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New Deposition Rule Could Have Benefits, But Lawyers Hate It

By Aebra Coe

Law360 (February 25, 2019, 3:45 PM EST) -- Despite intense and antithetical pushback from plaintiffs and defense counsel, controversial changes proposed to the Federal Rules of Civil Procedure with regard to the deposition of organizations may prove to greatly benefit the court system.

A deep chasm between the nation's attorneys has materialized in more than 1,000 published comments as the proposed changes to Rule 30 depositions hurtle toward a vote, with many plaintiffs and defense counsel agreeing that they don't want the amendments to be implemented as proposed, while offering up directly opposing reasons for why they must be trashed.

The changes would require parties to confer "in good faith" about the number and description of matters to be examined in the deposition as well as the identity of each person the organization plans to designate to testify, all before or "promptly after" the notice or subpoena in the case is served.

Rule 30(b)(6) depositions have been a sore point for some litigants who complain of companies putting forth wholly unprepared or oblivious deponents, as well as a lack of notice about whom a corporate entity will make available for deposition.

And while many practicing attorneys who submitted comments oppose at least some part of the new requirement, many third parties such as law professors who specialize in federal civil procedure, along with some plaintiffs counsel, believe it will make the deposition process more efficient and better for the administration of justice.

"The duty to confer is generally a positive development for the judicial system. Rather than kicking the can and potentially wasting time, it holds the promise of making both sides better prepared for depositions," said University of Richmond School of Law professor Luke Norris, an expert on civil procedure.

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Robin Effron, a professor at Brooklyn Law School and scholar on

federal civil procedure, also believes that the changes would be good for the judicial system.

LUKE NORRIS

University of Richmond
School of Law

"I think that this proposal will be positive for the courts because it continues to give parties direct and device-specific instructions that ex-ante discussion, negotiation and conferral are preferable to contemporaneous or ex-post bickering about the identity of the deponent and the contours and content of the questions and answers," Effron said.

The Chasm Between Attorneys

As of Feb. 15, when the window for public comment on the proposed rule changes closed, 1,374 comments had been submitted to the U.S. Courts.

The amendments were proposed by the Courts' Committee on Rules of Practice and Procedure last April. Now that the public comment period is closed, the committee will decide whether to approve them.

If approved, either "as is" or with revisions, by the committee, as well as the Judicial Conference and the U.S. Supreme Court, the amendments would become effective on Dec. 1, 2020.

Comments submitted on the proposed amendments included opposition from a number of defense attorneys and corporate counsel who said the rule requiring parties to confer about the identity of the person an organization plans to select as its representative during a deposition should be scrapped.

They said it could jeopardize their ability to choose that representative freely and could lead to time-consuming bickering over the selection.

A joint letter was submitted by 135 corporations associated with Lawyers for Civil Justice, a national coalition of law firms, defense trial lawyer organizations and corporations. It opposed the changes with regard to conferring on witness selection.

"Conferring over the choice of witnesses will not work because a company should retain the right to select the witnesses who speak on its behalf — and should be solely responsible for that decision," Lawyers for Civil Justice general counsel Alex Dahl said in a statement accompanying the letter. "Anything less opens the door to gamesmanship and mini-trials over witness selection."

Quentin F. Urquhart Jr. of Louisiana-based Irwin Fritchie Urquhart & Moore was one of the many defense counsel who submitted public comments opposing the proposed amendments. Urquhart's opposition hinged on the corporate witness requirement.

"Organizations responding to notices of corporate deposition should have the sole right to choose the witnesses who speak on their behalf," he said. "If this rule were to be enacted, it is easy to see how multiple disputes could develop over the question of whether the person so designated is the proper person to offer testimony on the corporation's behalf."

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The Other Side of the Coin

QUENTIN F. URQUHART JR.

Irwin Fritchie Urquhart & Moore

Many plaintiffs counsel said that they believe the requirement to confer on the identity of corporate witnesses is a positive change that would prevent corporations from putting forward witnesses who are unaware of relevant information needed to move the case forward.

But many also said the requirement to confer on the subject and number of topics anticipated in a Rule 30 deposition could hurt their ability to ask important questions in order to obtain justice for their clients.

One commenter, Richard Broussard of personal injury law firm Broussard & David LLC, replied directly to the letter submitted by Lawyers for Civil Justice, saying the letter's contention that it is an incendiary idea to confer on the identity of a corporate witness is "disingenuous" and concluded that the group's comments are "blatant strategic efforts to impede reasonable discovery."

Another, Jason Beale of Bailey Cowan Heckman PLLC, said he finds that in around half of the Rule 30 depositions he conducts, the witness is not the person most knowledgeable about the identified topics, which means he often spends the deposition discovering who the real person with knowledge is so that he can move to have that person produced.

"It is costly and wasteful," Beale said. "Requiring the identity of the person designated to testify and requiring a predeposition meet-and-confer would help to alleviate this problem."

Despite many plaintiffs-side attorneys stating their support for a discussion of the identity of an organization's witnesses, there were also many who pleaded with the committee to dump language that requires them to confer on the number and description of matters to be examined in a deposition.

"Good lawyers work out disputes using the existing meet-and-confer process," said Sara Peters of Walkup Melodia Kelly & Schoenberger, a plaintiffs attorney in California. "Presumptive limits on topics will result in gamesmanship as to what constitutes a topic and will only result in broader notices that increase inefficiency, both in preparation and taking of depositions."

Presumptive limits on topics will result in gamesmanship as to what constitutes a topic and will only result in broader notices that increase inefficiency, both in preparation and taking of depositions.

Many said that even a presumptive limit on the number of topics to be covered would be harmful.

"Rule 30 (b)(6) depositions are a critical tool for my clients. Most all information in these cases are in the possession of the employer. By limiting the categories we would be unable to properly collect evidence for our cases," said Joseph Lovretovich of employment law firm JML Law.

SARA PETERS

Walkup Melodia Kelly & Schoenberger

Why It Might Not Be So Bad

Experts on civil procedure say that the quandary of organizations providing witnesses unfamiliar with the relevant material to be

examined in a deposition is a long-standing complaint that would likely be addressed through the proposed amendments to Rule 30.

"Presumably there's less room for game-playing if there's a discussion," said Stephen Burbank, a professor at the University of Pennsylvania Law School. "They specify the subjects, and the designee is supposed to be able to testify based on information reasonably known to the corporation. It shouldn't be acceptable for a corporate designee to come in and say, 'I don't know anything about that.'"

University of Pittsburgh School of Law professor Rhonda Wasserman said she believes the proposed conferences should reduce any misunderstanding on the organization's part regarding the topics to be covered in the deposition and should facilitate designation of individuals with "actual knowledge on the topics."

"This would be a positive change over current practice — under which the organization may name a series of individuals, each of whom disclaims knowledge of the relevant topics, even though the organization in fact has relevant information," Wasserman said. "The proposed meet-and-confer should reduce the likelihood of this frustrating exercise."

Brooklyn Law School's Effron says that while she believes the proposed amendment would ultimately benefit the courts, that does not mean it will be implemented and all problems with Rule 30 depositions will disappear.

"I do think that this will be a net improvement in fostering a more efficient system of party-led discovery. However, I don't doubt that there will be some situations in which this foments earlier, and possibly costlier, judicial involvement in discovery disputes," she said.

Still, the proposed amendments were not completely devoid of support from practicing attorneys.

Daniel Karon of Ohio-based plaintiffs firm Karon LLC said he is on board with the proposal in its current form.

"To me, the theme of the proposed amendment to Rule 30(b)(6) is balance and respect," Karon said. "Its emphasis on avoiding overlong or ambiguously worded lists of matters for examination, facilitating deposition preparation, and avoid[ing] unnecessary burdens is sensible and promotes a worthwhile and collaborative goal."

Jason Fagnano of personal injury law firm Domnick Cunningham & Whalen PA also offered his support in a written comment to the committee.

[The proposed rule] will help ensure the witness is knowledgeable and prepared. Any rule that prevents wasting the time of counsel on both sides of the case is a no-brainer.

JASON FAGNANO

Domnick Cunningham & Whalen

"I support the proposed rule. It will help ensure the witness is knowledgeable and prepared. Any rule that prevents wasting the time of counsel on both sides of the case is a no-brainer," Fagnano said.

--Additional reporting by Andrew Strickler. Editing by Pamela Wilkinson and Alanna Weissman.

3 Comments

George Indest February 26th, 2019, 6:01PM

I agree with the previous commentators. How could a law professor possibly know anything about law practice, much less to comment knowledgeably about it? We ought to immediately defer to the combined wisdom of the 135 corporations (and their experienced practitioners representing them), rather than be influenced by any unbiased and objective observations that a mere law professor might have. Why even bother with any other comments?

Michael Kahn February 26th, 2019, 4:32PM

How can a law professor with no meaningful law firm litigation practice (one year at Biglaw as a litigation associate) be quoted in supporting the rule changes? I can guarantee that as a first year associate, he has never taken or defended a Rule 30(b)(6) deposition. So you can judge how much weight to give his opinion.

Charles Rysavy February 26th, 2019, 8:58AM

I find it interesting that the majority of those supporting the amendment are in academia and the majority of those opposing the amendment are practitioners. This, unfortunately, is consistent with the way the law is taught in this country. Those teaching it often have little or no idea of what the day-to-day practice of law entails. It's all theory and very little practicality. This proposal is intended to address a problem in the process of practicing law. The Committee should give substantially more weight to the opinions - whether in favor or opposed - of practitioners who would be required to implement it, and little or no weight to the theorists.

Sara Peters
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