

Comparing New York State's Court Rule Governing Entity Depositions to Federal Rule of Civil Procedure 30(b)(6)

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The New York State Court Rule (the "Rule"), 22 NYCRR 202.20-d, that governs entity depositions is intended to streamline the method for examining entities. Although it is similar to FRCP 30(b)(6), it is not entirely the same. The differences between the Rule and FRCP 30(b)(6), as well as the fact that there is minimal case law interpreting the Rule, will likely lead to some confusion for commercial entities – and their general counsel – that receive a notice or subpoena to testify at a deposition for a case pending in New York State court. This blog post provides a brief overview of what is required by such a notice or subpoena and the related rights that are afforded to the commercial entity.

While the Rule has been applicable for some time in the Commercial Division of New York Supreme Court, it was only recently adopted into the Uniform Rules for the Supreme Court and County Court, becoming effective in February 2021. Therefore, the Rule is applicable to the majority of New York State trial court cases and can be found at 22 NYCRR 202.20-d, and for cases pending in the Commercial Division, at 22 NYCRR 202.70.

Under the Rule, a notice or subpoena may, but is not required to, list the matters about which the entity will be questioned. This differs significantly from FRCP 30(b)(6), which mandates that a notice or subpoena include a list of matters of inquiry. However, if a list of matters is included, then similar to FRCP 30(b)(6), the matters must be described with some specificity and not just in general terms. Second, the notice or subpoena may, but is not required to, identify a particular officer, director, member, or employee of the entity that is to be questioned. This too differs from FRCP 30(b)(6).

If the notice or subpoena served under the Rule does not identify a specific individual to be deposed, then the entity has the right to choose whomever it wishes, including a former employee. This was recently addressed by the court in [*Prime Properties \(USA\) LLC v. Kefalas*](#), which held that a corporate representative need not be an employee of the entity. Additionally, the entity may designate more than one individual to testify on its behalf.

If the notice or subpoena both (1) includes a list of matters upon which the entity will be questioned, and (2) identifies a specific individual that is to be questioned, then the commercial entity has the option to produce someone other than the individual specified. In that situation, all that is required is that the entity provide notice at least 10 days prior to the scheduled deposition and provide the identity, description, or title of the individual that will instead be produced. However, this option does

not appear to be available to an entity if the notice or subpoena identifies a specific individual to be questioned and does not include a list of matters.

With respect to commercial entities that are not parties to a case for which they receive a deposition subpoena, both the Rule and NY CPLR § 3101(a)(4), indicate that nonparty entities are not exempt from being deposed. Such a nonparty deposition is permissible as long as the information sought from the nonparty entity is relevant to a party's claims or defenses. This was recognized by the New York Court of Claims in *Kapon v. Koch*. Nonetheless, the Rule provides that the subpoena directed to the nonparty entity must advise the entity of its duty to make the selections set forth in the Rule. Additionally, NY CPLR § 3101(a)(4) requires that the nonparty entity be provided with the circumstances or reasons why its deposition is being sought. If these two requirements are not met, there is an argument that the subpoena is facially defective and is unenforceable. However, the nonparty entity must object to these deficiencies at least 3 days prior to the scheduled deposition.

In summary, commercial entities and their general counsel should pay close attention to corporate representative deposition notices or subpoenas served under the Rule, insofar as they are not identical to those they may have become accustomed to receiving under FRCP 30(b)(6). An entity may have the option to choose whom it will produce to be questioned even if a specific individual is identified, and a nonparty entity may be able to object to the subpoena based on deficiencies if done so in the requisite amount of time.

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National Law Review, Volume XIII, Number 161

Source URL: <https://natlawreview.com/article/comparing-new-york-state-s-court-rule-governing-entity-depositions-to-federal-rule>