Proposed Changes to Rule 30(b)(6) Spark Support, Pushback, and New Suggestions

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The Advisory Committee on Rules of Civil Procedure invited comments on its proposed amendment to Rule 30(b)(6), which governs the depositions of organizations. If adopted, those changes would impose ongoing meet-and-confer obligations in connection with such depositions. The written comments submitted to date in response to the proposed changes reflect divergent perspectives about Rule 30(b)(6) depositions, the need for intervention, and the fixes for any perceived problems.

Parties use Rule 30(b)(6) to elicit binding deposition testimony from organizations. Typically, a noticing party will list topics to cover during the deposition, and the responding party will identify one or more individuals to address those topics on behalf of the organization. Expressing a sentiment echoed by others, the Federal Magistrate Judges Association has characterized Rule 30(b)(6) "deposition practice" as "a contentious subject."

On May 1, 2017, the committee asked for comments and suggestions regarding potential amendments to Rule 30(b)(6). The recommendations received mainly sought to address complaints that deponents frequently claim ignorance as to designated topics and protests relating to extensive deposition notices requiring significant, disproportionate preparation costs.

Based on the proposals submitted during the initial comment period, on August 15, 2018, the advisory committee then proposed specific amendments that would require parties to meet and confer about the "identity of the witness or witnesses who will testify" and "the matters on which each will testify" "before or promptly after" the service of a Rule 30(b)(6) notice. The new meet-and-confer process also would be ongoing "as necessary." The comment period on the proposed amendments closed on February 15, 2019.

Reflecting a focus on resolving potential disputes *before* a 30(b)(6) deposition occurs, the draft committee note emphasizes the synergy between the proposed changes and Federal Rule of Civil Procedure 1's mandate to secure the "just, speedy, and inexpensive determination" of every action and proceeding. The committee views preemptive discussions among the parties as having the potential to "avoid unnecessary burdens," "reduce the difficulty in identifying the right person to testify and the materials needed to prepare that person," and move cases forward in an efficient, collaborative manner.

The likelihood that the committee's proposal would yield those benefits remains hotly debated. In general, proponents included the National Consumer Law Center, the National Employment Lawyers' Association, and others who typically represent the interests of plaintiffs. Objectors included *The Voice of the Defense Bar*, the Defense Research Institute, a leading automobile manufacturer, Lawyers for Civil Justice, and attorneys representing corporate defendants. A third group comprised a minority of commenters that advocated for presumptive limits on the number of topics, witnesses, and total hours.

Proponents believe discussing the "number and description of matters for examination" will eliminate wasteful gamesmanship, improve the efficiency of deposition preparation, and enable the selection of the most qualified and appropriate deponents. By contrast, detractors contend the proposed rule is superfluous. They point out that Rules 16 and 26(b)(1)–(2) and local rules already require pre-deposition conferral; building this requirement into Rule 30(b)(6) is unnecessary because there are already workable mechanisms to address those issues. Objectors maintain the Rule 26(f) conference is the proper method to address the anticipated use of a corporate deposition and the concerns raised by commenters. They also assert the proportionality rule engages the courts to balance the burden or expense of proposed discovery.

The most contested proposed provision centers on who controls witness selection. The committee states that the conferral discussions would facilitate the identification of "the right person to testify" but leave "the choice of the designees" to "the organization." Supporters claim pre-deposition discussions would ensure that the right person with the right knowledge testifies. On the other hand, opponents view the meet-and-confer obligation as potentially affecting or even negating an organization's well-established discretion to choose who will testify on its behalf. They perceive the proposed amendment as an invitation to crack open settled law to create a new "give-and-take" duty, with each party having a right to affect the witness selection. According to opponents, the pre-deposition conferring would lead to more, not less, discovery disputes in the form of tactical abuses to challenge the witness selection. They contend the change would also impose additional costs from litigation about litigation, create unnecessary tensions, and increase judicial workloads.

I believe the proposed changes will not *directly* resolve or significantly reduce the 30(b)(6) challenges because of overburdened courts, distracted counsel, and litigation gamesmanship. *Indirectly*, however, litigants are on notice to change or improve past practices to incorporate early efforts focused on reducing Rule 30(b)(6) disputes. Whether a change is adopted or not, the courts will likely be forced to take a more active role to address the contentiousness that is presently driving the perceived need for proposed changes.

A digital version of this Civil Procedure Update, including links to resources and authorities, is available at http://bit.ly/LN443-zemil.

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