HEYL ROYSTER VOELKER & ALLEN, P.C.

TRUCKING

WINTER 2019-2020 NEWSLETTER

INTRODUCTION

As we leave 2019, there are many challenges facing the trucking industry, including ongoing driver shortage, driver retention, transportation infrastructure, nuclear verdicts, and rising insurance costs. In 2019, approximately 800 trucking companies failed, an increase from around 300 companies in 2018. Manufacturers that support the trucking industry were also laying off substantial people. Some of this is related to the economy, while some of it is simply due to ongoing costs that extend beyond the economy.

We are extremely tied to the interests of the trucking industry, and we view ourselves as partners with industry during the pre-litigation phase as well as during the litigation process. It is our job to quickly and effectively evaluate potential risk and move our clients in the direction of early resolution wherever possible. We take great pride in attempting to move files to closure as quickly as possible. Through a team approach, our goal is to strategically develop a plan designed to bring the matter to early resolution wherever possible.

Our trucking practice is consistently growing, and we are now handling work in five states. We are aggressively moving forward with work in Iowa, and we have also expanded our presence in Indiana, beyond our work in Illinois, Missouri, and Mississippi. We are growing, and we are very grateful for the relationships that we have with all of you.

The Winter 2020 Newsletter has some excellent articles. Brett Mares of our Chicago Office has written an excellent article regarding FMCSA Drug and Alcohol Clearinghouse Going Live In January, 2020. Ryan Kemper of our Edwardsville, Illinois office (Madison County) has written a very insightful and timely article addressing Federal Pre-Emption of Broker Liability Claims, and Megan Molé of our Chicago office has written an outstanding article regarding various issues to be aware of when planning for a 30(b)(6) deposition. Megan has recently accepted a job with Uber, and we wish her well in her future endeavors. We will miss her. Her article is certainly one to keep handy given it attempts to touch upon all of the various logistical issues that you encounter as you prepare for a 30(b)(6) deposition.

Lastly, I have attached a link to the DRI Trucking Law Seminar to be conducted in Austin, Texas, April 30–May 1, 2020. I am including a link to the Seminar as I have been blessed to be the Chair of the DRI Trucking Law Committee during 2019 and 2020. The focus of the Seminar will address "Changing the Narrative." At Heyl Royster we are strong believers that we need to partner with industry in helping change the narrative about the trucking industry. We need to be creative to stem the tide of negative publicity that seems to take attention away from all of the wonderful things that the trucking industry provides America. I hope that you consider attending the Trucking Law Seminar in Austin. Obviously, the theme of the Seminar is something I hold very personally. There has been a great deal of planning undertaken to prepare for the Seminar, and we are extremely excited about our slate of speakers.

We wish you the best in 2020, and we hope to see many of you as the year progresses.

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FMCSA DRUG & ALCOHOL CLEARINGHOUSE GOES LIVE

By: Brett Mares, bmares@heylroyster.com

After years of rulemaking, planning, and preparing, the implementation of the Federal Motor Carrier Safety Administration's (FMCSA) CDL Drug and Alcohol Clearinghouse is here. The Clearinghouse became operational on January 6, 2020, whether or not carriers, the Federal Government, and state Departments of Motor Vehicles were ready. While the system has already had some technical difficulties and continues to experience intermittent issues with verifying driver CDL information, the Clearinghouse is up

and running. Carriers should be reminded that if they are unable to access the Clearinghouse to conduct pre-employment queries, they should use the "old method" laid out in 49 C.F.R. 391.23(e) until access is reestablished.

According to the Department of Transportation, the purpose of the Clearinghouse is to "maintain records of all drug and alcohol program violations in a central repository and require that employers query the system to determine whether current and prospective employees have incurred a drug or alcohol violation that would prohibit them from performing safety-sensitive functions covered by the FMCSA and U.S. Department of Transportation (DOT) drug and alcohol testing regulations." Employers and DOT-certified medical examiners will be required to report positive tests and return-to-service actions by the close of the third business day following receipt of the information. Employers will be required to query the system during the pre-employment evaluation process, and once a year for existing driver employees. The goal of the Clearinghouse is to make readily accessible positive drug and alcohol tests, as well as completion of return-to-duty requirements, from employer to employer and jurisdiction to jurisdiction. Gone are the days when a driver who failed a drug test can simply move to a different state to avoid negative career repercussions.

There is, of course, a lot to be gained by implementation of the Clearinghouse, and carriers continue to work internally to meet the requirements it imposes. Employers will gain more certainty that employees entrusted with the safe operation of vehicles do not have a history of unsafe drug and alcohol practices. Should an accident occur and litigation result, this should mean less surprises for the employer during the discovery process. Hopefully, the Clearinghouse will mean that surprise positive drug and alcohol tests from the driver's past become less of an issue. But it is also true that, as implementation of the Clearinghouse now stands, employers that go above and beyond could, strangely, be penalized.

Hair based drug tests are often held out to be the industry gold standard. They supposedly offer an accurate look into an individual's history of drug use over a longer time frame. Drugs that are metabolized and disappear from an individual's blood stream can still show up in that person's hair for up to ninety days. Employers often use hair based drug tests in conjunction with more conventional drug tests to get a long term picture of drug use. Yet, as the rulemaking process now stands, hair based drug tests are not welcome in the Clearinghouse. The Clearinghouse only allows uploading of Department of Transportation Part 382 drug testing results. As stated on the Clearinghouse website, "Only results of DOT Drug and alcohol tests or refusals may be reported to the clearinghouse. While employers may conduct drug and alcohol testing that is outside the scope of the DOT testing requirements, positive test results or refusals for such non-DOT testing may not be reported to the Clearinghouse."

So why does the Department of Transportation appear to be pushing this useful information away? The creation of the Clearinghouse is itself an acknowledgment of a greater need to widely disburse information about failed or refused drug and alcohol tests. With that in mind, the most accurate tests are still being left out of the picture. That picture will not become clearer until the Department of Health and Human Services fulfills its Congressional mandate to issue standards for hair based tests. There is not yet publicly available information as to when that will happen.

Congress ordered the Department of Health and Human Services (HHS) to have a rule in place by December of 2016. According to a report sent to Congress by the Department of Health and Human Services in the summer of 2019, "Addressing the scientific and legal issues associated with hair testing has taken a significant amount of time and is the reason why HHS has not issued hair testing." For instance, HHS reports that it has found that "[v]igorous and extensive hair washing procedures may remove incorporated drugs, metabolites, and other target markers…." Further, hair color, natural and dyed, have been shown to affect drug disposition in the hair. Even something as simple as "vigorous brushing" has been shown to decrease the accuracy of the test. The HHS is struggling to find "any objective methods in use to assess specimen validity…."

So where does this leave carriers who prefer to use hair based tests which, on the whole, remain well respected? Could carriers be opening themselves up to vicarious liability if a plaintiff argues that they should have done more to make their hair based drug test results known to the greater trucking community? That remains to be seen as trucking litigation evolves following the implementation of the Clearinghouse. That said, there are a few simple steps that carriers can take to protect against such possibilities. First and foremost, carriers can subject potential hires and current employees to both fluid and hair based evaluations. Then fluid based test results can be uploaded to the Clearinghouse, and carriers can still have the hair derived information that they often require. Of course, that will lead to increased compliance costs until HHS codifies the use of hair based test results in conjunction

with the Clearinghouse. As carriers are already worried use of the Clearinghouse will delay hires by days, the duplication of drug tests might be a source of frustration. But doing so is also likely to ensure that carriers are doing all they can to make sure they are putting the safest fleet they can on the road. In front of a jury, that is worth its weight in gold.

FEDERAL PREEMPTION OF BROKER LIABILITY CLAIMS: WILL FEDERAL COURTS KICK OUT STATE LAW CLAIMS AGAINST FREIGHT BROKERS?

By: Ryan Kemper, rkemper@heylroyster.com

In order to maximize the pool of available settlement funds, plaintiffs seeking damages in personal injury actions arising out of trucking accidents are increasing casting a wide net to not only bring suit against the truck driver and motor carrier, but also companies with an ancillary role in managing the load, including the shipper and freight broker. These parties obviously have little or no ability to directly control the driver and, in the usual course of events, have no contractual right or obligation to train, instruct, or closely monitor the driver while he is in control of the load. That is, of course, why they hire a motor carrier.

Generally, the broker has simply selected a carrier in good standing with the Department of Transportation, and its due diligence consists of confirming the carrier's adequate rating and crash history with the Federal Motor Carrier Safety Administration. The broker rightfully believes that the motor carrier's compliance with federal regulatory requirements are adequate to ensure that they are brokering a load to be handled by a safe, reputable carrier, who will thereby ensure that its drivers are properly trained. Such due diligence does not, unfortunately, prevent the plaintiffs' bar from filing suit under a state-law negligence theory alleging that the broker failed to properly investigate the motor carrier or (somehow) mandate more direct driver training. The costs of such litigation can be substantial, even where the plaintiff cannot ultimately show any wrongful conduct by the broker.

Over the last several years, United States District Courts have become increasingly receptive to the argument that such state-law negligent hiring claims cannot stand because they implicitly add arbitrary state-law requirements to the federally regulated trucking industry. That is, a business brokering loads across state lines should not be burdened by state-by-state assessments, enforced via state negligence claims, of what constitutes proper conduct of a broker when the broker has complied with federal regulatory requirements and has no ability to directly control the conduct of the motor carrier in the first instance. This argument has taken the form of federal preemption.

In a recent string of cases, largely originating in Illinois, including *Volkova v. C.H. Robinson Co.,* No. 16 C 1883, 2018 U.S. Dist. LEXIS 19877 (N.D. Ill. Feb. 7, 2018); *Georgia Nut Co. v. C.H. Robinson Co.,* No. 17 C 3018, 2017 U.S. Dist. LEXIS 177269 (N.D. Ill. Oct. 26, 2017) and *Creagan v. Wal-Mart Transportation, LLC*, 354 F. Supp. 3d 808 (N.D. Ohio 2018), U.S. District Courts have shown a willingness to grant summary judgment in favor of freight brokers under the preemption provision of the Federal Aviation Administration Authorization Act (FAAAA), which applies to "any motor carrier, broker, or freight forwarder" and prohibits States from "enact[ing] or enforce[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier... broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

The Congressional objective of the FAAAA has been described as "prevent[ing] states from undermining federal deregulation of interstate trucking through a patchwork of state regulations." *Miller v. C.H. Robinson Worldwide, Inc.,* No. 3:17-CV-00408, 2018 U.S. Dist. LEXIS 194453, at *8 (D. Nev. Nov. 14, 2018). Arguably, under the preemption provision, a plaintiff cannot assert a state-law negligent hiring claim against a broker, because any such claim has a significant impact on the regulatory objectives of the FAAAA and is therefore explicitly precluded by federal law in an industry which is necessarily interstate in nature. Such claims would undoubtedly undermine this regulatory scheme entirely, thereby disrupting market forces and requiring brokers to tailor their services to a patchwork of "reasonableness" standards enforced by state courts under the rubric of negligent hiring claims. These recent decisions also reason that an injured plaintiff is not left without recourse, because the plaintiff may still proceed against the motor carrier, and the FAAAA mandates that the entity must carry liability insurance to register as a motor carrier.

The contrary argument is twofold. First, plaintiffs question whether or not a personal injury action resulting from motor carrier negligence actually "relates to" the service of the broker, thus falling within the preemption

language. The better reasoned decisions hold that the service of the broker – *i.e.* arranging for the transportation of a shipment by a motor carrier – does not change, regardless of whether the actions of the motor carrier resulted in property damage or personal injury. However, not all courts have agreed with this analysis, with many finding a distinction when personal injury is involved because such claims arguably do not have as significant an impact on the regulatory scheme. See *Mann v. C. H. Robinson Worldwide, Inc.,* No. 7:16-CV-00102, 00104, 00140, 2017 U.S. Dist. LEXIS 117503 (W.D. Va. July 27, 2017).

Second, plaintiffs point out that the FAAAA contains a safety regulatory exception which provides, in relevant part, that the preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A). This is the heart of the current debate, as, for years, federal courts reasoned that common law claims arising from the negligent procurement of a trailer represent a valid exercise of the state's police power to regulate safety. See *Finley v. Dyer*, No. 3:18-CV-78, 2018 U.S. Dist. LEXIS 182482 (N.D. Miss. Oct. 24, 2018). In rejecting this reasoning, the *Creagan* court found that to construe the regulatory exception so broadly would essentially swallow the preemption rule entirely. The *Miller* court likewise distinguished the regulatory exception as one limited to a recognition of the state's police power, but not exempting a private cause of action. The *Miller* court also correctly pointed out that the term "broker" does not appear in the in the language of the safety regulatory exception, which, on its face, only allows state regulation of motor carriers. This strongly suggests Congressional intent to treat brokers differently due to their limited direct control over drivers.

To date, no federal circuit court has reached this issue, leaving district courts with no binding authority and each reconsidering the same questions on the basis of persuasive authority. However, in *Creagan v. Wal-Mart Transportation, LLC*, Nos. 19-3562/3595, 2020 U.S. App. LEXIS 976 (6th Cir. Jan. 10, 2020), the Sixth Circuit may have an opportunity to weigh in on this important issue to freight brokers, likely setting the tone for future challenges across the country.

AVOID THE PITFALLS OF RULE 30(B)(6) DEPOSITIONS

By: Megan Molé, mmolé@heylroyster.com

Federal Rule of Civil Procedure 30(b)(6) depositions are a popular discovery tool intended to "secure the just, speedy, and inexpensive determination of every action and proceeding" by eliminating the process of bandying. *See* Fed. R. Civ. P. 30(b)(6) advisory committee's notes, subdivision (b) (1970). The rule was designed to eliminate wasteful corporate depositions where a series of deponents would testify to a lack sufficient knowledge regarding relevant topics. In theory, at least, 30(b)(6) depositions allow corporations sufficient control and leeway to designate their own corporate representatives, and to be able to provide their designees with sufficient corporate knowledge to answer questions truthfully and favorably on behalf of the deponent corporation – a win-win for both plaintiffs and defendants.

Pursuant to Federal Rule 30(b)(6), in its notice or subpoena (to a non-party), a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency, and must describe with reasonable particularity the matters for examination. *See* Fed. R. Civ. P. 30(b)(6). The organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on the organization's behalf. It may set out the matters on which each person designated will testify. The persons designated must testify about information known or reasonably available to the organization. *See Id.*

Although the rule was intended to be fair and equitable to both sides, in reality, 30(b)(6) depositions can easily turn into a trap for the unwary. As aptly noted in a Comment to the Rule 30(b)(6) Subcommittee of the Advisory on Civil Rules submitted on July 5, 2017, Lawyers for Civil Justice submitted that,

> Unfortunately, practice under Rule 30(b)(6) has not kept up with the rule's promise to be advantageous to both sides. It allows the requesting party to impose significant burdens that do not result in any benefit to the case. Because 30(b)(6) depositions are not discussed in Rule 26(f) conferences or addressed in Rule 16, it has become a catch-all for the kinds of disproportional demands, sudden deadlines and "gotcha" games that the Committee has removed from other discovery rules. Because there is no procedure for objections, 30(b)(6) notices force a Hobson's choice between attempting

> to comply despite overbroad topics, vaguely written descriptions and duplicative requests, or filing a motion for protective order, which could result in an even worse outcome including sanctions. And because there is doubt about the binding effect and no express ability to supplement testimony, 30(b)(6) depositions cause unhealthy tension between counsel.
>
> Rule 30(b)(6) depositions by their nature generate controversy. Preparing a witness to testify regarding the full extent of information reasonably available to an organization often inflicts an enormous burden of business disruption and expense on the responding party. That burden may be justified where the information is important to the case, but not when the noticed topics have no relevance to the claims or defenses or when the burden is disproportionate to the needs of the case. Also, a failure of the Rule 30(b)(6) notice to describe the subject matters of the deposition with "reasonable particularity" renders compliance an impossible task.

Lawyers for Civil Justice, Comment to the Rule 30(b)(6) Subcommittee of the Advisory on Civil Rules, July 5, 2017.

By carefully anticipating and preparing for the logistics of defending Rule 30(b)(6) depositions, however, a savvy practitioner can avoid potential traps that may befall the unwary.

Limit The Scope Of The 30(b)(6) Deposition Notice

At any point during the pendency of a lawsuit, an organization may be served with a Rule 30(b)(6) notice. This notice must be served in compliance with applicable Federal discovery rules and orders, including the manner and timing of service. It must be drafted in compliance with the rule, indicate the names of the organization to be deposed, set for a procedurally proper date and time of the deposition, and must identify with "reasonable particularity" the topics that will be the subject of the deposition. *See, generally,* Fed. R. Civ. P. 30.

Once the 30(b)(6) notice is received, it is imperative that receiving counsel closely examine the notice for potential issues, and in particular, for vague, overly broad, unduly burdensome topics, those that are not reasonable that may serve as grounds for objection, and ultimately, may require a Motion for Protective Order pursuant to FRCP 26(c) to preserve objections. In short, a defendant must be able to identify "the outer limits of the areas of inquiry noticed." *Reed v. Nellcor Puritan, Bennett and Mallinckrodt, Inc.,* 193 F.R.D. 689, 692 (D. Kan. 2000). Accordingly, it is important to take note of phrases such as "including but not limited to," as this places the organization in the impossible position of preparing to testify on indefinite and potentially an infinite number of subject areas. *Id.* Where possible, the 30(b)(6) notice should "be limited to a relevant time period, geographic scope, and related to claims" that are at issue in the case. *Young v. United Parcel Serv. of America, Inc.,* No. DKC-08-2586, 2010 WL 1346423, *9 (D. Md. Mar. 30, 2010). Markowitz and Franco, *Preparing and Responding to the Rule 30(B)(6) Notice*, Accessed November 2, 2019.

Rule 30(b)(6) deposition testimony is ultimately binding on the organization and 30(b)(6) depositions constitute a significant expense to an organization to properly prepare, educate, and produce corporate witnesses. Because this notice may ultimately define the breadth and depth of a corporation's admissible "knowledge" on the topics defined in the notice, and because an overly broad and open-ended topic served within a notice may invite sanctions upon an organization for failing to provide a witness to answer for those undefined and overly broad topics, it is within a defense practitioner's best interest to narrow the topics to a clearly defined breadth and depth. It is worth noting, however, that reasonable particularity does not necessarily favor a fewer number of 30(b)(6) topics. In fact, courts routinely uphold over 30 topics as long as they are specific. *See generally*, *Tamburri v. SunTrust Mortg. Inc.*, No. C-11-02899, 2013 WL 1616106, at *2 (N.D. Cal. April 15, 2013. *See e.g. Krasney v. Nationwide Mut. Ins. Co.,* No. 06-CV-1164, 2007 WL 4365677, *4 (D. Conn. Dec. 11, 2007).

After careful consideration of a notice, defense counsel should not only issue written objections to their opponent, but should also meet and confer regarding the topics as soon as practicable. Furthermore, because a stay of discovery may not be automatic when a Motion for Protection is filed, it may also be a worthy consideration to file a Motion for Stay pending resolution of any 30(b)(6) notice issues you wish to work out with opposing counsel. If counsels can agree to narrow the scope, issuing counsel should provide an amended 30(b)(6) notice with the agreed topics clearly defined. Of important note, however, "the proper procedure to object to a Rule 30(b)(6) deposition notice is not to serve objections on the opposing party, but to move for a protective order." *Beach Mart, Inc. v. L & L Wings, Inc.*, 302 F.R.D. 396, 406 (E.D. N.C. 2014). A corporate deponent cannot simply make "objections and then provide a witness that will testify only within the scope of its objections." *Id.* Markowitz and Franco, *Preparing and Responding to the Rule 30(B)(6) Notice*, (Nov. 3, 2019).

If counsel cannot quickly agree on whether and how to narrow the notice topics, defense counsel should immediately seek a protective order from the court to proceed before the deposition occurs or risk waiving its objections to the Notice. The motion may seek to have the entire notice quashed, or to have specific topics modified or quashed. If the notice generally lacks specificity or is otherwise full of correctable defects, then courts may quash the entire notice and provide leave for the notice to be re-issued consistent with the court's opinion. *See Murphy v. Kmart Corp.*, 255 F.R.D. 497, 518 (D. S.D. 2009); *Reed,* 193 F.R.D. at 693; *Gulf Production Co., Inc. v. Hoover Oilfield Supp., Inc.,* No. 08-5016, 09-2779, 09-0104, 2011 WL 2669294 (E.D. La. July 7, 2011). If, however, the protective order is being sought on grounds that cannot readily be cured with an amended notice, then the court may quash the notice in its entirety. *See SEC v. Buntrock,* 217 F.R.D. 441, 444, 448 (N.D. Ill. 2003). Markowitz and Franco, "*Preparing and Responding to the Rule 30(B)(6) Notice*, (Nov. 3, 2019.) Defense counsel may open itself to sanctions by refusing to provide the requested testimony and only later providing its objections in response to a propounding party's Motion to Compel.

Designate The Right Corporate Representative(s)

An organization is required to choose a corporate representative or representatives to answer questions pursuant to the Notice. This representative may be an employee, non-employee, or even a paid consultant. *Ierardi v. Lorillard, Inc.,* No. 90-cv-7049, 1991 WL 158911 (E.D. Pa. Aug. 13, 1991)). There is no rule regarding who a corporation may select to represent them in response to a 30(b)(6) notice. This testimony will be binding upon the organization and it is nearly impossible to later amend or supplement the representative's responses to questioning pursuant to the 30(b)(6) notice. Thus, it is imperative that the organization makes a strategic choice in deciding whom it will present in response to the Notice. Notably, however, an organization is not required to choose a "person with the most knowledge" on a particular topic or topics – the only requirement is that the organization must educate the individual or individuals with the "corporation's knowledge" on the topics outlined in the Notice. The organization can disclose more than one corporate representative, if one person simply cannot be adequately prepared to answer questions on every single topic. Relatedly, the organization should also be prepared to disclose any documents the deponent relied upon in becoming educated as to the Organization's knowledge, even if those documents have not been previously disclosed to the opposing party.

Rule 30(d) limits a deposition to seven hours, absent leave of court. However, Rule 30(b)(6) depositions have, at times, been treated differently in light of the Committee Notes on the subject. Specifically, the Committee Notes state that: "[f]or purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition." Fed. R. Civ. P. 30 advisory committee's note to 2000 amendment. Thus, should a defendant wish to designate more than one 30(b)(6) witness, it is advisable that the defendant either seek an agreement to limit all depositions to a cumulative seven hours, and/or make an immediate Motion for an Order of Protection with the court so that all parties proceed with the same understanding of a limited duration. As an alternative, if an organization feels the need to designate more than one 30(b)(6) witness, an unorthodox consideration may be to use a "deposition by committee" if agreed to by issuing counsel. This type of deposition would allow more than one 30(b)(6) witness to sit for deposition and answer questions at the same time, thus, potentially allowing for more streamlined and consistent responses, the ability for witnesses to understand the same context for questioning, and for witnesses to supplement each other's answers when appropriate, based on their field of knowledge.

It is important to choose a witness or group of witnesses who are articulate, savvy, have excellent memories and can withstand an exhausting day of questioning, and who understand the distinction between personal knowledge and the knowledge of the organization. Moreover, the organization should understand the pitfalls of producing certain types of witnesses as corporate representatives– including corporation counsel or paid consultations, as both types of witnesses can lead to privilege issues, including potential waiver of attorney-client privilege as well as the required disclosure of work-product. Moreover, paid consultants will inevitably face credibility challenges to the extent that they receive compensation for their testimony.

Meticulously Prepare The Witness

The noticed corporation must engage in "due inquiry" including searching its files and conducting interviews of its employees so that the representative is prepared and can answer fully and completely without evasiveness. *Mitsui & Co. v. Puerto Rico Water Resources Authority*, 93 F.R.D. 62, 67 (D. P.R. 1981). Corporate knowledge can include company records, prior depositions, interviews with current or former employees. *In re JDS Uniphase Corp. Securities Litigation*, No. C-02-1486, 2007 WL 219857, *1 (N.D. Cal. Jan. 29, 2007) ("While a corporation is not relieved from preparing its Rule 30(b)(6) designee to the extent matters are

reasonably available . . . it need not make extreme efforts to obtain all information possibly relevant to the request.")

It is important to note that failing to know an answer at the time of deposition may bind the organization to that lack of knowledge, regardless of whether the organization learns the answer at a later date. This newly acquired knowledge will likely be inadmissible at trial or for summary judgment, often even if the information was within the possession of a third party outside the control of the organization. Courts are inconsistent about supplementation. While some courts have permitted supplementation of Rule 30(b)(6) testimony, or have allowed a party to impeach its own witness and pay the price at trial, others have declined to do so and have stricken subsequent evidentiary submissions as inconsistent with Rule 30(b)(6) testimony. *See Keepers, Inc. v. City of Milford*, 807 F.3d 24, 34-35 (2d Cir. 2015; *Dixon Lumber Co., Inc. v. Austinville Limestone Co., Inc.*, No. 7:16-CV-00130, 2017 U.S. Dist. LEXIS 88642, at *13-15 (W.D. Va. June 9, 2017); *Radian Asset Assurance, Inc. v. Coll. of the Christian Bros. of New Mexico*, No. CIV 09-0885, 2010 U.S. Dist. LEXIS 127390, at *8 (D. N.M. Nov. 15, 2010); *Perez v. Five M's*, No. 2:15 cv 176, 2017 U.S. Dist. LEXIS 28467, at *21-23 (N.D. Ind. Mar. 1, 2017); *Rainey v. America Forest & Paper Assoc., Inc.*, 26 F. Supp. 2d 82 (D. D.C. 1998). Lawyers for Civil Justice, Comment to the Rule 30(b)(6) Subcommittee of the Advisory on Civil Rules, July 5, 2017.

The Supreme Court's Advisory Committee On Civil Rules has put forth a proposed amendment to Rule 30(b)(6) requiring that "[b]efore and promptly after the notice of 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…" In many respects this duty to confer in good faith should protect trucking companies from malicious, unreasonable, or otherwise improper requests from the plaintiffs' bar. It certainly appears clear that a significant change to the rule is coming soon. Until then, it is clear that defense counsel must remain vigilant and be prepared to deal with the logistics of defending a 30(b)(6) deposition. The pitfalls and potential traps of the unwary can usually be avoided.

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