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August 15, 2017

Honorable John D. Bates
Senior United States District Judge
Chair, Advisory Committee on Civil Rules
United States District Court for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Avenue N.W.
Washington, DC 20001

Honorable Joan N. Ericksen
United States District Judge
Chair, Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
12W U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

RE: Comment on proposed changes to Federal Rule of Civil Procedure 30 (b)(6); Rule 30 (b)(6) Subcommittee; Advisory Committee on Civil Rules

Dear Judge Bates and Judge Ericksen:

This letter contains comments to the proposed changes to Federal Rule of Civil Procedure 30(b)(6). These comments will address each of the proposed changes or concerns expressed by the Subcommittee as expressed in its invitation for comment dated May 1, 2017.

My background is that I am a maritime and personal injury lawyer in Miami, Florida. For the first 17 years of my career, I represented large corporations in both commercial litigation and in personal injury suits. These corporations included banks, railroads, and cruise lines. Many of these cases were in Federal Court. For the last 18 years, I have represented only injured people in personal injury cases against corporations including cruise lines. The latter cases are governed by maritime law. All passenger cases against cruise lines are in Federal Court by virtue of the terms in the passenger ticket contract. In all such cases, we take corporate representative depositions under Rule 30(b)(6). Also, I have written articles for lawyers and have lectured on Rule 30 (b)(6) issues.

I am Board Certified by The Florida Bar in both Admiralty and Maritime Law and as a Civil Trial Lawyer. Also, I am a past Chair of the Admiralty Law Committee of The Florida Bar and a past Chair of the Admiralty Section of the American Association for Justice.

Judicial Admissions. According to the comments to Rule 30(b)(6), one of the key purposes of the Rule is to prevent "bandying". That is the practice where a party takes the deposition of one employee of a corporation and that employee testifies that he or she does not know the answers to key questions. Then other depositions of employees are taken and the same issues of ignorance arise. Therefore, Rule 30(b)(6) is a rule of both judicial (litigation) economy and of fairness. Without the rule, a corporate party could "bandy" and drive up the costs of litigation immeasurably. And if the litigation involves an individual party and the other a corporate party, there will be an asymmetrical advantage to the corporate party.

If the corporate representatives are allowed to appear and not provide binding testimony or are allowed to supplement their testimony, the contentions and the facts will always be a moving target.

But the individual party can be deposed and will provide what he or she knows and will provide their contentions. The testimony of an individual is of course binding or at least in the eyes of the fact finder will be binding as a practical matter. The same should be expected of the corporate party.

Courts have taken different positions on whether an admission in a corporate representative deposition is "binding" on the corporate party. Some Courts, including the Southern District of Florida, follow a "hybrid" approach.[1] These cases state that when the corporate representative legitimately lacks the ability (because of lack of knowledge or failing memory) to answer relevant questions and the corporation fails to provide an adequate substitute the corporation will then be bound by the corporate representative's "I don't know" or "we don't know" response.[2] This precludes the corporation from offering

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[1] *Wilson v. Lakner*, 228 F.R.D. 524, 530 (D. Md. 2005); *QBE Ins. Corp. v. Jorda Enterprises*, Inc., 277 F.R.D. 676, 690 (S.D. Fla. 2012); *Ierardi v. Lorillard*, Inc., CIV. A. 90-7049, 1991 WL 66799 at *2,3 (E.D. Pa. Apr. 15, 1991).

[2] *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 690 (S.D. Fla. 2012)

evidence at trial on these points.[3] The practical purpose behind the hybrid theory is that it prevents trial by ambush.[4]

The more difficult issue is where the corporation makes a definitive statement within deposition and then seeks to retract or change it. The problem is that any change in the testimony or the stance of the corporate party in turn can change the discovery required by the other parties. What was once thought to be established in the litigation has now been made an issue. The facts then become a moving target. And the somewhat limited and sometimes abbreviated discovery schedules in federal court do not allow for any significant shifting of positions or of facts admitted or established by any party.

The District of Columbia in *Rainey v. American Forest & Paper Ass'n*, prevented the defendant corporation from presenting evidence which conflicted with the corporation's corporate representative's deposition testimony.[5] The court in *Rainey*, stated Rule 30(b)(6) obligates a corporate party to prepare its representative to be able to give binding answers on its behalf; unless it can be proven that the information was not known or was inaccessible.[6] A corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition.[7]

Requiring and permitting supplementation of Rule 30(b)(6) testimony. The only case law applicable to this idea of supplementation is the law on errata sheets following depositions. These sheets are meant only to correct a scrivener's error in the record. If they add or significantly change testimony, the deposing party can with leave of court retake the deposition on that point or those points.

This rule on errata sheets should suffice. Any additional provision would unnecessarily and unfairly expand the ability of the corporate party to avoid committing to a position. This would only serve to increase the time and costs of litigation.

Forbidding contention questions in Rule 30(b)(6) depositions. This proposal would limit the ability of parties to get to the real contested issues in the case. This in turn would increase the time and costs of litigation exponentially.

The apex doctrine provides that a party in litigation should not be allowed to take the deposition of the apex of a major corporation, that is, the top officers, unless exceptional circumstances exist. There is good reason for this rule. Yet, if a corporation is allowed to provide a representative in a Rule 30 b 6 deposition who is not required to make clear the contentions of the corporation and if under the apex doctrine the corporation is not required to produce their top officers, the party opposing a corporation will never be able to determine the contentions of the corporation.

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[3] *Id.*
[4] *Id.*
[5] *Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998).
[6] *Id.*
[7] *Id.*

The issue is also one of unfairness and asymmetry. A party opposing a corporation under any proposal to prevent contention questions would not be able in most situations to clearly and easily establish the position on an issue of a corporation.

But the individual party always can be asked what his or her contention in the action is. That is to be expected and it would be unnatural if it were any other way. But that would result in an asymmetrical distribution not only of information but also of clarity of position.

The end result would be an increase in litigation, in time, and in costs and this asymmetry would be inherently unfair to the party opposing a corporation.

Adding a provision for pre-deposition objections to Rule 30(b)(6). This proposal is not necessary and would only serve to engender more motion practice and delay. As it stands now, the noticed party reviews the designations on the notice and educates the representative as to those areas. If the party truly is unable to educate any witness on an issue, the representative or counsel can say so on the record at the deposition. There of course can be issues regarding whether the corporate party has fulfilled its obligations under Rule 30 (b) (6). There is a well-developed body of case law and there are several law review and other articles written about these obligations. This proposal is a remedy in search of a problem. It is not necessary at this time.

Applying limits on the time and number of depositions to corporate representative depositions. The limits to the time and to the number of depositions now is unworkable in many cases. The corporation may have to provide several deponents in order to provide witnesses who are properly educated on the issues in the designations. A corporate party could engage in gamesmanship where it provides several witnesses in response to a Rule 30(b)(6) notice. The several witnesses would eat away at the total number of depositions allowed in the case. Gamesmanship almost always engenders more motions, delay, and costs. For these reasons, the rule should be clarified that the corporate party may have to produce more than one witness and that the limitation on the number of depositions in a matter will not apply to Rule 30 (b)(6) witnesses.

Finally, the time limitation should not apply to Rule 30(b)(6) deponents. These are depositions of a party. One of the purposes of such depositions is to eliminate issues. These depositions therefore can be crucial to a case and to efficiency in the administration of justice, that is, for the court as well as for the parties. There should be no time limit on that.

Conclusion. Thank you for allowing me and others to comment on these proposals and issues. Rule 30 (b)(6) is a necessary rule and can allow the parties to hone in on what really is at issue in the case. I have discussed some proposed changes which were not discussed in the invitation of the Committee. My comments here are based on practical knowledge and a knowledge of the law in this area. If you have any questions, please let me know.

Very Truly Yours,

John H. Hickey