, how many topics, and who the corporate representative would produce less headaches and disputes during the deposition itself.

Additionally, it is important to emphasize that Rule 30(b)(6), as amended, would require parties to confer either *before* or *promptly after* the notice or subpoena for a deposition is served. The Committee seems to prefer that these discussions occur *before* service of notice or a subpoena, explaining that in its view the discussion can be more productive if the serving party provides a draft of the proposed list of matters for examination. Id. Theoretically, this proposed list can be refined as the parties work together. It is clear that the Committee's intent is for parties to discuss these depositions and come to an agreement as early in the discovery process as possible. The Draft Committee even goes so far as stating that the Rule 26(f) conference could also serve as an appropriate time to begin discussing these depositions. The Committee also suggested that Rule 30(b)(6) depositions could be included 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. Id.

The proposed amendment has generated significant criticism on a number of grounds. The primary criticism is that by requiring a pre-deposition conference, the Rule will likely generate *more*, not less, disputes and simply move those disputes earlier in the process. Moreover, the proposed "meet and confer" is unlikely to be either short or efficient. How likely is it that the parties—early in the case—are going to quickly agree on a list of topics and witnesses to be deposed? The Committee acknowledged this, and stated "[t]he rule recognizes that the process of conferring will often be iterative, and that a single conference may not suffice." Id. The Committee attempted to explain this issue away by pointing out that each party must confer in good faith, consistent with Rule 1, and that the amendment does not absolutely require the parties to reach an agreement. The duty to confer would continue as needed to satisfy the requirement of good faith, but the process must still be completed within a reasonable time before the deposition is scheduled to occur. Id. It is clear, however, that the Courts will see a new breed of discovery motion, based on pre-deposition failures to agree on topics and witnesses.

Moreover, requiring a party to disclose who they will be producing before the deposition is also almost guaranteed to produce disputes. Under the present Rule, a corporate defendant sensibly has the unfettered right to choose who will speak for the corporation. Existing case law incentivizes a party to act in good faith and to provide a suitable, and suitably prepared witness. The proposed rule injects a party adversary into this process in way that could materially prejudice a corporate party. If a dispute concerning the identity of a proposed witness goes to the Court for resolution, what is the standard of decision? Will Courts want to get into the process of deciding the proper corporate representative for a party before any deposition has taken place?

A number of organizations have provided feedback regarding the proposed amendments. As expected, plaintiff and defense bars are on opposite sides with respect to the effectiveness and feasibility of the proposed changes, with plaintiff attorneys generally praising the amendments while defense attorneys seek to have more stringent and defined rules set in place.

Plaintiff attorneys have been quick to applaud the "meet and confer" requirement proposed in the Amended Rule 30(b)(6).[1] These attorneys believe that the rule will reduce potential surprises during a deposition and increase the efficiency of the discovery process. They have also commented that the proposed amendments are appropriate because they believe the "meet and confer" requirement reflects existing best practices in the profession when it comes to Rule 30(b)(6) notices in the first place.

The defense bar's responses in the comment period accurately pointed out the flaws in the proposed amendment. In February, 2019, the Product Liability Advisory Council ("PLAC") provided its comments to the Advisory Committee regarding the proposed amendment to Rule 30(b)(6).[2] One of PLAC's primary critiques was regarding the requirement to identify the corporate representative prior to the deposition. PLAC opined that this amendment would work against case law that has held the witness's identity as irrelevant.[3] PLAC, and numerous other defense-oriented organizations, have pointed out that the witness speaks for the corporation, and the corporation alone should select the person to testify on its

[1] See e.g. January 2, 2019 "Comments on Proposed Amendment to Fed. R. Civ. P. 30(b)(6)" submitted by Andrus Anderson, LLP; December 14, 2018 "Written Testimony of M. Nieves Bolaños Regarding The Proposed Amendment To Federal Rule of Civil Procedure 30(b)(6)" submitted by Potter Bolaños LLC.

[2] See February 12, 2019 "Comment to the Advisory Committee on Civil Rules regarding Proposed Amendments to Rule 30(b)(6)" submitted by Product Liability Advisory Council"

[3] See, Roca Labs, Inc. v. Consumer Opinion Corp., No. 8:14-CV-2096-T-33EAJ, 2015 WL 12844307, at *2 (M.D.Fla. May 29, 2015)(denying motion to compel identity of witnesses and stating "the identity of Defendants' corporate representatives is not relevant and Defendants are not required to identify their Rule 30(b)(6) witnesses prior to deposition.").

behalf.[4] The new amendment seems to run counter to that notion.

Plaintiff attorneys, on the other hand, have claimed that advance notice of the identity of a witness is a practical necessity which also promotes efficiency. Plaintiff attorneys claim to be concerned about alleged "gamesmanship" and delaying tactics from defendants about identifying witnesses. They believe that forcing the corporation to identify their witnesses ahead of time will reduce these opportunities to delay or "hide the ball" from plaintiffs.

Not only are there disagreements on both sides of the aisle when it comes to having to identify witnesses ahead of time, but both sides also disagree regarding *who* will actually designate the witnesses. The defense bar has remained adamant that requiring the parties to discuss potential witnesses to be deposed will inevitably result in plaintiffs forcing certain employees to testify that they believe would be more beneficial to their case. The plaintiff bar on the other hand has claimed that, even though the identity of the witnesses will be discussed by the parties, the corporation ultimately would still solely be responsible for designating who testifies.

PLAC also pointed out that the proposed amendment to Rule 30(b)(6) did not address a glaring omission in the current rule—a mechanism for objecting to 30(b)(6) notices. The Lawyers for Civil Justice ("LCJ") have echoed this sentiment. As practitioners are well aware, different courts have different requirements for a corporate defendant's objections to a 30(b)(6) notice.[5] PLAC and the LCJ have called for an amendment that clarifies the procedures for objections to Rule 30(b)(6) notices that can applied uniformly across all jurisdictions.

Additional comments to the proposed amendment have offered many other suggestions including limiting the number of topics that can be discussed or expressly limiting the number of deposition hours. As PLAC noted, although rule 30(d) limits a deposition to seven hours, courts generally allow multiple seven hour sessions when multiple corporate representatives must be named to respond to 30(b)(6) notice. This

[4] See e.g. September 12, 2018 "Comment to the Advisory Committee on Civil Rules. Fixing What's Broken: A Call for Straightforward Answers to the Questions that Regularly Confound Rule 30(b)(6) Practice," submitted by the Lawyers for Civil Justice; November 20, 2018 "Comment to the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules," submitted by The Voice of the Defense Bar.

[5] See, e.g., New England Carpenters Health Benefits Fund v. First DataBank, Inc., 242 F.R.D. 164, 165-66 (D. Mass. 2007) ("Unlike the procedure with respect to interrogatories, requests for production of documents and requests for admissions, there is no provision in the rules which provides for a party whose deposition is noticed to serve objections so as to be able to avoid providing the requested discovery until an order compelling discovery is issued."); Ortiz v. Cybex Int'l, Inc., 2018 WL 2448130, at *8 ("[The responding party] objected out-of-court to the Rule 30(b)(6) notice but did not seek a protective order. Confronted with a notice of deposition and absent agreement, a party who for one reason or another does not wish to comply with a notice of deposition must seek a protective order."); Int'l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc., No. 11-CV-02007-MSK-KLM, 2013 WL 627149, at *6 (D. Colo. Feb. 19, 2013) ("filing a pre-deposition motion is the appropriate course of action.").

effectively makes Rule 30(d)'s limit moot in those situations.

Plaintiff attorneys have strongly pushed back against these suggestions. For example, attorneys have stated that limiting the number of topics that can be covered in a deposition would lead to broader and less precise descriptions. This, plaintiff attorneys argued, would lead to more objections to the topics from opposing counsel as being too broad, vague, or incomprehensible, which, in turn, would create further discovery disputes.

It remains to be seen if the Committee will incorporate any of these changes proposed by either side in the new Rule 30(b)(6). The comment period for the proposed amendment closed on February 15, 2019. The Committee must now decide whether to make any changes to the proposed amendment.[6] If the Committee approves the proposed Rule, it will submit it to the Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court. There is no timetable set as to when that decision will be made.

If the proposed Rule is approved by all entities, it would become effective on December 1, 2020 if Congress does not act to defer, modify, or reject it. While the future of the Rule is uncertain, what does appear to be certain are continued disputes when it comes to both identifying the corporate representative that will testify at a deposition and the topics plaintiff's counsel will ask that witness. An already overlong and unduly contentious discovery process may get even longer and more contentious.

[6] If the Committee does make "substantial changes" to the proposed Rule, then it must republish the Rule for an additional period of public comment unless the Committee determines that republication would not assist the work of the rules committees.

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