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Key Takeaways from the Amendment to Rule 30(b)(6)

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This past year has brought lots of change, including an amendment to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Rule 30(b)(6) governs the deposition of an organization (e.g., a corporation or a partnership) and requires, generally, that the notice of such a deposition set out with reasonable particularity the matters of examination. The amended Rule 30(b)(6)—which became effective on December 1, 2020—now requires that, "[b]efore 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." The amendment also requires that a subpoena notify a nonparty organization of its duty to confer with the serving party and to designate each person who will testify.

The purpose of the amendment is to prevent or narrow disputes about deposition topics before the deposition begins. Previously, the party noticing the deposition may have listed overly broad and ambiguous matters for examination out of an abundance of caution, even though Rule 30(b)(6) required (and still requires) that the matters of examination be described with reasonable particularity. On the other side, organizations may have designated inadequately prepared witnesses based on their own interpretation of broad or ambiguously worded topics, leading to disputes and motion practice concerning whether designated witnesses were adequately prepared to testify. With the new "confer in good faith" requirement, the goal is to require that litigants confer about the examination topics, so that the list of matters for examination may be refined and/or the organization may be better able to designate and prepare an appropriate witness or witnesses. This new requirement may also enable litigants to work out potential process issues, such as the timing and location of the deposition, the number of witnesses, and the matters upon which they will testify early on.

While the meet-and-confer requirement on examination topics is new to Rule 30(b)(6), it aligns with current widespread practice. For example, counsel to organizations have often served objections to notices or subpoenas seeking depositions of organizations even though neither Rule 30 nor Rule 45 provided for them, and in any event, counsel are invariably required to meet and confer ahead of filing a motion to compel or a motion for a protective order arising from a discovery dispute.

That said, this amendment may enable litigants to seek an earlier conference, or make a demand for a list of proposed examination topics earlier in litigation than before. Further, as a practical matter, counsel for the deponents may now attempt to rebut any claim a witness was unprepared by noting the examining party's duty to confer about the topics (i.e., counsel may claim the witness would have been prepared had the examining party been more candid in what it sought to examine). On the other hand, counsel for the party taking the examination may be able to argue an organization has no excuse for putting forth an unprepared witness because, presumably, the matters of examination will be more focused and clear due to the meet and confer process. Thus, the parties' communications regarding the topics for examination, the objections to same, and any responses clarifying the scope of topics are now more important than before, as they will be considered part of the mandatory meet and confer process ahead of the deposition occurring (i.e., rather than solely as a predicate to motion practice).

While the amended rule only instructs parties to confer concerning the matters of examination, there are several best practices litigants should consider going forward. *First*, the common practice of serving written objections to proposed topics would continue to be a prudent practice to identify issues for (or in spite of) the mandated conference. *Second*, a productive conference should focus on what topics the deposing party intends to cover, why each side believes the matters of examination are meritorious or not, and alternatives to the deposing party's specifications to resolve such a dispute. *Third*, litigants may have greater leeway not to confer over specific proposals rejected in the final amendment to Rule 30(b)(6). For example, while litigants may confer over the organization's designees to ensure knowledgeable witnesses are selected, that specific requirement was considered and rejected in a proposed amendment to Rule 30(b)(6) from August 2018 that would have imposed a duty to confer regarding "the identity of each person the organization will designate to testify." Further, the Advisory Committee on Civil Rules had also considered requiring conferral regarding the "number and description" of the matters of examination, but that proposed amendment was rejected so the parties would focus on the matters for examination themselves – not the number of topics or their description. Of course, all of those matters, even if not part of the new required conference on deposition topics, may be relevant to motion practice pursuant to Rule 26 and 37 (e.g., whether the number of topics is disproportionate).

In summary, counsel should be aware that Rule 30(b)(6) now requires them to meet and confer "before or promptly after the notice or subpoena is served." Exchanges during this meet and confer process will become more important than ever should disputes arise. The meet and conferral exchange is intended to enable counsel to better understand the specific topics that will be the subject of the deposition and it may give litigants the opportunity to narrow such topics by agreement when appropriate. In general, the process should more clearly outline the scope of any disputes earlier on than before. What the meet and confer process will look like in practice will have to be seen over the coming months but, at a minimum, this amendment should cut down on discovery disputes or, at least, focus the disputes earlier on in the process.

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