Cooperation and Corporate Representative Depositions:

EXPLORING THE NEW "MEET AND CONFER" REQUIREMENT IN REVISED FRCP 30(B)(6)

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INTRODUCTION

For over a decade, leaders in the legal profession have bemoaned the vanishing jury trial.[1] Two of the many factors leading to the decrease of jury trials are the escalating costs of litigation as well as time and budget demands of judicial resources. Experts agree the cost of discovery is directly related to the total costs in civil cases and the concomitant strain on the courts.

The Dec. 1, 2020 "meet and confer" amendment to Federal Rule of Civil Procedure 30(b)(6) is a positive step when it comes to addressing these problems. Iowa trial lawyers who are concerned about disappearing jury trials should informally incorporate the "meet and confer" concepts found in the amended rule into the Iowa Rules of Civil Procedure.

This article will briefly describe the history of the federal and state rules concerning deposing corporate representatives. It will also discuss the history and intent of the Dec. 1 "meet and confer" amendment to the federal rule. The article will offer some insight into committee notes and comments surrounding the new rule. Finally, the authors will briefly describe proposed best practices under Rule 30(b)(6) as well as Iowa Rule of Civil Procedure 1.707(5).

FRCP 30(B)(6) AND IRCP 1.707(5)

Under the previous version of FRCP 30(b)(6), and mirrored in current IRCP 1.707(5), the process of noticing up a deposition directed to an organization included the following basic steps: (1) the notice or subpoena would set forth the name of the entity to be deposed along with a description of the matters for examination; then (2) the named organization was required to designate one or more individuals to testify on behalf of the organization about information "known or reasonably available to the organization." If there was a dispute about the matters to be examined, for example, then the receiving party could serve an objection or file a motion for protective order in advance of the deposition date. There was no requirement that the parties meet and confer regarding the matters upon which the witness(es) would be examined or any other issue related to the noticed deposition.

PREPARING THE CORPORATE DEPONENT

There are a number of frustrating practical problems lawyers are forced to deal with whether they are taking or defending the deposition of a corporate representative. Some of the common problems reported by Iowa practitioners might be addressed with a "meet and confer" obligation. The most common complaint among counsel perpetuating FRCP 30(b)(6) testimony is that the corporate witness is, by design or neglect, unprepared to provide the requested testimony. On the reverse side, those defending the depositions of corporate witnesses outline two primary concerns:

1. The deposition notice is so expansive and ambiguous that it is nearly impossible to adequately respond; and

2. The deposing party is engaging in gamesmanship hoping to obtain inconsistent testimony from a single deponent who is a fact witness and the likely person with knowledge for a corporate representative deposition.

A deponent under rule 30(b)(6) is required to give responsive answers to questions posed.[2]

From a practical standpoint, there may be more than one deponent who has to be identified in response to a notice. It is well recognized that a deponent is not required to have personal knowledge of some or all of the topics to be addressed—but the corporation is obligated to prepare the witness so that they can give knowledgeable answers to the questions posed.

Under current practice in Iowa, the litigants will most likely end up before a judge if there is disagreement over the scope of the notice or the preparedness of the deponent.[3] A party objecting to a deposition noticed under Rule 1.707(5) has an obligation to clearly define the objections. In response, the deposing party must resolve the dispute or file a motion to compel prior to taking the deposition. Otherwise, the deposition will be taken subject to the objection.[4]

PROPORTIONALITY AND NARROWING THE SCOPE OF MATTERS TO BE EXAMINED

An additional issue that permeates the discovery process, including corporate representative depositions, concerns the proportionality requirements set forth in FRCP 26(b)(1) and IRCP 1.503(8)(c). Where the matters to be examined set forth in the deposition notice are overly broad in scope, this proportionality consideration may necessitate a narrowing of the issues to be discussed to strike the appropriate balance between (1) access to information that is relevant to the claims and defenses in the case and (2) the increasing costs of discovery. This balancing or narrowing process is frequently addressed through formal, written objections, as well as through motions for protective orders or motions to compel, all of which is more adversarial than collaborative.

HISTORY AND INTENT OF THE NEW MEET AND CONFER DUTY UNDER FRCP 30(B)(6)

As noted above, there were multiple problems that arose under the former FRCP 30(b)(6) (and current IRCP 1.707(5)) framework for corporate representative depositions. These problems included overly broad and vague deposition topics, preparation issues with designated witnesses, and an adversarial approach to resolving disputes with such depositions.

In 2017, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules requested comments about practitioners' experiences with Rule 30(b)(6). The subcommittee also identified six potential amendments for consideration:

1. Including a specific reference to Rule 30(b)(6) among the topics for discussion by the parties at the Rule 26(f) conference and between the parties and the court at the Rule 16 conference;
2. Clarifying that statements of the Rule 30(b)(6) deponent are not judicial admissions;
3. Requiring and permitting supplementation of Rule 30(b)(6) testimony;
4. Forbidding contention questions in Rule 30(b)(6) depositions;
5. Adding a provision to Rule 30(b)(6) for objections; and
6. Addressing the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions.[5]

After receiving comments from practitioners, the advisory committee focused on adding a meet and confer obligation to FRCP 30(b)(6) and proposed the following language for inclusion in the rule: "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."[6]

After a comment period and two public hearings, the advisory committee amended the proposed language to state as follows: "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 matters for examination."[7]

The new rule, including the revised language to require a meet and confer for any corporate representative deposition, was submitted by Chief Justice John Roberts on behalf of the U.S. Supreme Court on April 27, 2020, and it became effective on Dec. 1, 2020.[8] Notably, the new meet and confer requirement does not apply to Rule 31 written depositions directed to an organization, and it also does not require the parties to confer about the number and identity of the witnesses who will testify pursuant to the 30(b)(6) notice.

The new rule should force the parties to collaborate and reach agreement on which matters will and will not be covered during the corporate representative deposition without the need for timely and costly motion practice. By narrowing the topics, this should also reduce the number of witnesses who will be required to testify in response to a FRCP 30(b)(6) deposition notice, thereby helping to address the rising costs of discovery for litigants. Further, this meet and confer process may alleviate witness preparation issues that have arisen in the past due to the mutual agreement on topics to be covered and clear expectations for all involved. To the extent there are concerns about the time, method or manner by which the deposition is set to take place, the parties may seek to discuss those issues as well.

BEST PRACTICES UNDER THE IOWA CORPORATE DEPOSITION RULE

To be clear, the "meet and confer" amendments apply only to the federal rules; the Iowa Supreme Court has not amended Rule 1.705 to include a specific obligation of this sort. On the other hand, there is a general duty under Iowa law to make a good faith effort to engage in meaningful discovery and avoid unnecessary motion practice. Regardless of the scope of that duty, lawyers who are interested in the preservation of trial by jury and who are driven by general concepts of professionalism and civility

will be advised to adopt best practices that emulate the federal requirements.

For attorneys perpetuating testimony, it is advisable to create precise, tailored notices describing topics to be addressed. One should avoid the urge to adopt a "form" obtained from a CLE presentation or professional colleague. It also is important to avoid the urge to attempt to inflict pain on the opposing party through the corporate deposition process. Lawyers responding to corporate deposition notices should make a good faith effort to "see the other side of things." Avoid the knee jerk urge to object to a notice that at first blush seems overly broad or mean spirited.

Without the "meet and confer" requirement, Iowa lawyers noticing a corporate deposition should include reasonable instructions on the deponent's duties for preparing responsive testimony. It makes sense to prepare a letter accompanying the notice inviting the counsel for the deponent to confer to discuss the parameters of the notice.

There is some confusion as to whether a responding party has an obligation to serve an objection to a notice opposed to simply outlining concerns and inviting a conference. It may be prudent to start with an invitation to conference before serving an objection.

This new meet and confer requirement presents opportunities for thoughtful advocacy and compromise. The responding party should consider whether there are opportunities to narrow the topics, thereby potentially reducing the number of witnesses needed to testify as corporate representatives yet still providing access to relevant information related to the claims and defenses in the case. Additionally, the responding party likely has knowledge about their own client's corporate structure, which can be used to educate opposing counsel and streamline the deposition process in a manner that will reduce costs for the litigants yet still provide the opposing party with discoverable information.

CONCLUSION

Litigation is and will always be an adversarial endeavor. But the new Federal Rule 30(b)(6) is a step in the right direction to find compromise and reduce the rising costs of discovery while still ensuring access to relevant information as contemplated in Federal Rule 26(b)(1).

[1] *See* American College of Trial Lawyers "Vanishing Jury Trial" (2004).

[2] *See Spanski Enterprises, Inc. v. Telewizja Polska,* S.A., No. 17-7051 (D.C. Cir. 2018).

[3] *See Iowa Rule of Civil Procedure* 1.517(1)(2).

[4] *See Rumsey v. Woodgrain Millwork, Inc.,* LACL138889, Iowa District Court for Polk County (July 15, 2019).

[5] https://www.federalrulesofcivilprocedure.org/latest-updates/.

[6] Id.

[7] Id.

[8] Id.

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