January 17, 2018

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: Rule 30(b)(6), A Response to Lawyers for Civil Justice Comment 17-CV-HHHHHH

Dear Judge Bates and Judge Ericksen:

The American Association for Justice ("AAJ"), formerly known as the Association of Trial Lawyers of America ("ATLA"), submits these comments in response to a comment submitted by Lawyers for Civil Justice ("LCJ") on December 15, 2017, on Rule 30(b)(6) and catalogued as 17-CV-HHHHHH. AAJ, with members in the United States, Canada, and abroad, exists to preserve the constitutional right to trial by jury and access to justice when people are injured by the negligence or misconduct of others. AAJ advocates to ensure that all plaintiffs, including those litigating against corporate defendants, receive their constitutional right to their day in court under fair, just, and reasonable rules of procedure and evidence.

I. Seek A Fair, Balanced Approach

AAJ was cautiously optimistic about the proposed amendments and discussion regarding Rule 30(b)(6) by the Advisory Committee at its November 2017 meeting. In suggesting the rule change to create a 30(b)(6) deposition conference, it seems clear that the Advisory Committee carefully weighed the competing interests of plaintiffs and corporate defendants and sought a middle ground—one in which parties disclose basic information about the goals of the deposition and topics to be covered so that a party deponent can properly provide and prepare for a 30(b)(6)

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deposition. Likewise, the notice would also serve to avoid a common problem encountered by AAJ members—an unprepared deponent who knows nothing and can provide no answers.[1]

The suggestions provided by LCJ would take this reasonable, balanced approach by the Advisory Committee and tilt it in favor of corporate deponents. Individual plaintiff litigants already face major hurdles in accessing the information and data held by corporations in many types of litigation, including employment discrimination, civil rights litigation, nursing home negligence, products liability, aviation, railroad, and other transportation crashes as well as many other areas.[2] LCJ's proposal would reinforce the hurdles plaintiffs face with an asymmetrical information imbalance. For instance, plaintiffs are seeking the information because the defendant controls the employment records, the corporate structure and ownership of a nursing home, information about the composition and manufacturing processes of its product, and the vehicle involved at a crash site.[3]

II. Presumptive Limits Create New Problems and Inefficiencies

LCJ proposes a ten-topic presumptive limit for a 30(b)(6) deposition. AAJ asks the Committee to reject this proposition outright. If a presumptive limit were adopted, it would have several negative consequences. First and most obvious, deponents would not be better prepared for

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[1] *See Pioneer Drive, LLC v. Nissan Diesel America, Inc.*, 262 F.R.D. 552, 559-61 (D. Mont. 2009) (noting that a corporate deponent was unprepared for their deposition, which warranted sanctions where corporate defendant knew that deposition was going to involve questions about particular subject areas); *Harris v. New Jersey*, 259 F.R.D. 89, 93 (D.N.J. 2007) (finding that Rule 30(b)(6) deponent was unprepared and unresponsive); *Federal Deposit Ins. Corp. v. Butcher*, 116 F.R.D. 196, 201-02 (E.D. Tenn. 1986) (finding that corporate deponents were unprepared and ordering corporation to redesignate witnesses).

[2] *See Lyoch v. Anheuser-Busch Companies, Inc.*, 164 F.R.D. 62, 64 (E.D. Mo. 1995) (granting plaintiff's motion to compel discovery in employment discrimination case); *In re Estrada*, 143 P.3d 731, 735 (N.M. 2006) (finding that attorney representing pharmacy misled the court by falsely denying plaintiff's request for admission of fact); *Bollard v. Volkswagen of America, Inc.*, 56 F.R.D. 569, 583 (W.D. Mo. 1971) ("Experience has shown that, for some reason, possibly to avoid class actions, defendants in motor vehicle products liability cases…have been unusually evasive and loath to make discovery."); *Cason-Merenda v. Detroit Med. Ctr.*, 2008 WL 4901095, at *4-5 (E.D. Mich. 2008) (overruling defendant's discovery objections and ordering production of requested documents where defendants made general objections to plaintiff's specific document requests). *See also* David Halperin, *Discovery Abuse: How Defendants in Products Liability Lawsuits Hide and Destroy Evidence*, Public Citizen Congress Watch (July 1997), available at https://www.citizen.org/article/discovery-abuse-how-defendants-products-liability-lawsuits-hide-and-destroy-evidence ("Product liability defendants often respond incompletely or not at all to plaintiffs' discovery requests. They will wait until plaintiffs go to court asking the presiding judge to order the disclosure or to impose sanctions. Or a corporate defendant will refuse to hand over documents until the court actually rules on the plaintiff's motion and orders the defendant to do so. Sometimes defendants will release some of the requested documents to create the appearance of cooperation. Sometimes they will bury relevant documents within huge stacks of irrelevant documents the plaintiff never requested.").

[3] Defendants' control of this information creates additional hurdles for plaintiffs. *See* J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012), available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2889&context=facpub ("Defendants can exploit the broad relevance standard under Federal Rule of Civil Procedure 26(b) by inundating plaintiffs with information. This exploitation is particularly likely to be acute in situations in which plaintiffs need discovery the most because they do not know enough about the defendant's internal workings or documents to draft narrower requests. Many plaintiffs may simply buckle under the sheer volume of information and the costs of sifting through it.").

depositions.[4] If topics were to be limited, plaintiffs would be forced to list the topics very broadly. Not only would this defeat the purpose of a meaningful consultation,[5] it would drag out a relatively short consultation into a potentially lengthy delay.[6] Second, the broad topics can lead to gamesmanship, with deponents objecting that the presumptive limit is not being followed, and ultimately require judicial intervention.[7] The proposed amendment should be designed to make litigation more efficient,[8] not to take up more judicial resources. Finally, delay and gamesmanship also lead to increased litigation costs.[9] Since many plaintiff attorneys work under a contingency fee, they have a built-in incentive to reduce litigation costs, as do many companies looking at their bottom line.

AAJ also believes that presumptive limits would hinder the purpose of the Committee's proposed 30(b)(6) conference requirement. LCJ suggests that having too many topics is a problem for corporate deponents, yet the thorough topic outline provided for in the Committee's proposed 30(b)(6) conference amendment provides a road map for discussion and helps remove items from the deposition that can be addressed in another format. Not only would broad topic categories – a near-certain outcome created by presumptive limits – make it more difficult for parties to figure out how to select and prepare a designee deponent, but it would also defeat the purpose of a meaningful consultation.[10]

III. The Consultation Should Not Be Longer or More Involved than the Deposition

LCJ has also recommended that certain subject-matter issues must be addressed during the Committee's proposed consultation amendment, and lists nine different issues that "should" be addressed. This proposal is unnecessary, would prolong pre-trial discovery, and would create more motions practice between the parties. The list of nine topics LCJ proposes to confer about would result in widespread inefficiency because it would make the confer period much longer

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[4] For example, defendants have argued that they cannot prepare witnesses for depositions when deposition topics are broad. *See, e.g., Edelen v. Campbell Soup Co.*, 265 F.R.D. 676, 700 (N.D. Ga. 2010) ("Defendants argue that the vague, broad nature of the…topics make it impossible to designate and prepare witnesses to testify. The Court agrees, and Defendants' objections are sustained.").

[5] Regarding meet and confer requirements, courts have explained that "The purpose of the conference requirement is to promote a frank exchange between counsel to resolve issues by agreement *or at least narrow and focus the matters in controversy* before judicial resolution is sought." *F.D.I.C. v. 26 Flamingo, LLC*, 2013 WL 2558219, at *1 (D. Nev. 2013) (emphasis original) (citing *Nevada Power Co. v. Monsanto Co.*, 151 F.R.D. 118, 120 (D. Nev. 1993). *See also Dienstag v. Bronsen*, 49 F.R.D. 327, 328-29 (S.D.N.Y. 1970) (stating that the purpose of civil discovery rules such as Rule 30 "is to make possible fair and expeditious preparation of cases, minimizing to extent possible trial time spent in wasteful sparring unrelated to merits of case.").

[6] Plaintiffs who issue overbroad deposition notices have been required to spend time narrowing their inquiries. *See, e.g., Murphy v. Kmart Corp.*, 255 F.R.D. 497, 505-06 (D.S.D. 2009).

[7] This scenario should not be promoted as "[t]he rules of discovery were not designed to encourage procedural gamesmanship, with lawyers seizing upon mistakes made by their counterparts in order to gain some advantage." *Outley v. City of New York*, 837 F.2d 587, 590 (2d Cir. 1988).

[8] This result is the antithesis of the purpose of these rules. "The purpose of [rules 30 and 26] is to liberalize greatly the scope of permissible examination by depositions for purpose of effecting just, speedy, and inexpensive termination of every action." *State of Maryland, for Use of Montvila v. Pan-American Bus Lines*, 1 F.R.D. 213, 214 (D.Md. 1940).

[9] *See Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1542 (11th Cir. 1993) (noting that defendants' bad faith discovery practices unnecessarily delayed litigation and increased the costs of litigation for the parties).

[10] *See* cases cited *supra* notes 5 and 6.

and more contentious than need be. Indeed, a rule that creates the potential for a longer "confer" period than an actual deposition is not aligned with the goals of Rule 1 to create the "just, speedy, and inexpensive determination of every action and proceeding."[11]

Furthermore, the determination of what exact issues should be addressed during the consultation are better left to the discretion of the trial judge whom, being more familiar with the case, can more appropriately decide whether certain issues are relevant to the case at hand and the requested 30(b)(6) deposition.[12] Mandating that nine total subject-matter issues be addressed may very well contradict the better judgment of the trial judge.

IV. One Rule Change is Sufficient

Lastly, LCJ has proposed that the Committee add references to the suggested Rule 30(b)(6)'s conference to both Rules 16 and 26. This suggestion is unnecessarily redundant, and AAJ believes that the best place for an amendment on a 30(b)(6) consultation is in the rule itself. Saying the same thing multiple times does not make it more of a rule than just saying it once. If anything, it makes it seem to implicate that a relatively modest rule change is of greater importance than a rule change that is made only once.

Further, it is hard to imagine what interest of justice these additional references would serve. Additional references would certainly not promote rule compliance more than the rule change itself. LCJ suggests that these other references would "spark early judicial oversight." However, in some cases, the need for a 30(b)(6) deposition may not be apparent until the end of the discovery period, after other methods of discovery failed to produce important information or possibly raise additional unforeseen relevant information.[13] Inducing an "early spark" seems ill-fit to such cases. Perhaps the intention of additional reference in Rules 16 and 26 may be to create some improper procedural gamesmanship, such as to preclude 30(b)(6) depositions that are not apparent at the start of discovery.

AAJ appreciates the opportunity to submit this additional comment on Rule 30(b)(6). If you have any questions or comments, please contact Sue Steinman, Senior Director of Policy and Senior Counsel, American Association for Justice, at susan.steinman@justice.org.

Sincerely,

Kathleen L. Nastri
President
American Association for Justice

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[11] Fed. R. Civ. P. 1.

[12] American Association for Justice, Archived Rule Suggestion 17-CV-SSSSS, Aug. 10, 2017.

[13] *See Scott Hutchinson Enterprises, Inc. v. Cranberry Pipeline Corp.*, 318 F.R.D. 44, 56 (S.D.W.Va. 2016) ("In regard to the Rule 30(b)(6) deposition, if Defendants had properly responded to the interrogatory requests, Plaintiff may not have required a Rule 30(b)(6) deposition to explain the relevance of the documents. The manner in which Defendants supplied the pipeline file created confusion, and that confusion resulted in the Rule 30(b)(6) deposition.").