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COMMENT to the ADVISORY COMMITTEE ON CIVIL RULES
On Possible Issues Regarding Rule 30(b)(6)

To the Committee:

In response to the Rule 30(b)(6) Subcommittee's invitation for comments, the attorneys of Turner, Reid, Duncan, Loomer & Patton, P.C. submit the following remarks in favor of a serious examination and reconsideration of this important Rule.

Rule 30(b)(6) governs in a wide variety of circumstances, including in litigation involving small, locally-owned businesses to multinational corporations employing thousands of people. Obstacles arising from the Rule in the context of the former are vastly different than those arising in litigation involving the latter. However, there are several key amendments that could be made to the current Rule that would help to create a smoother and more collaborative experience for all litigants, counsel, and the Court.

First, to further the goals of recently amended Rules 1 and 26 regarding cooperation and discovery, Rules 16 and 26(f) should be amended to encompass Rule 30(b)(6) depositions in pretrial conferences and scheduling orders. This is especially critical in complex cases involving large corporations, as it can be difficult, if not impossible, to identify the persons and documents necessary for compliance with the now commonplace notices containing copious and in-depth topics and document demands served at or near the end of the discovery period. By outlining the parameters at the outset, the parties can conduct discovery with an eye toward potential 30(b)(6) issues that may be resolved in a way that benefits all parties before resorting to motion practice that forces the parties and the Court to unnecessarily expend valuable time and resources. Accordingly, the Rules governing the parties' discovery plans and the Court's scheduling orders should be amended to require that the parties to set forth the timing, scope, and limitations for

Rule 30(b)(6) depositions at the beginning of the litigation, when meaningful collaboration can provide the most benefit.

Second, Rule 30(b)(6) should be amended to provide a set time for service of the notice prior to the taking of the deposition. This will eliminate uncertainty as to the meaning of the term "reasonable" as it relates to the timing of service, and will aid the parties in identifying and properly preparing witnesses and locating any documents to be produced pursuant to attendant requests. Setting a clear deadline that the notice must be served at least 30 days prior to the deposition will further these goals and possibly jettison an entire category of motion practice.

Third, an amendment that requires the parties to schedule Rule 30(b)(6) depositions at a mutually agreeable time and date would eliminate the potential gamesmanship that can result from the unilateral scheduling of such depositions. It would also boost cooperation while simultaneously reducing the number of motions that must be dealt with by the parties and the Court.

Fourth, to ensure compliance with Rule 30(b)(6)'s requirement that the witness be "adequately prepared," the Rule should be amended to define a specific number of sufficiently detailed topics that may be included in the notice. In our own practice, we are routinely presented with notices that contain 20 to 30 far-reaching topics about all aspects of the case, with just as many, if not more, document requests, several of which seek materials more properly sought through written discovery. The result is often protracted disagreements that almost invariably end up in front of the Court. By placing a limit of 10 deposition topics (although no more than five topics is reasonable for most cases), many of these problems could be avoided. Of course, the option of altering the permissible number for good cause or by agreement of the parties should be present. Such an approach would also be consistent with other Rules that impose limitations, and would force the parties to focus on the central claims and defenses in the case. Further, it would promote proportionality and efficiency, two of the primary aims of other recent Federal Rule of Civil Procedure amendments. Finally, there should be a requirement that the topics be set forth not only with "reasonable particularity" but also with "detailed specificity." Too often a responding party is presented with topics that request a witness on such generalized issues that it is nearly impossible to comply with the Rule's preparedness requirement, putting a party at risk for motion practice regarding alleged lack of preparedness, including a request for sanctions.

Fifth, when discovery of the relevant information has already occurred or can be accomplished through other, more efficient means, such as written discovery, Rule 30(b)(6) should be limited so as to avoid duplicative discovery. This proposal would align with the proportionality and efficiency concerns highlighted in Chief Justice Roberts' 2015 Year-End Report regarding the 2015 amendments to the Federal Rules.

Sixth, Rule 30(b)(6) should be amended to provide a means for objecting to testimony topics and document requests contained in notices. Standardizing the practice would promote consistency within the Rules, and provide the parties with a procedure for raising objections, receiving rulings when necessary, and permit the parties to proceed with the agreeable portions of the

notice. Rule 30(b)(6) could easily be amended to mirror the procedure set forth in Rule 45 in this regard.

Seventh, amendments to Rule 30(b)(6) should be made so as to expressly exclude questioning concerning materials reviewed in preparation for the deposition and about the party's legal contentions, as these are not proper matters for inquiry in the 30(b)(6) context. Materials selected and compiled by counsel in preparation for a 30(b)(6) deposition should be considered opinion work product, as the assembling of documents for review by the deponent often reveals counsel's strategies and theories of the case. Therefore, Rule 30(b)(6) should be amended to provide that such materials are protected from disclosure by the attorney-client privilege and work product doctrine. Amending the Rule in this way would not prevent the discovery of discoverable information; rather, it would preserve the integrity of the litigation process. The Rule should also be amended to prohibit questioning that requires the deponent to express opinions or contentions that relate to legal issues, such as the organization's beliefs or positions as to the contentions in the lawsuit. Applying law to the facts in this way often forces the deponent, generally a non-lawyer, to analyze complex legal and factual positions and commit the organization to a legal position in the case—something that the deponent likely is not trained to do. Questioning regarding a party's theories in the case is better left, if appropriate, to contention interrogatories, which can be answered by those with the necessary skills and information to accurately disclose the party's contentions. This is particularly the case given that testimony in a Rule 30(b)(6) may be considered binding on the organization.

In sum, the attorneys of Turner, Reid, Duncan, Loomer & Patton P.C. endorse the Subcommittee's examination of Rule 30(b)(6), and encourage the Subcommittee to implement amendments to the Rule which further the goals of Amended Rule 1, a few examples of which are outlined above.

Very truly yours,

TURNER, REID, DUNCAN, LOOMER
& PATTON, P.C.

/s/ Sherry A. Rozell

By_____
Sherry A. Rozell