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Federal Civil Rules Committee Drops Divisive Corporate Witness ID Duty

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In April, the Federal Civil Rules Advisory Committee approved new language for the rule governing depositions of corporations and other organizations. The proposed amendment to Rule 30(b)(6) states, "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."[1] A nonparty organization also must "confer with the serving party." According to the Draft Committee Note, the proposal is intended to "avoid unnecessary burdens" through "candid exchanges" by the parties "about discovery goals and organizational information structure" and "the number and description of topics."[2] The proposed amendment is likely to be approved by the Committee on Rules of Practice and Procedure in June and is on track to take effect on December 1, 2020.

Significantly, the Advisory Committee declined to adopt a controversial proposal to require parties to confer about "the identity of each person the organization will designate to testify." That language was in the proposed amendment the Advisory Committee published for public comment in August 2018. As explained below, this language produced strong criticism from the defense bar and the business community. The Advisory Committee also declined to force organizations to identify their designees a certain number of days in advance of a deposition. (This was not part of the proposed amendment that was published for public comment, but was considered by the Advisory Committee in light of the "intensity of the commentary" on the published proposal).

Defense interests will be disappointed that the Advisory Committee did not adopt sweeping improvements to Rule 30(b)(6), such as a clear procedure for objecting to a Rule 30(b)(6) notice or presumptive limits on the number of topics that can be listed in a Rule 30(b)(6) notice. These reforms were not in the August 2018 proposal, but many on the defense side advocated for them in written comments and testimony.

The Advisory Committee received nearly 1,800 written comments[3] and heard two days of testimony from 80 witnesses at public hearings in Phoenix, Arizona, on January 4, 2019, and Washington, D.C., on February 8, 2019. The public comment period closed on February 15, 2019.

Conferral over Witness Identity Axed

Many of the comments from the defense perspective focused on the controversial inclusion of language to mandate conferral about "the identity of each person the organization will designate to testify."

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[1] Advisory Committee on Civil Rules, Agenda Book, Apr. 2019, at 105, *available at* https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2019.

[2] *Id.*

[3] Ed. Note: Washington Legal Foundation commented on the Advisory Committee's August 2018 draft, Feb. 11, 2019, https://www.wlf.org/wp-content/uploads/2019/02/WLFs-Comment-to-Rules-Committee-on-30b6.pdf.

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Lawyers for Civil Justice (LCJ), a leader in the movement to reform Rule 30(b)(6), told the Advisory Committee that the proposal would "exacerbate, not remedy, the contentious nature of many Rule 30(b)(6) depositions."[4] LCJ said that the proposed rule change would impose an impractical requirement on organizations to disclose witness names "on the spot" at a meet-and-confer before the matters for examination have been discussed, and create an ambiguous continuing good-faith duty to confer "as necessary" that would provide fertile ground for new discovery disputes and potential gamesmanship.[5]

The International Association of Defense Counsel (IADC) argued that requiring parties to confer about the identity of the Rule 30(b)(6) witness would lead to attempts by plaintiffs' lawyers to "reshape settled law that a noticing party has no right to dictate the witness speaking for the organization."[6] Further, plaintiffs' lawyers could misuse the proposed rule to "gain a litigation advantage by trying to block or challenge a witness with a reputation for being an effective spokesperson for an organization."[7] IADC also cautioned that witness identification at a meet-and-confer could "restrict the organization's flexibility to change its proposed designee."[8]

The President of DRI-The Voice of the Defense Bar told the Advisory Committee that a proposed Rule 30(b)(6) witness-identification requirement would create an improper "illusion that the other side has some say" in an organization's witness selection.[9] He additionally cautioned that mandatory witness identification far in advance of an organization's deposition could shift the focus of depositions to "personal issues with respect to that particular witness," distorting what is really at issue in a case.[10]

In addition, 138 corporations joined a letter to the Advisory Committee expressing their opposition to mandatory conferral about "the identity of each person the organization will designate to testify."[11] According to the companies, "Imposing such a requirement would provoke time-consuming and costly new discovery disputes as counsel and courts struggle to square the change with the well-settled and well-grounded law that the responding organization has complete discretion to select the 30(b)(6) witnesses that will speak for the organization."[12] The companies also noted that the "clear implication of the proposed amendment is that the party noticing the deposition has the right to influence the choice of the witness(es)."[13] Finally, they urged the Advisory Committee to include further defense-oriented reforms to improve Rule 30(b)(6) practice.

Conclusion

The Federal Civil Rules Advisory Committee's proposed amendment to Rule 30(b)(6) is a modest improvement to current practice and should be adopted. Defense bar and civil justice interests will be disappointed that the Advisory Committee did not include numerous suggestions advocated by defense interests to significantly improve the rule from their perspective. On the other hand, defense interests should be greatly relieved that the Advisory Committee did not adopt problematic rules requiring conferral about "the identity of each person the organization will designate to testify" or identification of the witness a certain number of days in advance of the deposition.

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[4] Comment from Lawyers for Civil Justice, Aug. 24, 2018, at 4, https://www.regulations.gov/document?D=USC-RULES-CV-2018-0003-0122.

[5] *Id*.

[6] Comment from International Association of Defense Counsel, Jan. 24, 2019, at 1, https://www.regulations.gov/document?D=USC-RULES-CV-2018-0003-0174.

[7] *Id*.

[8] *Id*.

[9] Transcript, In the Matter of Advisory Committee Meeting of the Rules of Civil Procedure, Feb. 8, 2019, at 159, https://www.uscourts.gov/sites/default/files/2019-02-08-civil_rules_hearing_transcript_corrected_0.pdf.

[10] *Id*. at 160.

[11] Comment from 138 Companies Opposing the Proposed Amendment to Rule 30(b)(6), Feb. 5, 2019, at 1, https://www.regulations.gov/document?D=USC-RULES-CV-2018-0003-0217.

[12] *Id.*

[13] *Id.*

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