

TO: THE BAR AND THE BENCH OF VIRGINIA

**FROM: Advisory Committee on Rules of Court
Judicial Council of Virginia**

DISCOVERY RULE AMENDMENTS CONSIDERED

The Advisory Committee on Rules of Court in Virginia seeks public comment on two pending proposed rule amendments relating to depositions in discovery, Rules 4:5(b)(5) and 4:5(c).

The first proposal is to add to Rule 4:5(b)(4) a provision creating a pre-set or default rule as to who may attend depositions. That roster of attendees may be altered by the parties upon their own consent. If one party wishes to add other authorized attendees, or obtain a ruling excluding one of the putatively eligible attendees, an order from the court resolving the disagreement will be available. The emphasis in this rule on counsel conferring is expected to result in agreement among attorneys specializing in particular practice areas where there is a norm of practice regarding expert witnesses. The emphasis on conferring regarding this topic will likely also eliminate unfair surprise and cancellation of depositions occasioned by unanticipated attendees appearing on the date set for a deposition. The Committee is thus contemplating that Rule 4:5(b)(4) would state as follows:

Rule 4:5:

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

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(4) Unless otherwise agreed to by the parties or otherwise provided by court order or by law, generally only the witness, the parties, their respective counsel including such counsel's staff, experts identified pursuant to Rule 4:1(a)(4)(A), and those involved with the administration of the deposition (such as court reporters and translators) may attend the deposition, given the private nature of discovery. Counsel of record for the parties and counsel for any non-party deponent must timely confer regarding any other attendees who are requested by a party or by the deponent to be present at the deposition, or any persons a party wishes to have excluded, and any objections must be presented to the court prior to the deposition for decision in the court's discretion.

Whether to include experts in the list of presumptively eligible attendees is one of the issues on which the Advisory Committee invites comments.

Second Possible Rule Amendment. The Advisory Committee on Rules also discussed and has tentatively agreed to recommend a Rule of Court that would clarify that the rigorous contemporaneous objection language of Virginia Rule of Evidence 2:103 is not applicable at depositions – failure to make such objections is not a waiver of arguments against admission of proof at trial or on appeal. The language considered would replace a few words at the outset of Rule 4:5(c)(1), stating that the examination is to “proceed as permitted at trial,” which invites the misapprehension that all evidentiary objections need to be placed on the record at a deposition. The draft Rule amendment would clarify that all objections other than to the form of a question, or those objections based on confidentiality or privilege, are automatically preserved without cluttering the deposition transcript with objections on those matters:

Rule 4:5 (c): Examination and Cross Examination; Record of Examination; Oath; Objections.

(1) ~~Examination and cross examination of witnesses may proceed as permitted at trial.~~ Unless the parties agree otherwise, examination and cross-examination of witnesses at depositions proceed in the sequence normally found at trial, beginning with direct examination by the party noticing the deposition. Objections pursuant to Virginia Rule of Evidence 2:103 are not required and a party need only object to the form of a question and on issues of confidentiality or privilege in order to preserve arguments against admission of deposition testimony; all other evidentiary objections are preserved for trial.

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

Send comments by August 25, 2019 to:

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