Comments to Proposed Changes to Rule 30(b)(6)
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Dear Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules:

Please accept this letter in opposition to many of the proposed changes to the Federal Rules of Civil Procedure ("Rules"), Rule 30(b)(6) deposition procedures.

By way of background, I have been in private practice since 1995. I have conducted depositions in both complex and non-complex civil litigation with both defense and plaintiff law firms. I have also served as president of the Harrison County Bar, the West Virginia Association for Justice, and as a member of the West Virginia Senate. I am also a former federal officer with the U.S. Securities & Exchange Commission.

Discovery is the essence of civil litigation and the only path to a just outcome. Civil litigation also is one of the tenants of democracy keeping in check forces that would subvert our institutions. The proposed changes to Rule 30(b)(6), in large part, improperly insulate parties from the consequences of bad faith discovery conduct, weaken the rights of litigants to discover relevant information and tilt the playing field in favor of corporate litigants that will play "hide the ball." Rule 30(b)(6), in its present form, provide the best discovery tool for obtaining full and complete discovery responses. This body should not condone any weakening of that tool which has operated efficiently for decades with appropriate judicial oversight. In my experience, corporate litigants do not hesitate to engage in motions practice when confronted with a Notice of Rule 30(b)(7) perceived to be violative of the Rules.

As to the proposal to require consideration of Rule 30(b)(6) depositions at the Rule 26(f) planning meeting and the Rule 16 conference, such a change, on the surface, appears harmless, perhaps even helpful. However, the effectiveness of Rule 30(b)(6) is somewhat grounded in not being sure if is a part of an opponent's litigation plans. While not telegraphing one's discovery strategy may not seem important to those who do not regularly try cases, it does shape the eventual completeness of an opponent's discovery responses.

Regarding admissions by an entity at a Rule 30(b)(6) deposition, Rule 30(b)(7) testimony has always had the significance of binding the corporation just as the testimony of an individual does. Of course, testimony can always be changed, but only upon a demonstration of a good faith basis for the prior erroneous response and a full explanation of the modification. Nothing should be done to modify the significance of sworn testimony by the corporation. The well-known consequences of changing prior testimony must remain, not only so that the need to fully prepare the Rule 30(b)(7) representative remains, but also to conclusively narrow issues for trial which can only be accomplished by binding answers from the corporation - just as an individual deponent would be bound by sworn answers. Any effort to weaken the Rule, so that a Rule 30(b)(7) representative's testimony carries less consequence if subsequently altered is an effort by defense/corporate interests to tilt the playing field.

Likewise, the proposal to permit supplementation of Rule 30(b)(6) testimony creates an opportunity for corporations to change prior testimony without a good faith explanation alters the effectiveness of a Rule 30(b)(6) deposition just as changing the binding nature of the representative's testimony as the discussed above. Many depositions adjourn with requests for additional information, however, to permit supplementation may create the unintended result of "sandbagging" at the deposition knowing that relevant information can be supplemented up to the close of discovery. Likewise, it invites changes to prior testimony by supplementation without a good faith showing why the sworn testimony was incorrect. The Rule has worked well in that any

subsequent change to sworn testimony of a Rule 30(b)(6) representative is generally preceded by a good faith showing to the Court explaining the reasons incorrect testimony was provided in the first place. The Court can then provide the opposing party with an opportunity to test the altered testimony by further deposition or disclosure if necessary. To permit mere supplementation invites strategies that are contrary to the promotion of exchange of accurate discovery under our Federal Rules of Civil Procedure and the common law. It also removes an important component of judicial oversight when sworn testimony is subsequently altered.

As for the proposal to forbid contention questions at a Rule 30(b)(6) deposition removes an important discovery tool that prevents "trial by ambush," for example, exploring affirmative defenses behind which corporate defendants often hide evidence. The ability to ask contention-related questions at Rule 30(b)(6) depositions is often the only way to flush-out whether the entity has any actual facts to support affirmative defenses as opposed to making obstructive accusations - which also narrow issues for trial as discovery is intended. The judicial mandate of narrowing issues for trial is well grounded in our jurisprudence and that contention discovery, whether written or oral, should be answered with all supporting facts available at the time.

The proposal to allow pre-deposition objections as opposed to moving for a protective order is perhaps the most disconcerting. Pre-deposition objections will only invite mischief by litigants. It is easy to envision a plethora of objections, only to find the Rule 30(b)(6) representative unprepared to respond to any area of inquiry to which an objection has been lodged. Those objections would have to be resolved prior to the deposition, otherwise, risking that the deposition will be repeated at the increased expense to all litigants. The time-tested requirement of objecting to a question to preserve the record remains the best method to protect all parties, which includes the right to instruct the witness not to answer should the circumstances so dictate. In the instance where an area of inquiry is burdensome, a Motion for Protective Order is most appropriate with the understanding it must be filed before the date of the deposition and a hearing scheduled accordingly.

Finally, the proposal to apply to Rule 30(b)(6) the current numerical limits on depositions in civil cases seems unnecessary. In my twenty plus years of practice, the issue has never been raised. As with any deposition, the rule against redundancy protects litigants from unnecessary or excessive depositions under Rule 30(b)(6). It seems more than sufficient to prohibit revisiting prior areas of inquiry, just as the rule is applied to depositions of individuals.

Litigating claims against any fictitious organization presents numerous hurdles to legitimately discovering relevant facts and documents, without which cases worthy of prosecution or a defense can be undermined and defeated. Rule 30(b)(6) is one of the best tools capable of facilitating efficient discovery of relevant facts and documents necessary for trial. Rule 30(b)(6), as now written and applied, streamlines and facilitates the discovery process. Nearly all of the proposals would have the effect of diminishing the Rule's effectiveness. Rule 30(b)(6) is not broken, therefore a fix is unnecessary. Any complaints to the contrary are more likely a testament to the fulfillment of Rule 30(b)(6)'s purpose, than a bona fide complaint about any perceived abuse.

Thank you for taking the time to consider my comments. I remain available at your convenience should you have any questions.

*Kindest regards,*
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***"Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds."***
***-- John Adams, 1774***