Commentary on Consideration of Amendments to FRCP 30(b)(6)
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to:
Rules_Comments
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17-CV-DD

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Dear Subcommittee,

FRCP 30(b)(6), and the nearly identical Arkansas Rule of Civil Procedure 30(b)(6), is an invaluable part of the rules of civil procedure. I agree that the rule imposes a burden upon the requesting party to draft the 30(b)(6) notice outlining the areas of testimony, along with a burden on the responding party to designate persons to testify on those areas and prepare them to fully offer testimony on same. However, it is this burden that gives the rule its force and effect and allows it to greatly reduce the number of depositions that would otherwise need to be taken. In doing so, the rule reduces the time and expense of litigation, which was the very purpose for the creation of the rule. It also eliminates the "I don't know" response by a responding party that would otherwise run rampant were there no duty to prepare the corporate representative(s), or if the requesting party was instead forced to depose numerous employees of the entity regarding only their own personal knowledge. While this may or may not have been another intention of the rule when it was created, Rule 30(b)(6) has accomplished both of these vital goals. Limitation or elimination of the rule would be a disservice to the civil justice system. For this reason, I urge the Subcommittee to make no changes to Rule 30(b)(6). Any disputes that may arise surrounding Rule 30(b)(6), just as with any other discovery mechanism, are properly handled by the district courts, courts of appeals, and if necessary, Supreme Court. It is my opinion that the courts have handled the disputes that do arise well and have left no need for formal changes to the rule

If the Subcommittee is inclined to make changes to the rule, my suggestions would be to clarify some of the specific operations of the rule, and thereby potentially reduce certain disputes while also strengthening the force and effect of the rule:

1. Make clear that the deposition counts only as one (1) deposition for purposes of Rule 30's limitation on the number of depositions, regardless of the number of representatives designated by the responding entity.

2. Make clear that a protective order must be in place before a responding party can refuse to attend, refuse to produce a representative on certain issues, or instruct a representative not to respond to certain questions. Merely applying for a protective order should not be sufficient grounds for any of the above. It may also be helpful to place a specific deadline prior to the deposition by which a responding party must apply for a protective order, otherwise it need not be heard by the court. Failure to abide by this rule should be automatic grounds for sanctions, just like failure to attend a deposition by an individual party/deponent.

3. I believe contention questions are very important and should be maintained. Certainly, a corporate or government entity can request of an individual person at their deposition whether they contend ____, and the factual basis or support they have for contending it. I do not understand how this could

suddenly become unfair when asked of a corporate or government entity. If anything, I believe the sophisticated corporate or government entity is often times better equipped to respond to such a question than an individual person may be.

4. Establish that testimony of a corporate representative on the issues for which they have been designated to testify is "binding" on the entity, and define what is meant by this. My suggestion would be making clear that "binding" means that it is the testimony of the corporation or other entity, and including a provision that if the corporation or entity wishes to amend its testimony on a particular issue it must (a) demonstrate that its testimony is being changed based upon evidence that was not reasonably available to the entity at the time of the prior testimony, and (b) supplement the testimony and evidence in support of same within a reasonable time prior to trial. In the event the entity is attempting to change its testimony, but the reason for changing the testimony was or reasonably could have been discovered by the entity at the time of the prior testimony, then the entity should be bound by the prior testimony and any evidence contradicting the prior testimony should be prohibited.
    a. I believe the effect of this would be a middle ground between i) allowing the entity to engage in free-for-all supplementation or amendment of testimony after the deposition that would undermine the purpose of 30(b)(6), and ii) preventing the entity from having a fair opportunity to supplement or amend its testimony during the course of discovery. This change would also have the effect of punishing a lax entity that failed to prepare its representative(s) and later wanted to change the "I don't know" answers that were offered at a deposition. This seems to be the fairest resolution of the question of "binding testimony" for both a requesting and responding party, and tracks with the manner in which I handle an individual's deposition. If they do not supplement or amend their testimony after their deposition and prior to trial, then I will impeach them with their prior deposition testimony.
    b. That then leads to the question of what should be done in the scenario where a corporate representative spontaneously testifies differently at trial than he or she did during the 30(b)(6) deposition without prior disclosure. In this situation, the examining party could simply impeach the corporate representative with the entity's prior testimony, just as with any witness. If it were proved that the basis for changing the entity's testimony at trial was known by the entity within a reasonable time prior to trial, it may then be ordered that the evidence be excluded or stricken from the record for failure to supplement as required above.

Although I continue to recommend no changes to the rule because I believe it works well as is, the above are solutions to the most common disputes that I have dealt with in using Rule 30(b)(6) in practice. I believe they are fair solutions to these issues that do not undermine the spirit and purpose of the rule, but also balance the burdens to be placed upon the parties in litigation. I hope the Subcommittee considers these recommendations helpful and reaches the same or a similar conclusion. At the very least, I hope my comments are helpful to the Subcommittee in making the best decision for the vitality of the civil justice system.

Sincerely yours,

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