U. S. Department of Justice

Civil Division

17-CV-RR

Office of the Assistant Attorney General *Washington, D.C. 20530*

July 10, 2017

The Honorable Joan Ericksen
Chair, Rule 30(b)(6) Subcommittee
c/o United States District Court for the District of Minnesota
12W U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Dear Judge Ericksen:

On behalf of the Department of Justice, thank you for allowing us the opportunity to submit our preliminary views concerning potential amendments to Rule 30(b)(6). The Department has considerable experience with Rule 30(b)(6), both as a plaintiff and as a defendant, and as the party propounding and responding to a Rule 30(b)(6) deposition. Based on the Department's unique perspective, we believe that Rule 30(b)(6) serves a useful and important purpose in litigation, but that it could benefit from certain improvements.

To that end, there are at least two proposals the Department believes are worth further consideration. The first involves the issue of whether Rule 30(b)(6) testimony constitutes a binding admission. A split of authority on this issue currently exists. The majority view is that the organization is not bound by the designee's testimony. *See United States v. Taylor*, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996). These courts hold that testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted at trial by other evidence. *A.I. Credit v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001). In other words, these courts hold that an entity is "bound" by its Rule 30(b)(6) testimony in the same sense that any individual would be "bound" by his or her testimony. *See A&E Prod. Group, L.P. v. Mainetti USA, Inc.*, No. 01-10820, 2004 WL 345841 (S.D.N.Y. Feb. 25, 2004). The minority view holds that, by commissioning the designee as the voice of the organization, the organization cannot argue new or different facts that could have been asserted at the Rule 30(b)(6) deposition. *See Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998). The Department believes that the better view is consistent with the majority of courts that hold that Rule 30(b)(6) testimony does not constitute a judicial admission, and that it may be contradicted by other evidence. Accordingly, the Department supports further consideration of a rule amendment that codifies the majority view.

The second proposal the Department believes warrants further consideration concerns contention questions. In particular, the Department has the experience of being subjected to Rule 30(b)(6) depositions that seek the United States' views about legal theories or legal opinions, particularly in cases where the United States is a plaintiff in litigation. This practice raises

substantial privilege concerns. A rule amendment that distinguishes between factual contentions, on the one hand, and legal opinions or legal theories, on the other, would be worth further consideration.

We do not believe, however, that an amendment requiring discussion of Rule 30(b)(6) during the parties' Rule 26(f) meeting of counsel and in the report to the court under Rule 16 is advisable. Indeed, we believe that such an amendment is not only impractical, but that it also may even lead to unintended, unhelpful consequences. As a starting point, the proposal risks raising Rule 30(b)(6) matters too early in the pretrial process, a point highlighted at page 2 of your May 1, 2017 Invitation for Comment. Pursuant to Rule 26(f), the parties must submit a discovery plan at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b). Under Rule 16(b)(2), absent good cause for delay, the court must issue the scheduling order within the earlier of 90 days after any defendant has been served or 60 days after any defendant has appeared. Accordingly, the suggestion to focus on case management as a method for regulating Rule 30(b)(6) practice would require the parties to discuss items like the topics for Rule 30(b)(6) depositions at the earliest stages of the litigation, before the parties even know whether Rule 30(b)(6) depositions will be necessary or the parties have engaged in meaningful document discovery. This may result in unnecessary or inefficient Rule 30(b)(6) depositions, which is contrary to the rationale for the consideration of amending the rule in the first instance. Accordingly, although this approach would provide the court substantial flexibility in managing discovery, it likely would come too early to be effective. And, more fundamentally, Rules 26(f) and 16 are sufficiently flexible as currently drafted such that, if the parties wanted to, they could discuss Rule 30(b)(6) topics at the meeting of counsel and the court could include that topic in the Rule 16 scheduling order.

The Department appreciates the opportunity to provide input into this process and is ready to provide any assistance that the Subcommittee may find useful.

Sincerely,

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Civil Division
United States Department of Justice