Comments on Rule 30(b)(6)
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17-CV-BBB

Dear Sir or Madam:

None of the six (6) possible changes suggested by the Subcommittee would improve current practice under Rule 30(b)(6). A number of the proposed changes would introduce costly and time-consuming motion practice to address issues that the parties in a case can and do resolve without court intervention. Others would encourage gamesmanship and similarly unproductive litigation behavior. Each incorporates a perspective that is too solicitous of the interests of organizational litigants at the expense of both individual litigants and broader judicial economy.

Proceeding in this manner would represent a serious and troubling departure for the Civil Rules Advisory Committee, which has worked to issue carefully-calibrated rule changes that do not favor one set of litigants over another.

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

We oppose including a specific reference to Rule 30(b)(6), either (1) among the topics to be discussed during the Rule 26(f) conference or (2) as part of the Rule 16 report to the court.

The Subcommittee suggests in the Invitation for Comment that discussing Rule 30(b)(6) depositions during the Rule 26(f) conference and 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 statement assumes (a) that disputes are arising regarding Rule 30(b)(6) depositions that cannot be resolved without court intervention, and (b) that such disputes, if they do arise, do so early enough in a case to be addressed effectively at the Rule 26(f) conference. We respectfully submit that neither assumption is accurate. In our experience, inclusion of Rule 30 (b)(6) depositions as an item to be addressed at the parties' Rule 26(f) conference would undermine much of what makes the rule useful and threaten to create disputes that otherwise would not exist.

We represent employees in litigation against their current or former employers, which are often large companies. Because such entities generally have custody or control of all or most of the potential evidence at the outset of a case, we tend to be at a considerable disadvantage when it comes to identifying key documents and witnesses. Accordingly, we often use 30(b)(6) depositions early in discovery as an efficient means of identifying the categories of documents and other evidence that may be available for discovery, how they are maintained, and how they may be obtained. Acquiring this information early in a case creates additional efficiencies through its value in helping to identify disputed issues and keep 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 a host of items— e.g., (a) when and where the deposition will take place, (b) the topics that will be covered, (c) the timeframe(s) at issue, or (d) whether follow-up depositions can be obtained. Under existing practice, these types of issues have been resolved by the parties themselves, without the need for court involvement and the

costly and time-consuming motion practice that comes with it.

II. Potential Treatment of Statements Made During 30(b)(6) Depositions as Judicial Admissions

It is unnecessary to clarify through the Rules of Civil Procedure when Rule 30(b)(6) testimony is treated a judicial admission, such that an organization then would be forbidden from offering evidence inconsistent with that testimony. This is best left to be decided by courts on a case-by-case basis.

Although we recognize that most courts view Rule 30(b)(6) testimony as binding only in the sense of traditional deposition testimony, a different result is appropriate in some instances. For example, in some cases, courts have rejected declarations contradicting prior Rule 30(b)(6) testimony using reasoning analogous to the "sham affidavit" rule. *See, e.g., Orthoarm, Inc. v. Forestadent USA, Inc.*, 2007 WL 4457409, at *2-3 (E.D. Mo. Dec. 14, 2007) (rejecting declaration as a "sham affidavit" at summary judgment because it "directly contradict[ed]" prior Rule 30(b)(6) deposition testimony); *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."). Attempting to create a bright line rule to apply in all situations has the potential to create confusion, and is best left to the courts to decide on a case-by-case basis. Alternatively, we suggest that because this issue concerns the interplay between Rule 30(b)(6) and certain provisions of the Federal Rules of Evidence, perhaps it would be appropriate to refer it to the Advisory Committee on Rules of Evidence for its review and analysis before proceeding further.

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

We oppose requiring and/or permitting supplementation of 30(b)(6) testimony.

As the Subcommittee points out in its Invitation for Comment, allowing 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 provide "I don't know, I will need to review our records" type of answers, thereby transforming the 30(b)(6) deposition into an unproductive, expensive, and largely empty exercise.

The entire point of a 30b6 deposition is for the noticing party to designate subject areas and the testifying party to prepare by reviewing documents and interviewing witnesses to give testimony on those topics. Permitting supplementation would encourage 30b6 designees and their lawyers to not prepare to testify.

Further, such evasions can benefit only organizational defendants, and therefore would create serious inequities without any recognizable benefit. As the Subcommittee recognizes in the Invitation for Comment, existing Rule 26(e) does not require or permit supplementation of deposition testimony. Indeed, supplementary testimony from a plaintiff that changes her prior testimony would be subject to a motion to strike and/or impeachment at trial. It is therefore difficult to understand why organizational parties would be allowed or required to freely supplement, while leaving individual plaintiffs subject to the existing, harsher rule. A corporate defendant already has the advantage of choosing the witness (or witnesses) who are most knowledgeable, so it would be doubly unfair then to allow these witnesses to decline to provide responsive, complete testimony, secure in the knowledge that inadequate or inconvenient testimony could be supplemented later. Individual deponents are not permitted to do so, and there is no principled reason to allow it in the context of 30(b)(6) depositions.

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

As with the preceding item regarding supplementation, forbidding contention questions in Rule 30(b)(6) depositions would unfairly impose a discovery restriction on individual litigants, but not organizational parties. While the Subcommittee is correct that parties have much more time to respond to contention interrogatories, corporate defendants often ask plaintiffs numerous contention questions 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, again would unfairly tilt the scales in favor of one party to the litigation, without any principled justification. Whether a Rule 30(b)(6) witness may be asked to express an opinion or contention depends on the circumstances and should not be the subject of rulemaking. *See U.S. v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996) ("Whether a Rule 30(b)(6) deposition or a Rule 33(c) contention interrogatory is more appropriate will be a case by case factual determination.") .

V. Adding a Provision for Objections to Rule 30(b)(6)

Injecting a formal objection process into Rule 30(b)(6) is problematic for a number of reasons. As we have already indicated, the 30(b)(6) deposition is often the first deposition taken in the case. Encouraging formal objections would create more motion practice at the start of the discovery process, causing long delays that will prevent any productive discovery from being conducted. Further, the additional suggestion of requiring the objecting party to specify what information they will provide despite their objection (similar to Rule 34) would do little to resolve this issue. Indeed, this would require that a party sit for multiple depositions—one on the topics they have agreed to, and a second after the court rules on an inevitable motion to compel regarding the topics to which they object. These types of inefficiencies can be avoided by leaving the rule as it stands, and allowing the organization to move for a protective order if the proposed notice truly is objectionable. There has been no showing that the few motions for protective orders that may have been filed have been incorrectly decided, and there is no reason to assume that motions for protective orders are not an adequate remedy for a truly abusive notice.

More broadly, this proposal runs contrary to the mandate of Rule 1, as well as the overall direction the Advisory Committee on Civil Rules has taken in recent years, seeking to reduce expense and to improve efficiency. If this provision were enacted, it is highly probable that a majority of noticed Rule 30(b)(6) depositions would face objection. It would increase the workload of already overburdened district court judges, clerks, and staff, and because rulings on such objections would be linked so closely to the particular circumstances of a given case, they would not provide useful guidance in other cases. This would be particularly true if the 30(b)(6) deposition at issue was the first one in the case. Neither the court, nor the litigants, would have a clear conception of how the case may develop, yet the court would be required to make substantive decisions that could be highly consequential to the proceedings.

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

In our experience, it is the current practice in most jurisdictions to allow one full-day deposition for each witness that an organization designates in response to a Rule 30(b)(6) notice. It is rare for disputes to arise in this area that cannot be worked out by counsel without court intervention. It is also significant that the party receiving the notice is in control of how many witnesses are produced. For instance, in some cases multiple witnesses are designated to cover different time periods. This is done, presumably, for the convenience of the organization. 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 that a party can spend with each Rule 30(b)(6) witness may prevent certain topics from being explored as thoroughly as needed, requiring additional fact witness depositions that could otherwise be avoided. This area is not currently a source of disputes that cannot be resolved by the parties, and a rule change would be more likely to increase unnecessary conflict.

Thank you.

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