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## Depositions of Organizations—Will the Rules Change?

The complex rules governing depositions of organizations may be about to change. An upcoming rule review by the Civil Rules Advisory Committee (“Committee”) could result in one of the biggest developments in the way discovery is handled since the Federal Rules of Civil Procedure (“FRCP”) amendments went into effect on Dec. 1, 2015. Those amendments were highlighted as “a major stride toward a better federal court system” by Chief Justice Roberts in his 2015 year-end report on the judiciary. The upcoming review of Rule 30(b)(6) could result in significant changes to how federal courts handle depositions of organizations including corporations, partnerships, associations and governmental agencies.

Rule 30(b)(6) provides a mechanism for discovering “information known or reasonably available to an organization.” The rule has proven controversial and complicated since it was added to the FRCP in 1970. It requires organizations to designate people to testify on their behalf about specific matters raised in litigation. The rule applies not only to litigants, but also to non-parties. It has created a great deal of uncertainty, which has led to costly and inefficient “litigation about litigation.”

Some of the controversy about the rule relates to the following questions: Does the rule require designation of “the most knowledgeable person” on each topic? Should there be another mechanism besides a motion for protective order to object to topics or arrangements for depositions? Should there be limits to the number of topics, the number of witnesses, and the scope of the questioning? What is the evidentiary value of contradictory answers from different witnesses from the same organization, and what should be done where organizations have no knowledge on a particular topic? And, to what extent must witnesses disclose their preparation for depositions?

These questions and others will be included in the Committee’s review. The Committee will study both the text of Rule 30(b)(6) and the case law that interprets it with the goal of crafting amendments that would resolve conflicts among the courts, reduce litigation about the meaning of the rule, and improve practice under the rule.

This is not the first time the Committee has examined the rule. In 2006, the Committee undertook an extensive study of the rule and found many problems. The Committee, however, concluded that revising the text of the rule was unlikely to provide an effective solution. Many problems with the rule were thought to be case-specific and therefore difficult to address in a rule that applies generally. Although it is possible that the Committee will come to a similar conclusion this time, the fact that the Committee is re-examining the rule in light of the recent FRCP amendments may indicate that the Committee will proceed with proposals to amend the rule.

The Committee’s decision to review Rule 30(b)(6) is in response to a request by members of the Council and Federal Task Force of the ABA Section of Litigation in their individual capacities. The Committee is forming a Rule 30(b)(6) Subcommittee for this purpose. If the Committee moves forward with proposed rule amendments, it is likely they will be available for public comment in August 2018.

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