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*By email: Rules_Comments@ao.uscourts.gov*

Please accept my comments in response to the Advisory Committee on Civil Rules Rule 30(b)(6) Subcommittee's Invitation for Comment on Possible Issues Regarding Rule 30(b)(6).

It appears that none of the 6 possible changes would improve the current practice under Rule 30(b)(6), and some of them would add a costly and time-consuming motion practice to address issues the parties typically resolve without court intervention. Others changes encourage gamesmanship and other unproductive litigation behavior.

## I. Inclusion of Rule 30(b)(6) Among the Topics for Discussion at the Rule 26(f) Conference and in the Report to the Court Under Rule 16

Rule 30(b)(6) should not be included among the topics to be discussed during the Rule 26(f) conference, or as part of the Rule 16 report to the court. The Subcommittee suggests that including them in the Rule 16(f) report "might be a catalyst for early attention and judicial oversight that could iron out difficulties that have emerged in practice." This assumes there are disputes in Rule 30(b)(6) depositions that cannot be resolved without court intervention, and that, if/when such disputes do arise, they arise early enough in a case to be addressed effectively at the Rule 26(f) conference. Neither assumption is correct. In cases where an individual brings suit against a large corporation, the corporation generally has exclusive control over most or all of the evidence, so plaintiff's lawyers would be at a huge disadvantage if we have to identifying key documents and witnesses at the outset of a case. In fact, we often use 30(b)(6) depositions early in discovery to identify categories of documents and other evidence available for discovery, how they are maintained, and how they may be obtained. Acquiring this information early in a case creates additional efficiencies by helping to identify disputed issues and keeping subsequent discovery requests as narrowly-tailored as possible.

Inclusion of Rule 30(b)(6) depositions in the initial case planning discussions would threaten these efficiencies and risk grinding the discovery process to a halt by providing the opportunity to create unnecessary disputes on any number of items, such as when and where the deposition will take place, the topics to be covered, (c) the timeframe at issue, etc. Until now, these issues have been resolved by the parties themselves, without court involvement and the costly and time-consuming motion practice that comes with it.

## II. Treating 30(b)(6) Deposition Testimony as Judicial Admissions

It's unnecessary to clarify through the Rules of Civil Procedure when Rule 30(b)(6) testimony shall be treated as a judicial admission, thereby forbidding corporate defendants from offering evidence inconsistent with that testimony. This decision should be left to the courts on a case-by-case basis.

Although most courts view Rule 30(b)(6) testimony as binding only in the sense of traditional deposition testimony, courts sometimes reject declarations contradicting prior Rule 30(b)(6) testimony under the "sham affidavit" doctrine. *Casas v. Conseco Fin. Corp.*, 2002 WL 507059, at *10-11 (D. Minn. Mar. 31, 2002) (granting summary judgment based on Rule 30(b)(6) testimony and refusing to consider contradictory affidavits); *see also Rainey v. Am. Forest and Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) ("[Rule 30(b)(6)] binds the corporate party to the positions taken by its 30(b)(6) witnesses so that opponents are, by and large, insulated from trial by ambush."). Trying to create a bright line rule to apply in all situations could create confusion.

## III. Requiring and Permitting Supplementation of Rule 30(b)(6) Testimony

Requiring and/or permitting supplementation of 30(b)(6) testimony is dangerous and unfair. As the Subcommittee pointed out in its Invitation for Comment, supplementation would encourage wasteful forms of gamesmanship, such as intentionally failing to prepare witnesses or introducing sham testimony. Courts routinely strike sham affidavits, but allowing supplementation would permit 30(b)(6) deponents to say, "I don't know, I need to review our records" type answers, thereby transforming the 30(b)(6) deposition into an unproductive, expensive, and meaningless discovery tool.

And, such a change would only benefit corporate defendants. As the Subcommittee recognizes in the Invitation for Comment, the existing Rule 26(e) doesn't require or permit supplementation of deposition testimony. If a plaintiff supplemented his/her deposition testimony, it would be subject to a motion to strike and/or impeachment at trial. Why should organizational parties be allowed or required to freely supplement, while leaving individual plaintiffs subject to the existing, harsher rule?

## IV. Forbidding Contention Questions in Rule 30(b)(6) Depositions

Forbidding contention questions in Rule 30(b)(6) depositions would unfairly impose a restriction on individual, but not corporate, parties. Although individual parties do have more time to respond to contention interrogatories, corporate defense counsel often ask contention questions to plaintiffs during their deposition (e.g., "What support do you have for your claim that you suffered discrimination?"). Allowing these types of questions to be asked of plaintiffs, but not defendants, is simply unfair.

## V. Adding Objections to Rule 30(b)(6)

Injecting a formal objection process into the Rule 30(b)(6) discovery process is problematic for a number of reasons.

First of all, 30(b)(6) depositions are often the first deposition in a case. Encouraging formal objections would create a motion practice at the outset of discovery, resulting in delays that prevent conducting productive discovery. Requiring the objecting party to specify the information they will provide despite their objection (similar to Rule 34), would not resolve this issue. In fact, it would require parties to sit for multiple depositions—one on the topics they agreed to, and a second after the court rules on an inevitable motion to compel regarding the topics to which they object.

This provision would undoubtedly result in corporate defendants objecting to most Rule 30(b)(6) deposition notices, thereby increasing the workload of already overburdened district court judges, clerks, and staff. Neither the court, nor the litigants, would have a clear concept of how the case might develop, yet the court would be required to make substantive decisions about an early 30(b)(6) deposition notice, which could have a significant impact on the proceedings right at the start of discovery.

## VI. Amending the Rule to Address the Application of Limits on the Duration and Number of Depositions as Applied to Rule 30(b)(6) Depositions

Most jurisdictions to allow one full day deposition per 30(b)(6) witness. Disputes rarely arise over this. When they do, they're resolved among counsel without court intervention.

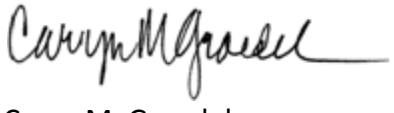
Also, why should the party receiving the notice be in control of how many witnesses are produced? For instance, in some cases, corporations designate several 30(b) witnesses to cover different time periods. The noticing party should not be required to use an extra deposition due to the needs (strategic or otherwise) of the other side.

Further, limiting the amount of time a party can spend with each Rule 30(b)(6) witness will result in numerous topics not being explored, or being explored less fully than otherwise.

Please do not amend these rules in the manner proposed, as doing so will be overwhelmingly prejudicial to individual plaintiffs, while favoring corporate defendants, who are already in a much superior position in terms of access to discovery, funds for discovery, etc.

Thank you in advance.

Very truly yours,



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