

TO: THE BAR AND THE BENCH OF VIRGINIA
FROM: Advisory Committee on Rules of Court
Judicial Council of Virginia

September 6, 2019

Comments Requested on Rule 4:5(b)(6)

To comply with the requirements of a 2019 statute, the Advisory Committee on Rules of Court is considering amendments to Rule 4:5(b)(6), which provides for issuing a deposition notice to a party or non-party entity, identifying the subjects on which deposition testimony is requested.¹ The entity must then designate one or more individuals to give testimony on its behalf about those topics, to the extent that there is information on such matters “reasonably available” to the responding entity. The Rule has some gender neutralization needs, and will be clarified in expression. In addition, there is a 2019 statute that – in effect – requires the use of this 4:5(b)(6) process rather than directly noticing the deposition of a top officer of certain large corporations. Code § 8.01-420.4:1, now provides with regard to the taking of depositions of certain corporate officers as follows:

A. For the purposes of this section, "officer" means the president, chief executive officer, chief operating officer, or chief financial officer of a publicly traded company or of a subsidiary of such company that employs 250 or more people.

B. In any action in which an officer's publicly traded company is a party, if a party issues a witness subpoena for the deposition of an officer prior to taking the deposition of a corporate representative pursuant to Supreme Court Rule 4:5(b)(6), and the officer, or company on the officer's behalf, files a motion for a protective order asserting that the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive, in order to defeat such motion for a protective order, the burden is on the party seeking the deposition to show that (i) the officer's deposition is reasonably calculated to lead to the discovery of admissible evidence, (ii) the officer may have personal knowledge of discoverable information that cannot reasonably be discovered through other means, and (iii) a deposition of a representative other than the officer or other methods of discovery are unsatisfactory, insufficient, or inadequate.

C. A motion for a protective order filed pursuant to subsection B shall include one or more proposed corporate employees available to be deposed instead of the officer, along with a description of the employee's role in the corporation, his knowledge relevant to the subject matter of the litigation, and the source of such knowledge, provided that the party opposing the motion has stated with reasonable particularity the matters on which the officer's examination is requested.

¹ This provision has been designed to track Federal Rule of Civil Procedure 30(b)(6), and the Virginia version has been in the Part Three rules for several decades.

D. If a protective order is issued and the party seeking the deposition subsequently learns that the requirements set forth in subsection B can be met, then the party seeking the deposition may file for modification or lifting of the protective order.

E. The provisions of this section apply to a subpoena issued pursuant to the Uniform Interstate Depositions and Discovery Act (§ 8.01-412.8 et seq.) consistent with the provisions of subsection E of § 8.01-412.10.

In addition to adding a reference to this new statute, the Advisory Committee is striving to eliminate sexist presumptions in the language of the Rule. Further, the Rule needs minor edits to bring it back into alignment with Federal Rule of Civil Procedure 30(b)(6), on which it is modelled. Finally, the Committee seeks comment on a revision (also pending within the federal rules drafting process for the comparable rule in that system) that will highlight the need for the noticing and responding parties to confer about the topics identified for testimony and the witnesses designated to provide the testimony. Thus the Committee is considering these amendments:

(b) Notice of Examination: General Requirements; Special Notice; Production of Documents and Things; Deposition of Organization.

* * * *

(6) A party may in the ~~his~~ notice name as the deponent a public or private corporation, ~~or~~ a partnership, ~~an~~ ~~or~~ association, ~~a~~ ~~or~~ governmental agency, ~~or~~ other entity and must describe and designate with reasonable particularity the matters on which examination is requested. The organization so named must ~~shall~~ designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; ~~and it may set out forth, for each person designated,~~ the matters on which each person designated ~~he~~ will testify. Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person the organization will designate to testify. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party. The persons ~~so~~ designated must ~~shall~~ testify as to matters known or reasonably available to the organization on the topics specified in the notice of deposition. Except as provided in Virginia Code § 8.01-420.4:1, this subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these Rules and Virginia law.

The Advisory Committee on Rules of Court invites comments on the draft revisions to the Virginia Rules published herewith.

Send comments by to **December 12, 2019** to:

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