MCDONALD TOOLE WIGGINS, P.A.
ATTORNEYS AT LAW

17-CV-FFFFF

August 1, 2017

Submitted via e-mail:

Hon. John D. Bates, Senior Judge
Chair, Advisory Committee on Civil Rules
U.S. District Court, District of Columbia
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue N.W.
Washington, D.C. 20001

Re: Comments to Advisory Subcommittee on Rule 30(b)(6)

Dear Judge Bates:

This letter is submitted on behalf of McDonald Toole Wiggins, P.A., a civil trial firm with more than 100 years of combined advocacy experience. Our firm has defended countless Rule 30(b)(6) depositions on behalf of numerous multi-national and national corporations, and we respectfully submit these comments related to a number of the proposed revisions to the rule. In short, we propose a set limitation on the number of topics and duration, which can be extended with good cause shown, consistent with Rules 30 and 33. Additionally, the scope of the 30(b)(6) deposition should be expressly limited to information that is known to the company or within its possession, custody or control. We also suggest an amendment to Rule 30(b)(6) that is instructive about maintaining the work product privilege concerning documents used to prepare a corporate designee for the deposition. Lastly, we do not believe an amendment describing what constitutes "reasonable notice" in advance of a deposition, or that mandates coordination on scheduling, is warranted because it would be superfluous of Rule 1.

Limitations on Topics and Duration

Pursuant to Rule 30(b)(6), corporate representatives are to be "adequately prepared" to testify regarding the topics of the notice. However, all too often, the notice is voluminous, vague or duplicative of prior depositions. To ensure that 30(b)(6) notices are appropriately limited in scope to conform with the proportionality requirements outlined in Rule 26(b)(1), topics should be limited to no more than eight topics. Additionally, the deposition should be limited to one day, and not to exceed seven hours. A limitation of topics and duration is consistent with Rules 30 and 33 which set out similar limiting parameters for interrogatories and depositions.

Rule 30(b)(6) depositions should not be utilized as a fishing expedition or as a tactic for gamesmanship. To that end, the topics should be consistent with the nature of discovery that has already occurred in the case and should not seek to interject new areas of inquiry that were previously not discovered through less burdensome means. The use of corporate deponents to develop new theories is outside of the proper scope and intent of Rule 30(b)(6). *Blackwell v. City & Cty. of S.F.*, No. C-07-4629 SBA (EMC), 2010 U.S. Dist. LEXIS 75453, at *6 (N.D. Cal. June 25, 2010) (denying a second 30(b)(6) deposition where the plaintiff sought to pursue a new theory); *Franklin v. Smith*, No. 15-12995, 2016 U.S. Dist. LEXIS 163029, at *3-4 (E.D. Mich. July 7, 2016) (denying defendant an additional deposition to inquire on new theories). Although understandably difficult to balance, a Rule 30(b)(6) notice should also not duplicate depositions of those with personal knowledge on the subject. Often deposition requests for corporate or organization employees with personal knowledge of the subject matter are served in conjunction with a Rule 30(b)(6) deposition request. Such a practice runs afoul with the proportionality factors expressed in the Advisory Committee Notes.

A preemptive limitation on topics and duration of a 30(b)(6) notice also avoids the pitfall of a lack of proper remedy by which to address a verbose, voluminous, or overbroad notice. The current remedies for addressing a poorly constructed notice require filing a Motion for Protective Order or Motion to Quash, neither of which are appropriate vessels to resolve such a dispute. As suggested by the Committee, the inclusion of a specific reference to Rule 30(b)(6) about the number of deposition topics at the Rule 26(f) conference would be advantageous. Should the litigants determine that more than eight topics and seven hours of testimony is necessary due to the complexity of the case, such a concern can be raised early on to put the opposing party and the Court on notice of the issue.

Additional 30(b)(6) Notices with Leave of the Court

In line with Rules 30 and 33, should a party determine the need for additional topics over and above the eight allotted, they can seek leave to add additional ones. Parties should not be foreclosed from seeking additional topics should the need arise. We believe the same "good cause" standard that is required for supplementing the number of interrogatories would be appropriate. Further, the court should have the discretion to shift costs for additional depositions or topics.

Scope of the 30(b)(6) Notice

An express limitation that the scope of the 30(b)(6) notice only relate to information that is known, or within the company's possession, custody or control should also be included. A 30(b)(6) deposition should not be used to obtain information from non-party subsidiaries, parent companies or foreign entities outside of the subpoena power of the court.

Discovery into the Preparation

Courts are split on whether documents that are used to prepare a corporate designee for the 30(b)(6) deposition are protected as work product. This inconsistency presents recurring problems for corporations with litigation pending nationwide, particularly pattern litigation. If preparation documents are not privileged in one federal district and are thus produced, it can defeat protective status in a jurisdiction that would have otherwise protected the documents. The selection and compilation of documents used to prepare a witness reflect the attorney's legal theories, strategies and analysis. The Seventh Circuit reasoned "the purpose of the work-product doctrine is to establish a zone of privacy in which lawyers can analyze and prepare their client's case free from scrutiny or interference by an adversary." *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006); In *re Yasmin & Yaz (Drospirenone) Mktg., Sales & Relevant Prods. Liab. Litig.*, 2011 U.S. Dist. LEXIS 69711, at *3-4 (S.D. Ill. June 29, 2011). Thus, the required disclosure of the specific compilation of documents selected to prepare the witness "would implicitly reveal the thought process of the attorney that selected the documents." *In re Yasmin*, 2011 U.S. Dist. LEXIS at *5; *Sporck v. Peil*, 759 F.2d 312, 318 (3d Cir. 1985). Any amendments to Rule 30(b)(6) should clarify that documents selected by counsel to prepare the corporate deponent to testify are undoubtedly protected.

Coordination of Timing and "Reasonable Notice"

One of the proposed amendments to Rule 30(b)(6) is a mandate that coordination is needed on scheduling the deposition for a time that is mutually agreeable to both parties. The scheduling of all depositions, hearings and the like are governed by Rule 1. As Justice Roberts explained in his 2015 Year-End Report on the Federal Judiciary, "[t]he underscored words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow." An additional amendment that would otherwise dictate that scheduling be coordinated, while admirable in theory, is not warranted. In that same vein, setting a timeframe of "reasonable notice" prior to a 30(b)(6) deposition was also proposed. This too should be governed by Rule 1 and left to be defined and agreed upon by the practioners contingent on the nature of the case, allegations, or the breadth of material at issue in the 30(b)(6) deposition. Providing a time limit of 30 or 45 days of advance notice will quickly become the rule, not the minimum. Oftentimes preparing a corporate designee can take several months. The parties should be left to determine the timeframe needed to prepare and schedule a deposition of a 30(b)(6) witness within the constraints of the court's scheduling order.

Conclusion

We thank the Committee in advance for the consideration of the comments submitted. Further, our firm strongly supports the efforts of the Subcommittee at examining Rule 30(b)(6) and developing potential amendments.

Very truly yours,

Scott A. Richman, Esq.

SAR/jmk