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Amended Rule 30(b)(6) Fed. R. Civ. P. Requires Conference Regarding Matters for Examination in a 30(b)(6) Deposition

BY PATRICIA S. SMART

Rule 30(b)(6) of the Federal Rules of Civil Procedure, "Notice or Subpoena Directed to an Organization," is amended effective December 1, 2020. Rule 30 (b)(6) now imposes a requirement that the party serving a Rule 30(b)(6) deposition notice or subpoena and the organization to be deposed confer regarding the matters for examination.

The amended rule provides: "Before or promptly after the [Rule 30(b)(6)] notice or subpoena is served, the serving party and the organization [which is subject to the 30(b)(6) notice] must confer in good

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What Are Costs That You Can Recover on State Law Actions Filed in Federal Court?

BY AMBROSE V. MCCALL

You had just started to enjoy your Zoom or other web portal holiday party and felt good about all of your litigation expenses being covered by the remedies provided under state law. But then you feel a possible white or blue light headache coming on from excessive wattage, or too much caffeine, or something stronger in your glass. At the same time, you hear a voice from a square in the gallery raise the possibility that a great state law that provides for payment of certain litigation expenses is unavailable in their multi-party diversity jurisdiction case. You cannot help

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Amended Rule 30(b)(6) Fed. R. Civ. P. Requires Conference Regarding Matters for Examination in a 30(b)(6) Deposition

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faith about the matters for examination." The amended rule further requires that a Rule 30(b)(6) deposition subpoena advise a nonparty organization of its duty to confer with the party serving the subpoena, as well as its duty to designate the person(s) who will testify. The changes to the Rule are as follows:

(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 ~~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, 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 make this designation~~ 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.

Per the Advisory Committee, the amendment is in response to problems caused by overlong or ambiguously worded lists of matter for examination or inadequately prepared witnesses. Candid discussions may clarify and focus the matters for examination and facilitate the organization's designation and preparation of appropriate witness(es), thereby avoiding later disagreements. *See,* Committee Note regarding the amendment.

The Committee points out that it may be beneficial to expand the conference to include additional 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 may facilitate the efficiency and productivity of the deposition.

As indicated, the requirement for a conference applies only to the party which served the deposition notice or subpoena and the organization to be deposed. In the case of a third-party subpoena, there is no requirement that the conference include any party to the lawsuit other than the party which served the subpoena. Similarly, in a multi-party litigation, there is no requirement that the conference include any parties other than the one which served the deposition notice and the one which is to be deposed.

The deposition of a public or private corporation, partnership, association or governmental agency may be taken by written questions pursuant to Rule 31(a)(4) of the Federal Rules of Civil Procedure, which authorizes a deposition by written questions "in accordance with Rule 30(b)(6)." The Committee Notes regarding the amendment of Rule 30(b)(6) state that the newly imposed requirement to confer about matters for examination does not apply when an organization is deposed under Rule 31(a)(4).■

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What Are Costs That You Can Recover on State Law Actions Filed in Federal Court?

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yourself. So, you start scrambling to find a device and conduct some quick computer research. Where do you begin? As usual with such issues, one starts with the Rules, the federal statutes, and the authorities from the U.S. Supreme Court and U.S. Court of Appeals.

The procedure for recovering taxable costs other than attorney's fees appears in Federal Rule of Civil Procedure 54(d)(1). The Rule states that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party." "The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action. *Id.*

The types of recoverable costs appear in the governing statute codified at 28 U.S.C. § 1920. Taxable costs include the following:

1) clerk and marshal fees;

2) fees for "recorded transcripts necessarily obtained for use in the case";

3) expenses for printing and witnesses;

4) expenses for exemplification and necessary copies;

5) docket fees; and

6) compensation of interpreters and court-appointed experts.

The U.S. Supreme Court informs us that taxable costs "are limited by statute and are modest in scope." *Taniguchi v. Kan Pac. Saipan, Ltd.,* 566 U.S. 560, 573 (2012). Rule 54, however, does not provide a court with an independent power to tax. Rather, the "'discretion granted by Rule 54(d) is . . . solely a power to decline to tax, as costs, the items enumerated in §1920.'" *Taniguchi v. Kan Pac. Saipan, Ltd.,* 566 U.S. 560, 573 (2012), *quoting Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 442 (1987).

Most specifically, in diversity jurisdiction cases, a major point of conflict can arise over whether state law remedies or federal rules determine what costs may be available for a plaintiff to recover, or that apply to a defendant as "costs." A decade ago, a majority of a divided U.S. Supreme Court disagreed with the U.S. Circuit Court of Appeals over whether Federal Rule of Civil Procedure 23, or a New York statute with additional class certification criteria that barred "penalty only" class actions, controlled a pending diversity jurisdiction class action. *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.,* 559 U.S. 393, 400-01 (2010). The U.S. Supreme Court held that Rule 23 prevails, meaning a state law could not add other requirements where both laws address the same question, specifically, "whether a class action may proceed for a given suit." *Id.* at 401. In response to Justice Ginsburg's dissent and argument that Rule 23 and the New York statute could be read so as to avoid finding any conflict between the two laws, the majority stressed that it would not twist its reading of Rule 23 to an extent that would invalidate the Rule as a means to avoid finding any such conflict. Compare majority op. at 406, with dissent op. at 437.

The potential black hole that practitioners must evaluate originates with the concurring opinion of Justice Stevens. From the perspective of Justice Stevens, the plurality strayed by solely relying on the Federal Rule which he viewed as inconsistent with the Rules Enabling Act, and specifically its provision that says: "Such rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). *Shady Grove*, 559 U.S. at 438 (Stevens, J., concurring). The analysis detailed by Justice Stevens "turns on whether the state law actually is a part of a State's framework of substantive rights or remedies," meaning a Federal Rule will not carry the day if it "would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Id.* at 419, 423 (Stevens, J., concurring). Ok, now I definitely have a headache. While Justice Stevens still reasoned that the New York law at issue was not so intertwined with state rights or remedies through his reading of the New York class action law, *id.* at 432-36, what do we mortals take away from this analysis when deciding what state laws on "costs" and other remedies are available in our diversity jurisdiction cases?

Fortunately, the Tenth Circuit of the U.S. Court of Appeals issued an opinion this year that is a helpful guide that might aid your efforts to map a pathway to the conclusion of your case. In *Stender v. Archstone-Smith Operating Trust*, 958 F.3d 938 (10th Cir. 2020), the specific issue was whether a court presiding over a diversity jurisdiction case could award costs provided under Colorado laws that Federal Rule of Civil Procedure 54(d) specifically prohibits. *Id.* at 940. The Colorado laws, codified at Sections 13-16-104 and 13-16-105, provided the state law grounds to award more than $230,000 in costs that were unavailable under Fed. R. Civ. P. 54(d). *Id.*

The *Stender* court started its analysis with the analytical plank from the plurality of the *Shady Grove* opinion. Since both the Colorado laws and Rule 54(d) addressed the "same question," and their differences were irreconcilable, and Rule 54(d) is a procedural rule, Rule 54(d) certainly prevailed over the Colorado laws on what constituted awardable costs. *Stender*, 958 F.3d at 945-46. Moreover, the constitutionality of the Congressional action that led to the issuance of Rule 54 was clear. *Id.* at 946 (citing *Hanna v. Plumer*, 380 U.S. 460 (1965)) (explaining that the Constitution grants "a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either").

But the *Stender* court extended itself further by running its scenario through the concurring opinion analysis of Judge Stevens. Upon reviewing the Colorado laws on costs, the *Stender* court also concluded that the state laws shifted costs in every type of case, including those conducted under federal or state laws. *Id.* at 947. Since the state laws on cost-shifting were not limited to or tied to a particular type of claim, such as "civil-rights or employment-discrimination claims" or covenants not to compete or trade secrets, the Colorado state laws on costs did

not qualify as a state law remedy. *Id.* With no impairment being caused to any state law substantive right by the application of Rule 54, a federal court in Colorado lacked any basis to award costs provided under Colorado law. *Id.*

The *Stender* opinion reminds us that in cases where costs are an issue, it always helps to seek directions from the federal authorities before you bank on your opponent paying your client's costs that only state laws may provide. ■

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Federal Presuit Information Preservation Orders

BY JEFFREY A. PARNESS

Introduction

Federal civil procedure laws allowing presuit information preservation orders by courts should be expanded in order to promote greater compliance with current substantive and procedural laws on the duties of preserving civil litigation information. These new laws should appear in Federal Civil Procedure Rule (FRCP) 27. Following are the rationales and guidelines for a new rule.

Situs

New presuit information preservation laws are best located within amendments to current FRCP 27, the rule on perpetuating witness testimony via deposition. The goals behind presuit information preservation orders mirror the goals behind presuit deposition orders to perpetuate testimony. They both promote assurance that information important for accurate factfinding during later civil litigation will be available.

Unlike presuit witness deposition orders, however, newly-recognized presuit information preservation orders should be able to address both the lack of a duty to preserve and the duty to preserve. Thus, those who have been asked presuit to preserve certain information should be able to obtain court orders that preservation is not legally compelled.

Without an express rule on presuit information preservation beyond depositions, federal courts might now consider presuit preservation orders founded on their inherent equitable powers.[1] New written norms within Rule 27 will promote the procedural law uniformity generally sought by the FRCP.

Petitioners and Respondents

Petitioners

Petitioners eligible for presuit information preservation orders should be limited to potential parties in later federal civil actions. Petitioners should not soley be, however, those who presently cannot bring civil actions.[2] The allowance of presuit information preservation petitions even when civil actions could be filed serve several important purposes. They include allowing petitioners to better meet their presuit "reasonable inquiry" duties under FRCP 11; avoiding litigation over the current ability to sue; promoting more informed presuit settlements; and, most importantly, promoting compliance with preexisting information preservation duties, which only may be tied to foreseeable litigation.[3]

Respondents

A broad range of people and entities should be subject to presuit information preservation orders. Thus, orders should be able to reach beyond an expected adverse party. Yet such a party, when known, should be notified of any presuit preservation petition. Presuit discovery often is not more burdensome on respondents than postsuit discovery wherein parties and nonparties alike can be summoned through depositions. Of course, presuit discovery is necessarily more speculative as there is no guarantee of a later civil action. Thus, respondents should be less available for presuit discovery than for postsuit discovery, as with Rule 27 depositions.

Petition Contents

Petitions seeking presuit information preservation orders, given their pleas for extraordinary relief, generally should be quite detailed, as well as certified and verified. Lawyers should certify reasonable inquiry, which might include earlier meet and confers and proportionality assessments. Their clients should at times need to verify the factual circumstances prompting their requests for presuit judicial assistance, as well as allegations of a statutory, common law, or contractual duty to preserve. Petition requirements thus should track somewhat the dictates on lawyers and parties who file complaints[4] or who seek provisional remedies.[5]

A petition for a presuit information preservation order should contain the

possible subject matter of a later action; the facts a petitioner wishes to learn through the preserved information when it is revealed; and the expected adverse party or parties, if then known. A petition for a presuit information nonpreservation order should, at the least, contain the problems arising from the legal uncertainties and potential costs arising when presuit demands for information preservation have been made.

Presuit preservation orders should sometimes be permitted even where the information can otherwise be obtained. Reasonable inquiry dictates, however, should compel potential presuit petitioners to engage first in efficient information gathering and storage outside of discovery.

Yet very burdensome information gathering should not be expected when it can be fairly avoided.

Proportionality

As with many postsuit discovery requests, a presuit information preservation request should only be made after the petitioner's assessment of proportionality. For postsuit discovery in a federal district court, one seeking a discovery must certify that the request is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."[6] In ruling, a district judge must consider whether the request is "proportional to the needs of the case, considering the importance of the issues at stake,…the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[7]

Clearly, proportionality assessments will differ for the same requested information in presuit and postsuit settings. Given the more speculative nature of the need for the information, proportionality relating to presuit requests should be more difficult to demonstrate. Yet, an irreparable harm standard is unwarranted, especially where petitioners rely on the clear preexisting duties of the respondents to preserve and where they claim that court orders are needed in order to insure compliance which otherwise will likely (or may) not occur.

Meet and Confer

Presuit information preservation petitions should normally be preceded by "meet and confer" encounters between potential petitioners, respondents, and other possible parties in future litigation.[8] Reasonable efforts should be made to agree on information preservation duties (and sometimes access). Similar compelled encounters are commonplace under the FRCP before discovery begins[9] and when postsuit discovery disputes arise.[10]

Available Forms of Relief Beyond Preservation

Presuit information preservation orders should, at times, be available to prompt information disclosures to petitioners together with information preservations by respondents. So, at times, copies of documents will be ordered to be revealed to petitioners while the originals will be ordered to be preserved by the respondents.

Presuit information preservation orders may sometimes prompt preservation for a time, followed by disclosures necessitating information destruction. For example, a machine involved in an accident might be ordered to be preserved and then tested even if the testing will result in complete destruction, or permanent alteration, of the machine. Such a presuit testing order is particularly appropriate when the machine is key evidence in a likely future lawsuit and will naturally spoil if it is only preserved for an extended time.

As noted, available forms of relief should also include protective orders on behalf of petitioners. Thus, at least some who receive presuit information preservation demand letters should have standing to seek declaratory relief on whether or not there is a preservation duty and on the parameters of any such duty. Standing to seek a presuit declaration is easily justified, for example, where the relevant information is quite costly to maintain; where the facts in any later lawsuit will likely be generally undisputed; and, where an explicit statute or an express contract calls for the petitioner to have no preservation obligation for, or to destroy, the information.

Cost Shifting and Sanctions

The costs of compliance with presuit information preservation orders directing that certain information be preserved by the respondent should be able to be shifted from the respondent to the petitioner, not unlike compliance costs for certain postsuit discovery orders.[11]

Sanctions for discovery violations should be available and track the sanctions available for similar (or somewhat similar) postsuit discovery violations.[12] Of course, there will be no perfect overlap. For example, sanctions involving future jury instructions might generally be out of place in presuit discovery settings. Some individual or entity liability for sanctions due to failures by agents should also be expressly recognized in a new FRCP 27.[13]

Choice of Law

Vexing choice of law issues can arise with presuit orders on information preservation. For some presuit preservation requests, the information might be found in one state while the holder of the information and the potential civil litigants are in other states. Without a preservation order, spoliation torts, as well as spoliation sanctions, perhaps can be pursued in later federal district court cases. But opportunities for FRCP presuit information preservation orders are also needed. And when justified, the court hearing the presuit petition will need to consider at times not only federal procedural common law duties on information preservation, but also varying state laws -- substantive and procedural -- on information preservation.

Appeals

As there are no claims in the traditional sense, appeals of orders on presuit information preservation petitions cannot be grounded on the final judgment rule. Appellate standards should be comparable to the standards for interlocutory reviews of formal discovery orders during civil litigation. Appeals will sometimes follow the precedents on friendly contempts by respondents. When petitioners are denied, appeals should sometimes be available, as

when the dispute is ripe and cannot await any future lawsuit because the information in the interim will likely be lost.

Later Effects

Because presuit discovery is more speculative than postsuit discovery, denials of presuit information preservation petitions should not foreclose similar requests postsuit. Further, grants of presuit petitions should not foreclose follow-up, related postsuit discovery requests since new information may have been created or old information may have become unreliable. Further, presuit orders that require continuing preservation should be amenable to modification, including in later related civil actions.

Conclusion

A new FRCP 27 should, at the least, authorize certain presuit court orders involving information preservation when the information, relevant to possible later litigation, will likely spoil otherwise and/or is already subject to a preservation duty, as under FRCP 37(e) on esi. The new rule should authorize both presuit information preservation orders and presuit protective orders declaring a lack of any preservation duty, especially where a presuit information preservation demand has been made, is disputed, and warrants immediate judicial attention. The availability of more expansive presuit information preservation orders will promote greater uniformity among district courts and enhance accuracy in later civil litigation factfinding. ■

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The article follows up on Parness and Theodoratos "Expanding Pre-Suit Discovery Production and Preservation Orders," 2019 Michigan State Law Review 652.

1. See FRCP 27(c) (the rule on presuit depositions "does not limit a court's power to entertain an action to perpetuate testimony").
2. In his FRCP 37(e) proposal, Professor Spencer urged that a petition for presuit discovery should only be pursued by one expecting to be a party in a civil action "cognizable in a United States court" who "cannot presently bring it or cause it to be brought." A. Benjamin Spencer, "The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court," 79 Fordham L. Rev. 2005, 2023 (2011) [hereinafter "Spencer"] (proposed FRCP 37(e)(3)(A)(i)). Yet petitioners should sometimes be able to proceed even where any future claim may now be brought. Presuit settlements founded on accurate factual assessments should be encouraged. Both federal and state civil procedure laws on presuit information preservation via depositions to perpetuate testimony have no requirements on the current inability to bring a civil action or cause a civil action to be brought. *See, e.g.*, FRCP 27(a)(1) and Montana Civil Procedure Rule 27(a)(1).
3. Duties tied to foreseeable litigation arise, for example, under FRCP 37(e) on irreplaceable electronically stored information ("esi"). Duties untethered to foreseeable litigation arise, for example, under statutes on medical record maintenance.
4. See, *e.g.*, FRCP 11(b)(2) (lawyers must certify that "legal contentions are warranted by existing law" or by a nonfrivolous argument for a change in the law) and FRCP 11(c)(1) (parties "responsible for" Rule 11 violations, typically involving "factual contentions" without "evidentiary support," per FRCP 11(b)(3) and (4), may be sanctioned).
5. See, *e.g.*, FRCP 65(b)(1)(A) (requests for temporary restraining orders must be supported by "specific facts in an affidavit or a verified complaint clearly" showing the need for immediate relief).
6. FRCP 26(g)(1)(B)(iii).
7. FRCP 26(b)(1).
8. Professor Hoffman found in Texas that a lack of an express notice requirement covering future litigants led to instances of no notice given, prompting changes to the Texas presuit discovery rule. Lonny Sheinkopf Hoffman, "Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery," 40 Univ. Mich. J.L. Reform 217, 270-272 (2007).
9. See, *e.g.*, FRCP 26(f) (good faith effort to formulate discovery plan) and FRCP 26(d)(1) (no discovery until conferral required by FRCP 26(f) regarding a discovery plan).
10. See, *e.g.*, FRCP 26(c)(1) (good faith effort to resolve discovery dispute before a motion for a protective order may be filed). Local court rules sometimes extend such dispute resolution obligations following private meet and confers which do not resolve discovery disputes. See, *e.g.*, U.S. Dist. Ct., S.D. of Indiana, Local Rule 37-1(a) (before district judge involvement in a "formal discovery motion," counsel must confer with "assigned Magistrate Judge" in order to see if dispute resolution is possible).
11. See, *e.g.*, FRCP 26(b)(4)(E) (party seeking discovery involving an adversary's expert must pay some fees and expenses).
12. See, *e.g.*, Illinois Supreme Court Rule 224(b) (sanctions available for postsuit discovery violations "may be utilized by a party initiating" an independent action for presuit discovery or by a respondent in such an action).
13. Liability for principals due to any agent actions is sometimes unwarranted. *Compare* FRCP 11 (on law firm liability for only some pleading failures by their attorneys). Thus, entity liability should normally arise when an agent's failure was caused, wholly or in significant part, by the entity's deficient system on litigation holds. But no entity liability should be grounded on an agent's purposeful destruction of information solely geared to shielding the agent from personal liability, where the entity directed there should be no such destruction.

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