

## NOTICE OF COMMENT PERIOD

The Nebraska Supreme Court invites interested persons to comment on proposed amendments to the Nebraska Court Rules of Discovery in Civil Cases, Neb. Ct. R. Disc. §§ 6-330, 6-331, and 6-332. The amendments were submitted to the Court for consideration on June 12, 2015, by the Nebraska Supreme Court Committee on Practice and Procedure.

Anyone desiring to comment on these proposed amendments should do so in writing to the office of the Clerk of the Supreme Court and Court of Appeals, P.O. Box 98910, Lincoln, Nebraska 68509-8910, or via e-mail to [jill.machacek@nebraska.gov](mailto:jill.machacek@nebraska.gov) no later than August 31, 2015.

The proposed amendments, and the June 1, 2015, explanatory memo from University of Nebraska College of Law Professor John Lenich, Reporter for the Committee, are available for review below, or a hard copy may be reviewed in the office of the Clerk of the Supreme Court and Court of Appeals upon request.

§ 6-330 [Rule 30]. Depositions upon oral examination.

(a) When Depositions May Be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of thirty days after service of summons, except that leave is not required:

(1) If a defendant has served a notice of taking a deposition or otherwise sought discovery, or

(2) If special notice is given as provided in subdivision (b)(2) of this rule.

The attendance of witnesses may be compelled by subpoena. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of Examination: General Requirements; Special Notice; ~~Nonstenographic~~ Recording; Interpreters; Production of Documents and Things; Deposition of Organization; Officer's Duties.

(1)(A) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or her or the particular class or group to which he or she belongs. ~~If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.~~ The notice shall also state the name, address, telephone number, and e-mail address (if any) of the party taking the deposition or if the party is represented, the party's attorney. If it is known that an interpreter will be used, the notice shall state that an interpreter will be used and shall state the language that will be interpreted or the type of interpretation (e.g., sign language). If it is unknown whether an interpreter may be necessary, the notice shall include the following advisory statement: "If you are a person who is deaf, hard of hearing, or unable to communicate in the English language, you should contact as soon as possible the attorney or the party whose name is stated in this notice or subpoena and let that attorney or party know that you will need the help of an interpreter to understand and answer questions during the deposition."

(B) If a subpoena is to be served on the person to be examined, the subpoena shall contain the same information required by subdivision (A) of this rule. The advisory statement required by subdivision (A) may be omitted from the notice if it is included in the subpoena.

(C) If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced pursuant to the subpoena shall be attached to or included in the notice. The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

~~(B)~~ (D) When the party against whom the deposition is to be used is unknown or is one whose whereabouts cannot be ascertained, he or she may be notified of the taking of the deposition by publication or by any manner that is approved by the court and reasonably calculated under the circumstances to provide the party with actual notice. The publication must be made once in some newspaper printed in the county where the action is pending, if there be any printed in such county, and if not, in some newspaper printed in this state of general circulation in that county. The publication must contain all that is required in a written notice and must be made at least ten days prior to the deposition. Publication may be proved in the manner prescribed in Neb. Rev. Stat. § 25-520. A copy of the written notice shall be filed with the clerk before publication.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice:

(A) States that the person to be examined is about to go out of the State of Nebraska and will be unavailable for examination in the State of Nebraska unless his or her deposition is taken before expiration of the thirty-day period, and

(B) Sets forth facts to support the statement.

The plaintiff's attorney shall sign the notice, and his or her signature constitutes a certification by him or her that to the best of his or her knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when he or she was served with notice under subdivision (b)(2) he or she was unable through the exercise of diligence to obtain counsel to represent him or her at the taking of the deposition the deposition may not be used against him or her.

(3) The court may for good cause shown enlarge or shorten the time for taking the deposition.

(4) The notice required by subdivision (1) shall state the ~~manner in~~ means by which the testimony will be recorded and preserved. The court may make any order necessary to assure that the record of the testimony will be accurate and trustworthy.

(A) Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means, or any combination of those means. The noticing party bears the cost of the recording means specified in the notice.

(B) With prior notice to the deponent and other parties, any party or the deponent may designate another means of recording the testimony in addition to the means specified in the original notice. The additional recording shall be made by the officer personally or by someone acting in the presence of and under the direction of the officer. The party or deponent who designates another means bears the cost of

the additional record or transcript unless the court orders otherwise. Absent a stipulation of the parties, no other recordings of the testimony may be made.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request. If the deponent is a person who is deaf, hard of hearing, or unable to communicate the English language as defined in Neb. Rev. Stat. § 25-2402, an interpreter must be used to interpret the questions and answers. Unless the parties stipulate or the court upon good cause shown orders otherwise, the noticing party shall arrange and pay for the interpreter. Unless the parties stipulate or the court upon good cause shown orders otherwise, the interpreter must be a certified or provisionally certified interpreter; however, if the noticing party has made reasonably diligent efforts to obtain a certified or provisionally certified interpreter and none are available, the interpreter may be a registered interpreter. A certified interpreter, a provisionally certified interpreter, and a registered interpreter is one who, pursuant to Neb. Ct. R. § 6-702(A)-(C), is listed as such in the statewide register of interpreters published and maintained by the State Court Administrator.

(6) A party may in his or her notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing, or the court may upon motion order, that a deposition be taken by telephone or by other remote means. For the purposes of these rules, a deposition taken by telephone or by other remote means is taken ~~in the district and~~ at the place where the deponent is to appear to answer questions. Absent a court order or stipulation of the parties, the officer must be in the same location as the deponent.

~~(8)(A) A party taking a deposition may have the testimony recorded by videotape. The notice of deposition shall specify that a videotape deposition is to be taken.~~

~~(B) Upon the request of any of the parties, the officer before whom a videotape deposition is taken shall provide, at the cost of the party making the request, a copy of the deposition in the form of a videotape, an audio recording, or a written transcript.~~

~~(C) When the videotape deposition has been taken, the videotape shall be shown immediately to the witness for examination, unless such showing and examination are waived by the witness and the parties. Any changes in form or substance which the witness desires to make shall be recorded on the videotape with a statement by the witness on such tape of the reasons given by him or her for making such changes.~~

~~(D) The officer before whom the videotape deposition is taken shall cause to be attached to the original videotape recording a certificate that the witness was duly sworn or affirmed by him or her and that the videotape recording is a true record of the testimony given by the witness. If the witness has not waived the right to a showing and examination of the videotape deposition, the witness shall also sign the certification.~~

(8) Officer's Duties.

(A) Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted before an officer identified by Rule 28 as a person before whom a deposition may be taken. The officer must begin the deposition with an on-the-record statement that includes: (i) the officer's name and business address; (ii) the date, time, and place of the deposition; (iii) the deponent's name; (iv) the officer's administration of the oath or affirmation to the deponent; and (v) the identity of all persons present.

(B) Conducting the Deposition; Avoiding Distortion. If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(8)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) After the Deposition. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections.

(1) Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Nebraska Evidence Rules. The officer before whom the deposition is to be taken shall put the witness ~~on~~ under oath and, if an interpreter is used, also put the interpreter under oath. The officer shall also personally, or by someone acting under his or her direction and in his or her presence, record the testimony of the witness. The testimony shall be recorded in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed. All objections made at time of the examination to the qualifications of the officer taking the deposition, the qualifications of the interpreter, or to the manner of taking ~~it~~ the deposition, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections.

(2) An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d).

(3) In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he or she shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during ~~the taking of the~~ a deposition, the deponent or a party may move to terminate or limit the deposition on the ground that (1) ~~it on motion of a party or of the deponent and upon a showing that the examination~~ is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress that unreasonably annoys, embarrasses, or oppresses the deponent or party ~~the court in which the action is pending or the district court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(e).~~ or (2) the interpreter is not rendering a reasonably complete and accurate interpretation or is repeatedly altering, omitting, or adding things, including explanations, to what is stated. The motion may be filed in the court in which the action is pending. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated the deposition may be resumed only by order of the court in which the action is pending. If the objecting deponent or party so

~~demands, the deposition must be suspended for the time necessary to obtain an order. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.~~

~~(e) When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him or her, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.~~

(e) Review; Waiver; Motion to Suppress.

(1) On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which (a) to review the transcript or recording and (b) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them. The deponent may be allowed more or fewer than 30 days if the parties stipulate to or the court orders a different number of days. The officer must note in the certificate required by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the period specified above for review.

(2) All objections to the accuracy of the deposition, including objections to accuracy of the interpreter's interpretation of the questions or answers, are waived if a request for review is not made before the deposition is completed or, if a request for review is made, no changes are submitted to the officer in the time and manner required by subdivision (1) of this rule and no motion is made pursuant to subdivision (3) of this rule.

(3) If a request for review is made, the deponent or any party may move to suppress the deposition pursuant to Rule 32(d)(4) on the ground that the deponent was not allowed to review the transcript or recording as provided in subsection (1) or that the transcription or interpretation of the deposition is inherently inaccurate.

(f) Certification and Delivery by Officer; Storage Copies; Notice of Delivery.

(1) The officer shall certify on the deposition that the witness was ~~true~~ duly sworn by him or her and that the deposition is ~~a true~~ an accurate record of the testimony of the witness. Unless otherwise ordered by the court, ~~he or she~~ the officer shall then deliver the deposition to the party taking the deposition, who must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them, he or she may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if he or she affords to all parties fair opportunity to verify the copies by comparison with the originals or (B) offer the originals to be marked for identification, after giving to each party an

opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the originals be annexed to the deposition, pending final disposition of the case.

(2) Unless otherwise stipulated to by the parties or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the ~~deposition transcript or recording~~ to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice to all other parties that it has been delivered by the officer before whom taken.

(g) Failure to Attend or to Serve Subpoena; Expenses.

~~(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him or her and his or her attorney in attending, including reasonable attorney fees.~~

~~(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him or her and the witness because of such failure does not attend, and if another party attends in person or by attorney because he or she expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him or her and his or her attorney in attending, including reasonable attorney fees.~~

A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

(h) Protective Orders. The deponent or any party may move at any time for an order pursuant to Rule 26(c) to limit the dissemination of the deposition, either in whole or in part, or to limit the persons who may have access to the deposition.

*Rule 30(f)(1) amended December 12, 2001; comments to Rule 30(f) amended December 12, 2001.  
Renumbered and codified as § 6-330, effective July 18, 2008.*

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#### Comments to Rule 30

~~30(a) This subsection is substantially the same as the federal rule. It is also similar to former Neb. Rev. Stat. § 25-1267.01 (Repealed 1982). Changes from the earlier statute include the addition of the special notice defined in subdivision (b)(2) and the plaintiff's waiting time is expanded from 20 to 30 days.~~

~~30(b) This section is based on former Neb. Rev. Stat. §§ 25-1267.19 to 25-1267.21 (Repealed 1982). Subdivision (1)(A) eliminates the particular requirements of time contained in the former sections as~~

unnecessary. It is similar to the present federal rule 30(b)(1). Subdivision (1)(B) follows the language of current law allowing published notice of the taking of a deposition.

Subdivision (2) has been adapted from the federal rule. Subdivision (4) follows the language of former Neb. Rev. Stat. § 25-1267.19 (Amended 1979) (Repealed 1982). Subdivision (6) is a new provision that was added to the federal rules in 1970 that is very useful when taking a deposition of a corporation or organization.

Subdivision (7) is based on a similar provision adopted in the federal rules in 1980. Subdivision (8) is adapted from former Neb. Rev. Stat. § 25-1267.45 (Repealed 1982); it has been shortened substantially because some of the subjects currently covered by the statute are either covered elsewhere in the rules or are better left to the control of the trial judge.

~~30(e) The language of this subsection is substantially the same as the federal rule and former Neb. Rev. Stat. §§ 25-1267.03 and 25-1267.23 (Repealed 1982). The requirement in former § 25-1267.23 that the testimony be taken stenographically has been dropped in accordance with the 1979 amendment of former Neb. Rev. Stat. § 25-1267.19 (Repealed 1982).~~

~~30(d) This is substantially the same as the federal rule and former Neb. Rev. Stat. § 25-1267.24 (Repealed 1982).~~

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~~30(e) This is substantially similar to the federal rule and former Neb. Rev. Stat. § 25-1267.25 (Repealed 1982), except that subsection (2) of that section has been dropped as unnecessary because a court order is not required to take the testimony by nonstenographic means.~~

~~30(f) The former Nebraska statute was Neb. Rev. Stat. § 25-1267.26 (Repealed 1982). Additional language from the federal rule provides a procedure for handling documents and things produced during a deposition. The deposition will not be filed with the court but will be sent to the party taking the deposition. Subsection (f)(3) requires notice to other parties that the deposition has been received; Rule 26(g) provides that a certificate of completion will not be filed with the court. The party taking the deposition will have to preserve the original in order to be able to file it when required to do so under Rule 26(g).~~

~~30(g) The language of this subsection follows former Neb. Rev. Stat. § 25-1267.27 (Repealed 1982), with the addition of a specific mention of attorney fees.~~

**Rule 30(b)(1).** Because of the increasing number of Nebraskans who may have difficulty communicating in the English language, there is an increased likelihood that the deponent will need the assistance of an interpreter. It is important for the parties to work together to ensure that an interpreter is used when necessary. Rule 30(b)(1)(A) provides that if an interpreter will be used, the notice should state that and should also state the language that will be interpreted. If notice is silent about an interpreter but another party believes that one is necessary, then the other party should contact the noticing party. That way, both parties may avoid appearing for a deposition that would otherwise have to be cancelled for lack of an interpreter. To facilitate parties working together, the rule requires the inclusion of an advisory statement in the notice.

It is less likely that the noticing party will know if nonparties require an interpreter and it is also less likely that nonparties will know to contact the noticing party if they do. Therefore, it is especially

important that a subpoena served on a nonparty include the advisory statement. If a subpoena will be served on a nonparty witness, a party may give the other parties written notice of the deposition by serving them with a copy of the subpoena, provided that the subpoena contains the information required by the rule. Alternatively, a party may give the other parties written notice by serving them with a separate document that contains the information required by the rule. If the party does so, the party may omit the advisory statement from the document because it will be contained in the subpoena served on the witness.

Parties sometimes attempt to circumvent the 30 day period for responding to Rule 34 requests by serving a subpoena on the party. Rule 30(b)(1)(C) makes it clear that document subpoenas should only be served on nonparty deponents.

A deposition can only be used against a party who had notice of the deposition. See Rule 32(a). Sometimes it is not possible to serve a party with a deposition notice because the party's identity or whereabouts are unknown. That may occur in a quiet title action. Historically, publication has been the only method for giving notice. Rule 30(b)(1)(D) now allows the use of any other method reasonably calculated to give actual notice if the use of that method has been approved by the court. This is the standard for substitute service under Neb. Rev. Stat. § 25-517.02(3) (Reissue 2008).

**Rule 30(b)(4).** The rule previously provided that the notice had to state the means by which the testimony would be recorded but did not specify what those means were. The assumption was that the testimony would be recorded by stenographic means. Former Rule 30(b)(8) added a second option: videotape depositions. The rule as amended provides for three means: (1) stenographic, (2) audio, and (3) audiovisual. The term "audiovisual" is used because "videotape" refers to an outdated form of recording technology (magnetic tape).

The rules previously did not discuss whether the opposing party could designate an additional means of recording the deposition. Rule 30(b)(4)(B) now makes it clear that the opposing party may do so. In order to prevent different persons from preparing different records of the deposition, the rule provides that the additional recording must be prepared by the deposition officer (who is selected by the noticing party).

Although the rule allows the testimony to be recorded by nonstenographic means, parties need to bear in mind that, as a practical matter, they will need to have a transcript prepared if they plan to use the deposition to support or oppose a motion, including for example a motion for summary judgment. Parties also need to bear in mind that they should have an audio or audiovisual recording made if an interpreter is used because, as a practical matter, without a record of the questions and answers in the interpreted language, they will be unable to assert later that the interpreter's interpretation was not accurate.

**Rule 30(b)(5).** Ideally, the parties should use a certified or provisionally certified interpreter for a deposition. That is not always possible in Nebraska, however, because there are a limited number of certified and provisionally certified interpreters in some languages. The rule therefore tracks Neb. Ct. R. § 6-703 and allows the use of registered interpreters if the noticing party has made reasonably diligent efforts to obtain a certified or provisionally certified interpreter and none are available. It is possible that no registered interpreters are reasonably available either. In that case, the parties need to agree on an interpreter or the noticing party needs to file a motion for a court order.

Among the factors that a court may consider in deciding whether to grant a motion to vary from the rule's interpreter hierarchy are: availability, cost, and logistical difficulties of obtaining a certified, provisionally certified, or registered interpreter, the amount in controversy in the case, the significance of the testimony and the purpose for which it is sought (for example, steppingstone discovery as opposed to

key evidence), and the competence and experience of the proposed interpreter.

**Rule 30(b)(7).** The rule has been amended to allow depositions to be taken by remote means other than telephone – for example, by video conferencing technology – but only pursuant to a stipulation or court order. The rule has also been amended to eliminate the uncertainty about whether the officer must be in the same physical location as the deponent. The rule as amended provides that they must be in the same location absent a court order or stipulation otherwise. One reason for having the officer and the deponent in the same location is to minimize the risk of improper behavior such as coaching of the witness or the surreptitious use of documents. There are other ways of minimizing the risk. For example, the parties may stipulate that a notary be present in the same location as the deponent and administer the oath to the deponent but the officer who is stenographically recording the deposition may be present in the same location as the person or attorney taking the deposition.

**Rule 30(b)(8).** The former rule governed videotape depositions and had special provisions that governed the review of such depositions. The provisions of Rule 30(e) now apply to the review of all depositions, regardless of how they were recorded. Rule 30(b)(8) as amended is substantially the same as the current version of Rule 30(b)(5) of the Federal Rules of Civil Procedure. The rule as amended sets out the deposition officer’s duties at the beginning and end of the deposition. It also sets out the officer’s duties during a deposition in which the testimony is recorded by audio or audiovisual means.

**Rule 30(c).** The rule has been divided into three subdivisions. The first addresses the order of examination and the officer’s obligation to record all objections. It is substantially similar to former Rule 30(c). The major differences are the addition of a requirement that the interpreter be sworn and the inclusion of an objection to the interpreter’s qualifications in the list of objections that must be recorded. The second subdivision is modeled on Rule 30(c)(2) of the Federal Rules of Civil Procedure and is designed to eliminate speaking objections that are made for the purpose of disrupting the questioning or suggesting how the deponent should answer a question. The third subdivision is taken from the last sentence of the former rule.

**Rule 30(d).** The rule has been amended to add a provision allowing a party to terminate a deposition if the interpreter’s performance is so problematic that it undermines the usefulness of the deposition. It should be emphasized that a problem with how the interpreter handled a particular question or answer is insufficient to justify terminating a deposition. “Interpretation is a demanding and inexact art, and . . . the languages involved may not have precise equivalents for particular words or concepts. Minor or isolated inaccuracies, omissions, interruptions, or other defects in translation are inevitable . . .” *Tapia-Reyes v. Excel Corp.*, 281 Neb. 15, 27, 793 N.W.2d 319, 328 (2011). Repeated problems, however, may signal that the interpretation is so fundamentally flawed that it would be pointless for the party to continue the deposition.

**Rule 30(e).** The rule has been amended to streamline the procedures for review and use of the deposition. Under the former rule, the deponent had a right to review unless the right was waived by deponent and the parties. There was no time limit on review except for videotape depositions, which had to be reviewed immediately. The rule as amended requires the deponent or party to invoke the right of review before the end of the deposition and gives the deponent or party 30 days to review after being notified that the transcript or recording is available. The parties may agree to or the court may order a different time. For example, a shorter time may be necessary when the deposition is taken a few days before trial. A signature is only required if the right to review was invoked and the deponent made changes to the testimony.

If the right to review is not invoked, or if invoked no changes are submitted to the officer in the time and manner required in subdivision (1) and no motion to suppress is filed pursuant to subdivision

(3), then the transcript or recording of the deposition is deemed to be accurate. Subdivision (2) of the rule is designed to make it clear to the deponent and to the parties that failing to invoke the right to review has serious consequences. If the right to review is invoked, then the deponent has a duty to review the transcript or recording and make changes to correct any errors. If the deponent fails to do so, then the deponent cannot later seek to suppress the deposition on the ground that the transcription or interpretation was inaccurate. If the deponent invokes the right to review and determines that the transcription or interpretation is inherently inaccurate, however, the deponent may move to suppress the deposition instead of making changes. Even if the deponent makes changes, any other party who believes that the deposition is inherently inaccurate may move to suppress the deposition. The burden of proof is on the moving party.

**Rule 30(f).** Subdivision (3) of the rule has been amended to require the officer to retain the stenographic notes of a deposition taken stenographically or a copy of the recoding of a deposition taken by another method. This requirement mirrors Rule 30(f)(3) of the Federal Rules of Civil Procedure. Retaining the notes or a copy is necessary because the officer must furnish a copy of the transcript or recording if a party or the deponent later requests and pays for one.

**Rule 30(g).** The former language of the rule has been replaced by the current language of Rule 30(g) of the Federal Rules of Civil Procedure. The new language is easier to read and makes no substantive changes.

**Rule 30(h).** This subdivision is new. As a result of the growth of electronic media, it is much easier today for parties to disseminate sensitive portions of depositions in an attempt to harass or oppress their adversaries. This subsection serves as a reminder that courts may enter appropriate orders pursuant to Rule 26(c) to prevent parties from using the recording or transcription of a deposition for improper purposes.

*Rule 30(f)(1) amended December 12, 2001; comments to Rule 30(f) amended December 12, 2001.  
Renumbered and codified as § 6-330, effective July 18, 2008.*

§ 6-331 [Rule 31]. Depositions upon written questions.

(a) *Serving Questions; Notice.* After commencement of the action, any party may take the testimony of any person including a party by deposition upon written questions. The attendance of witnesses may be compelled by a subpoena that contains the information specified by Rule 30(b)(1)(B). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating:

(1) The name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or her or the particular class or group to which he or she belongs, and

(2) The name or descriptive title and address of the officer before whom the deposition is to be taken.

(3) If an interpreter will be used, the notice shall also state that an interpreter will be used and state the language that will be interpreted or the type of interpretation (e.g., sign language). The provisions of Rule 30(b)(5) govern who may serve as an interpreter.

A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within thirty days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within ten days after being served with cross questions, a party may serve redirect questions upon all other parties. Within ten days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) *Officer to Take Responses and Prepare Record.* A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and deliver the deposition, attaching thereto the copy of the notice and the questions received by him or her.

(c) The party taking the deposition shall give prompt notice to all other parties that it has been delivered by the officer before whom taken.

#### Comments to Rule 31

This rule substantially follows the federal rule ~~and under former Neb. Rev. Stat. 25-1267.28 to 25-1267.30 (Repealed 1982).~~ The time periods for serving questions are also longer than under former Nebraska law. It also incorporates the provisions of Rule 30 on interpreters.

§ 6-332 [Rule 32]. Use of depositions in court proceedings.

(a) Use of Depositions. Any part or all of a deposition, so far as admissible under the Nebraska Evidence Rules applied as though the witness were then present and testifying, may be used against any party who

was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any purpose permitted by the Nebraska Evidence Rules.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association, or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) That the witness is dead; or

(B) That the witness is at a greater distance than one hundred miles from the place of trial or hearing, or out of the state, or beyond the subpoena power of the court, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) That such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or

(F) Upon application and notice prior to the taking of the deposition, that circumstances exist such as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him or her to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts relevant to the issues.

Substitution of parties does not affect the right to use depositions previously taken; and when an action has been brought in any court of the United States or of any state and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest all depositions lawfully taken in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Nebraska Evidence Rules.

(b) Objections to Admissibility. Subject to the provisions of subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying; or if the trial court directs, such objections may be heard and determined prior to trial.

(c) (Not Used).

(d) Effect of Errors and Irregularities in Deposition.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency or relevancy of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time. In a deposition recorded and preserved by nonstenographic means, such objections shall be made to the court before the trial or hearing, or such objections will be waived unless otherwise ordered by the court.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the depositions.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within ten days after service of the last questions authorized.

~~(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or recorded, or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.~~ (4) As to Interpreting, Completing and Returning the Deposition. An objection to how the interpreter interpreted the questions or answers, how the officer transcribed the testimony, or how the officer prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition is waived unless a motion to suppress the deposition is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

### Comments to Rule 32

~~32(a)~~ Rule 32(a). Subdivision (3) creates an exception to the hearsay rule. In other words, a deposition does not have to satisfy the requirements of § 27-804(2)(a) to be admissible under this subdivision. See *Walton v. Patil*, 279 Neb. 974, 984, 783 N.W.2d 438, 446 (2010). This section is based upon former Neb. Rev. Stat. § 25-1267.04 (Repealed 1982). Under subdivision (3)(B), the witness must be at least 100 miles away in order to use the deposition ~~in district court~~ because Neb. Rev. Stat. § 25-1227 (Reissue 2008) establishes 100 miles as the maximum distance a witness must ordinarily travel for a civil trial ~~in district court~~. ~~For county or municipal court the subpoena power is limited to the county, so a deposition could be used for a witness outside the county but within 100 miles.~~ Subdivision (3)(E) allows use of a deposition under exceptional circumstances; under subdivision (3)(F) the court may

authorize use of the deposition in the absence of exceptional circumstances if the application is made before the deposition is taken. ~~This is a further expansion of the idea in former § 25-1267.04(3)(f), but it is no longer restricted to audio-visual or video tape.~~

~~32(b) No substantial change from the federal rules or former Neb. Rev. Stat. §§ 25-1267.05 and 25-1267.36 (Repealed 1982).~~

~~32(c) Not used because the topic is covered by the Nebraska Evidence Rules.~~

~~32(d) No substantial change from the federal rules or former Neb. Rev. Stat. §§ 25-1267.32 and 25-1267.35 (Repealed 1982).~~

Rule 32(d). The rule includes an objection to interpretation as one that may be raised by a motion to suppress the deposition. The objection can only be raised if a request to review the deposition was made pursuant to Rule 30(e)(1). The deponent may correct alleged errors in interpretation by signing a statement listing the changes and the reasons for them pursuant to Rule 30(e)(1). The errors, however, may be so extensive that the deposition is inherently inaccurate. In that case, the deponent may file a motion to suppress the deposition in its entirety. See Rule 30(e)(3). So too may an opposing party. An opposing party may also file a motion to suppress the deposition in part on the ground that there were errors in interpreting a limited but material part of the deposition and those errors render that part inherently inaccurate. If the court suppresses a deposition in whole or in part, the court may order the deposition to be retaken in whole or in part.

It should be noted that the rule requires the motion to be filed promptly. A motion may be untimely if the party failed to act with reasonable diligence in obtaining a transcript or recording of the deposition or in reviewing the transcript or recording.

## MEMORANDUM

DATE: June 1, 2015  
TO: Hon. Michael Heavican,  
Chief Justice, Nebraska Supreme Court  
FROM: John Lenich  
Reporter, Supreme Court Committee on Practice & Procedure  
RE: Proposed Amendments to Discovery Rules 30-32

Last year, the Interpreter Advisory Committee (“IAC”) forwarded a proposal to amend the Discovery Rules to require that an audio-visual recording be made of any deposition that was taken with an interpreter who was not a certified interpreter. The Practice & Procedure Committee discussed the proposal and concluded that more far-reaching changes to the rules were necessary to address the issue of interpreters. The Committee explored various options and reviewed multiple drafts of proposed amendments. The end result of the Committee’s work is a proposal to amend Rules 30-32.

Two versions of the Committee’s proposal are attached. One is a marked-up version that shows the proposed changes to the rules. Additions are underlined and deletions are struck-out. The second is a clean version of the proposed rules that incorporates the changes.

The proposal includes not only changes to the language of the rules but also to the comments to the rules. Most of the current comments were written when the rules were adopted in 1982 and discuss how the rules varied from the statutes that previously governed discovery. Although the comments may have been helpful to lawyers and judges in 1982, the Committee believes that they are no longer helpful today. The Committee concluded that new comments were necessary.

### *The Core Proposal*

The Committee considered but ultimately rejected a proposal to require the use of a certified or provisionally interpreter in all cases. The Committee concluded that such a proposal was impractical. Certified or provisionally certified interpreters are not readily available in Nebraska for most languages. For example, the meat packing industry in Nebraska employs a significant number of Somalians. Yet the Supreme Court’s website does not list any Nebraska-based certified interpreters for Somali. The only certified interpreter listed is based in Minnesota (as is the only registered interpreter). As a practical matter, lawyers have to make due when deposing Somalian-speakers.

The same is true when deposing Vietnamese speakers (no certified interpreters; two registered interpreters; three non-certified and non-registered interpreters) or those who speak a number of European languages. There are no certified or registered interpreters listed for German, Italian, Polish, Czech, Latvian, Swedish, or Ukrainian. The list could go on and on.

The Committee instead opted to make the use of a certified or provisionally certified interpreter the general rule, but to allow exceptions. The core of the Committee’s proposal is in

Rule 30(b)(5). The rule requires the use of a certified or provisionally certified interpreter except when: (1) the party taking the deposition had made reasonably diligent efforts to obtain a certified or provisionally certified interpreter and none were available, in which case a registered interpreter may be used; (2) the parties stipulate otherwise; and (3) the court orders otherwise.

The rule reflects the interpreter hierarchy in Neb. Ct. R. § 6-703(A)-(B). The hierarchy is to use a certified or provisionally certified interpreter if one is reasonably available and if not, then a registered interpreter. If a registered interpreter is not reasonably available, then the rule requires the parties to agree on an interpreter or to seek a court order to resolve their disagreement.

The Committee opted to allow the parties to vary from the interpreter hierarchy by stipulation. One of the core principles of civil discovery is that the parties should be able to vary from the rules when and how they see fit. The Committee thought that principle should be expressly incorporated into the rule because the parties may have good reasons to use someone other than a certified or provisionally certified interpreter. For example, the parties may have had bad experiences with that interpreter but good experiences with another interpreter who is not certified. Alternatively, the subject matter or potential importance of the deposition may not warrant the costs or logistical issues involved in using a certified interpreter.

Another of the core principles of civil discovery is that the court has considerable discretion to vary from the rules when the circumstances warrant doing so. The Committee thought that principle should also be expressly incorporated into the rule. If a party can establish good reasons for using someone other than a certified or provisionally certified interpreter in a particular case, then the court should have the ability to allow that.

The Committee took a similar approach on the question of who pays. The Committee opted to create a general rule in the second sentence of proposed Rule 30(b)(5): the party taking the deposition pays for the interpreter. The parties, however, may agree to vary from the default rule (for example, the parties may agree to split the cost) or the court may order a variation.

#### *Recording*

The IAC proposed that an audiovisual recording should be made of any depositions taken with an interpreter who was not certified or provisionally certified. Requiring an audiovisual recording, however, would substantially increase the cost of taking the deposition. The Committee concluded that the benefits did not justify the increased costs.

There are benefits to having an audiovisual recording. Such a recording may be helpful in later assessing the accuracy of the interpretation. If the interpretation was inaccurate, then one of the parties might move to suppress the deposition in whole or in part pursuant to Rule 32(d). Alternatively, the deponent might make changes to the deposition in order to correct any inaccuracies. The deponent may still be impeached with his or her original answers. Having a recording, however, would provide the deponent with an evidentiary basis for counteracting the impeachment.

This all assumes that the deponent reviewed his or her deposition. If the right of review has been waived, then the right to suppress or correct the deposition has also been waived. It is likely that the right to review will be waived in a substantial number of cases involving interpreters. There is often no point in having the deponent review the transcript because the

transcript will be in English rather than the deponent's native language and the deponent may lack the resources to pay an interpreter to review the transcript with him or her. If the right to review has been waived, having an audiovisual recording of the deposition serves no purpose.

The Committee concluded that the best approach is to leave it up to the parties to decide whether there should be an additional recording of the deposition. The Committee therefore rewrote Rule 30(b)(4), using the current version of Federal Rule 30(b)(3)(A)-(B) as a model. Rule 30(b)(4)(A) as amended would allow a deposition to be recorded by stenographic, audio, or audiovisual means, or any combination of those means. If the noticing party designates a particular method of recording, then the other party has the option of designating the use of another method.

For example, assume that the noticing party does not believe that an audiovisual recording is necessary or cost-effective and therefore specified that the deposition would be recorded by stenographic means. The other party, however, believes that an audio recording should be made. The proposed rule would make it clear that the other party could designate that an audio recording also be made. As a general rule, the party would need to pay the cost of the additional recording. Yet there may be unusual circumstances that warrant shifting the cost to the noticing party. That would be possible under the proposed rule because subpart (B) gives the court the power to order the noticing party to pay.

If a party has concerns about interpretation, an audiovisual recording would be the preferred auxiliary method of recording the deposition when visual interpretation (e.g., sign language) is used. Otherwise, having the deposition recorded by both stenographic and audio means should be sufficient. An audio recording should not add substantially to the cost of the deposition because most court reporters currently use a digital recorder as a backup.

### *Waiver*

Waiver of the right to review normally includes waiver of the right to make changes to the deposition testimony. There are arguments for treating interpretation differently. A deponent may lack access to an interpreter to review the transcript of the deposition. Furthermore, a pro se party may not understand the importance of invoking the right to review. But there are also counterarguments. Once the period for review has passed, parties should be able to rely on the deponent's answers in structuring their case. Furthermore, the system expects everyone – lawyers and pro se litigants alike – to follow the rules. Finally, issues regarding the admissibility of a deposition should be resolved sooner rather than later.

After weighing the competing interests, the Committee concluded that waiver of the right to review should encompass both alleged errors in transcription and in interpretation. At the same time, the Committee believes that the rules should clearly state the waiver rules so that lawyers and deponents who read the rules will know the consequences of the decision to waive the right of review. The Committee therefore rewrote Rule 30(e) to create two new subsections (subsections (2) and (3)) to make the waiver rules clear. The Committee also decided to follow the approach of the federal rules and impose a time limitation on making changes when the right to review has been invoked. The time limitation – which is contained in Rule 30(e)(1) – is 30 days absent a court order or stipulation to the contrary.

### *Contents of the Notice & Subpoena*

In many cases, the parties will know that an interpreter is necessary for a deposition because they will have talked to each other or engaged in some preliminary discovery before they take any depositions. But there is always the possibility that the parties may not have talked about the need for an interpreter, especially if the deponent is not a party.

The Committee concluded that something needed to be included in the deposition notice to help ensure that parties did not inadvertently stumble into deposition without an interpreter when they in fact need one. The Committee reworked Rule 30(b)(1)(A)-(B) to require the inclusion of an advisory statement in the deposition notice and subpoena. The goal of the statement is to encourage a deponent or the deponent's attorney to contact the party taking the deposition to let the party know that an interpreter will be needed.

### *Terminating the Deposition*

There is always risk that an interpreter is not up to the job. That may not be apparent at the beginning of a deposition – but it may become apparent as the deposition goes on. The Committee believes that the rules should give lawyers the right to terminate the deposition if it becomes apparent that the interpreter's performance is deficient. The Committee included a provision to that effect in Rule 30(d). The provision is modeled on Canon 1 of the Code of Professional Responsibility for Interpreters.

### *Other Changes*

The Committee made a number of minor changes to address interpreter-related issues. For example, the Committee added language to Rule 30(c)(1) to require the deposition officer to place the interpreter under oath. The Committee also made stylistic changes. For example, Rule 30(g) – the rule that authorizes the award of expenses if a party notices a deposition but fails to appear or serve a non-party deponent with a subpoena – has been made easier to read by tracking the current language of Federal Rule 30(g).

The Committee also made substantive changes to address other issues that surfaced as it reviewed the rule. Here are the substantive changes.

- Rule 30(b)(1)(D) [formerly Rule 30(b)(1)(B)] – The rule now authorizes the use of means other than publication to provide substitute notice of the taking of a deposition.
- Rule 30(b)(7) – The rule now allows a deposition to be taken by remote means other than a telephone and also specifies where the deposition officer must be. The language “other remote means” was taken from the current version of Federal Rule 30(b)(4).
- Rule 30(b)(8) – The current version of the rule governs videotape depositions. The Committee decided to eliminate some of the special provisions that govern videotape depositions (e.g., Rule 30(8)(C), which requires the deponent to review the videotape immediately), and to move others to different subsections. The Committee also

substituted the term “audiovisual” for “videotape” because “videotape” refers to an outdated form of technology (magnetic tape).

The Committee replaced the current content of Rule 30(b)(8) with a provision that governs the inclusion of identifying information when the deposition is recorded nonstenographically. The provision is based on the current version of Federal Rule 30(b)(5).

- Rule 30(c)(2) – The Committee added a provision that prohibits argumentative objections and specifies when an attorney can instruct a witness not to answer. This provision is based on the current version of Federal Rule 30(c)(2).
- Rule 30(f)(2) – The Committee added a provision that requires the deposition officer to keep his or her stenographic notes. This provision is based on the current version of Federal Rule 30(f)(3).
- Rule 30(h) – This is a new provision. The Committee was concerned that parties might post excerpts from audiovisual depositions on YouTube, Facebook, or the like in order to harass the deponent. At the same time, the Committee was concerned that adding an elaborate provision might be counterproductive, i.e., it might give parties ideas. The Committee therefore opted for a light touch by drafting the provision simply to say that a party or the deponent may move for a protective order.

#### *Conclusion*

The proposed amendments to the rules break new ground. The federal discovery rules do not discuss interpreters. To the best of my knowledge, neither do the discovery rules of any other state. But interpreters are being used in depositions, so it is time for the rules to catch up with practice. Although the Committee decided to take a different approach, the IAC deserves special credit for raising an issue that needed to be raised.

Please do not hesitate to contact me if you have any questions or need additional information about the Committee’s proposals.