COMMENT TO THE RULE 30(b)(6) SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON CIVIL RULES REGARDING THE IMPROVEMENT OF RULE 30(b)(6)

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I respectfully submit this Comment in favor of amendments related to Rule 30(b)(6) that will improve the fairness and efficiency of this important part of the discovery process.

Over the last 24 years, I have taken and defended many 30(b)(6) depositions and believe that the failure to require early discussion of these depositions, the absence of presumptive limits on topics, and the lack of a clear procedure for resolving disputes create an unbalanced framework that unnecessarily complicates the discovery process. The fact that many 30(b)(6) depositions occur without court involvement does not mean that the rules regarding these depositions are "good enough" as the lack of clarity and guidance in the rules only favors the noticing party, which can serve a 30(b)(6) notice nearly any time before discovery closes and demand a designee regarding an unlimited number of topics, including ones that are vaguely defined, impossibly broad, or unrelated to the core issues in the case. This problem is amplified when the existing schedule does not provide sufficient time to object or discuss topics, ensure designees are prepared to discuss relevant topics, and complete the deposition. The responding organization has no clear recourse under the rules when confronted with such a notice and faces a disproportionate burden to identify and ensure the preparation of one or more designees. The rules should not foster this possibility and can be improved without reducing the usefulness of 30(b)(6) depositions.

As currently written and interpreted, Rule 30(b)(6) creates unnecessary uncertainty for all parties and undue burdens on the responding organization. In some cases, the lawyer seeking the deposition tries to avoid the problem by suggesting saving objections until the deposition or expressing an uncertainty about ever getting into a particular topic. These proposals do not adequately protect the responding organization or the designated witness and place a disproportionate burden and risk of sanction on the responding organization—without creating a corresponding benefit related to the testimony that can be obtained through a properly and reasonably focused notice. These problems can be eliminated or reduced through early discussion of 30(b)(6) depositions and changes to Rule 30 that provide a clear process to raise and resolve disputes regarding 30(b)(6) notices. These changes would be consistent with the recent reforms of other rules, and are necessary to ensure that Rule 30(b)(6) assists in the "just, speedy, and inexpensive determination of every action and proceeding."

I. Rule 16 and Rule 26 should include discussion of Rule 30(b)(6) depositions.

The early discussion of discovery is one of the best and easiest ways to avoid future disputes, particularly when the court is involved in or informed of these discussions. The 2015 and earlier amendments to the Federal Rules of Civil Procedure recognize this fact and increased, early discussion has clearly improved discovery efficiency and fairness. However, a number of

comments submitted to the Subcommittee stated that the 30(b)(6) depositions are not appropriate for discussion in Rule 16 and Rule 26(f) conferences. While it is true that a party may be reluctant to identify specific topics, agree to limitations on topics, or commit to the timing for taking a 30(b)(6) deposition, that is not always the case and there is no reason to avoid discussion regarding these subjects. In fact, the repeated comments regarding the importance of 30(b)(6) depositions reveals the absolute necessity of including this discussion in Rule 16 and Rule 26(f) conferences. Further, the parties should be required to include a statement regarding these subjects in their Rule 26(f) report.

II. Rule 30 should include a presumptive limit on topics and the length of depositions.

The absence of a presumptive limit on the number of topics that can be included in a 30(b)(6) notice creates opportunity for mischief and abuse. One of the primary causes of disputes related to 30(b)(6) depositions is the volume of topics contained in the notice—particularly when these topics are not focused on the issues in the case and create a burden on the organization that is disproportionate to the complexity of the case. Further, lengthy, multi-topic notices served late in the discovery process often seem designed to ensure the noticing party can ask anything about anything, create a undue burden on the responding organization, or encourage some action other than the eliciting relevant testimony.

Limitations on the number of topics will facilitate more careful consideration of the areas to be covered and help to ensure the responding party knows and understands those topics. As with any discovery limit, the noticing party can seek the agreement of the other side or leave of court if additional topics are necessary in a particular case.

Rule 30 should also include a limitation regarding the length of a 30(b)(6) deposition. While a noticing party may need additional time to understand the background of each designee produced in response to a 30(b)(6) notice, the scope of this inquiry does not require that the deposition of each designee should be treated as a separate deposition that is subject to its own 7-hour time limit under Rule 30(d). A reasonable compromise would be to allow an additional hour for each individual produced—*i.e.*, if an organization produces two individuals in response to a 30(b)(6) notice, the noticing party has 8 hours in which to take the depositions of these individuals.

III. Rule 30(b)(6) should include clear procedures for resolving disputes.

Uncertainty regarding the procedure to raise objections is not helpful to the party seeking or responding to a notice served under Rule 30(b)(6).

Identifying and preparing a designee, or multiple designees, to testify in response to a 30(b)(6) notice can impose an enormous burden on the organization. However, the requirement under Rule 30(b)(6) to describe subject matters with "reasonable particularity" frequently gets lost in topics that are far-ranging in time and scope and impose a disproportionate burden on the responding organization. Poorly-defined topics do not provide an identifiable benefit regarding the scope of testimony sought or obtained, but they create significant burdens and unfair risks of sanction for the responding organization.

Unfortunately, there is no clear procedure for handling disputes regarding 30(b)(6) notices, including when and how the court should be involved in this process. In some courts, a responding organization must file a motion for protective order under Rule 26(c) before the deposition occurs or risk sanction—even if it has submitted written objections and engaged in discussions regarding the scope of the notice. Other courts take the opposite view, finding that motions for protective order are not a proper mechanism for resolving disputes. Neither option is entirely satisfying, and all parties would be better served by amendments to Rule 30(b)(6) that include the timing for service of a 30(b)(6) notice, a deadline for serving objections, and a process for resolving disputes. This process should allow the responding organization to clarify the scope of a topic through a written objection and identification of the subjects on which the organization will produce a witness. Formalization of this process—which already happens in many cases—would provide useful certainty and balance in the process for taking 30(b)(6) depositions.

IV. Conclusion

A 30(b)(6) deposition is an important and useful tool for obtaining information from an organization, but the discovery rules related to these depositions can and should be improved in ways that will improve the efficiency in which these depositions occur and ensure an adequate balance between the interests of the noticing party in obtaining information and the burden on the responding organization to provide that information.

Thank you for consideration of this Comment and your efforts to improve Rule 30(b)(6).