19-CV-G

COMMENT
to the

ADVISORY COMMITTEE ON CIVIL RULES

THE RULE 30(b)(6) SUBCOMMITEE'S ALTERNATIVE 1 —WITH THE ADDITION OF A 30-DAY NOTICE PROVISION— WOULD HELP LAWYERS ACHIEVE PRODUCTIVE RULE 30(b)(6) DEPOSITIONS

March 25, 2019

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Civil Rules Advisory Committee ("Committee") concerning the Rule 30(b)(6) Subcommittee's ("Subcommittee") proposed alternatives for an amendment to Federal Rule of Civil Procedure 30(b)(6).

INTRODUCTION

The Subcommittee has made considerable improvements to its Proposed Amendment in light of extensive public comment—in particular, omitting the highly problematic language mandating conferral over witness identity.[2] It now presents the Committee two alternatives: (1) approving a simple meet-and-confer amendment; or (2) publishing for public comment a new proposal that would require organizations to disclose the identity of witnesses (Alternative 2) or the number of witnesses (Alternative 2A) within a not-yet-determined timeframe.[3] Because the Subcommittee has rejected the idea of going "back to the drawing board" to consider more meaningful

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. Although LCJ's corporate members are often defendants, they are plaintiffs as well. They not only respond to many discovery requests, they also seek discovery. They receive many 30(b)(6) notices but also, on occasion, serve them and expect meaningful compliance. LCJ wants Rule 30(b)(6), like the rest of the FRCP, to be fair and efficient for everyone, regardless of their position in any particular lawsuit.

[2] Advisory Committee on Rules of Civil Procedure, *Agenda Materials, San Antonio, TX, April 2-3, 2019* (hereinafter "Agenda Book"), pp. 101-06, *available at* https://www.uscourts.gov/sites/default/files/2019-04_civil_rules_agenda_book.pdf.

[3] *Id*. at 107.

reforms,[4] and has concluded that "there is not a Subcommittee consensus in favor of adding a witness-identification requirement to the rule,"[5] there is no point to prolonging this process for another year. The Committee should proceed with Alternative 1—but should add the 30-day notice provision before approving it for consideration by the Standing Committee.

I. A 30-DAY NOTICE PROVISION WOULD ENHANCE ALTERNATIVE 1 AND SHOULD NOT REQUIRE REPUBLICATION.

A 30-day notice provision would enhance Alternative 1 by providing a clear and sensible timeframe for conferral about the matters for examination and preparation for productive depositions. The potentially positive effects of a new meet-and-confer requirement in Rule 30(b)(6) are more likely to result if there is certainty about timing. Indeed, some of the current problems with practice under the rule stem from the absence of such structure because responding to a notice can be a scramble when the time is insufficient or unknowable. Under the current rule, the time provided by notices is exceedingly short in many cases,[6] and sometimes completely inadequate.[7] A productive Rule 30(b)(6) deposition requires the receiving party to complete a substantial amount of work between the notice and the deposition, including: confer with the noticing party (to be required by the proposed amendment); assess the notice; ensure that the responsive information available to the organization has been fully gathered;[8] identify witness candidates and determine their availability to testify on the dates indicated;[9] and confirm that the selected deponents can spend sufficient time to assimilate the organization's responsive information and otherwise prepare to address the topics set forth in the notice.[10] Sufficient time

[4] Agenda Book at 102.
[5] *Id*. at 108.
[6] Courts have allowed parties to proceed with Rule 30(b)(6) depositions covering multiple topics after providing notice of just five days. *See, e.g., P.S. v. Farm, Inc*., Civil Action No. 07-CV-2210-JWL, 2009 WL 483236, at *4 (D.Kan. Feb, 24, 2009) ("Defendant was still given five days' notice (November 21, 24, 25, 26, and 28, 2008), which is considered reasonable notice under D. Kan. Rule 30.1. The Court therefore concludes that Defendant was provided reasonable notice of the Rule 30(b)(6) deposition as required under Fed.R.Civ.P. 30(b)(1)."); *Alkayali v. Geni, Inc*., Case No. SACV 06-1002 DOC, 2008 WL 11342554, at *4 (Jan. 25, 2008)("Plaintiff may depose Soft Gel by serving a Rule 30(b)(6) deposition notice that gives all parties at least five court days written notice of the date, time, place, and matters for examination. Soft Gel must produce a designee who is prepared to testify on its behalf regarding the designated matters for examination.").
[7] *See, e.g., Bernardi Ortiz v. Cybex Int'l, Inc*., Civil No. 15-2989 (PAD), 2018 WL 2448130, at *8 (D.P.R. May 30, 2018) ("the court accepts Cybex's representation that service of the Rule 30(b)(6) notice [six days prior to the deposition] was not sufficient to provide it with a reasonable amount of time to prepare a knowledgeable representative on the topics"); *Tyler v. City of San Diego*, No. 14-CV-01179-GPC-JLB, 2015 WL 1953464, at *2 (S.D. Cal. Apr. 29, 2015) ("Seven days is insufficient notice for the City to be able to adequately prepare for its Fed.R.Civ.P. 30(b)(6) deposition.").
[8] *See, e.g., Georgia-Pacific Consumer Products, LP v. NCR Corp*., Case No. 1:11-CV-483, 2015 WL 11236844, at *2 (W.D. Mich. Feb. 23, 2015)("Preparing a 30(b)(6) witness is not a casual exercise where a witness simply has to testify as to his own personal knowledge. A 30(b)(6) witness is testifying as to the collective knowledge and information known or reasonably available to the corporation, and in preparation may be required to gather documents, interview witnesses and become familiar with each topic to which he will be called upon to testify.").
[9] *See, e.g., DWFII Corp. v. State Farm Mut. Auto. Ins. Co*., Case No. 10-20116-CIV-UNGARO/SIMONTON, 2010 WL 11553415, at *2 (S.D.Fla. Nov. 1, 2010) ("It is also reasonable that the individual whom Defendants wished to designate for any such 30(b)(6) deposition was unavailable on nine days notice.")
[10] *See Consol. Rail Corp. v. Grand Trunk W. R.R. Co.*, 853 F. Supp. 2d 666, 670 (E.D. Mich. 2012) ("It is well-established that an organization served with a Rule 30(b)(6) deposition notice is obligated to produce a witness

is required, and knowing the timeframe is often more than a convenience—it can be critical to executing the work in a timely fashion.

Adding 30-day notice to Alternative 1 should not require republication of the proposal. It is not a "substantial change" as contemplated by the Judicial Conference procedures because it would not change the mechanism of the rule or inject a novel or untested procedure. On the contrary, 30-day notice is a well-known and widely accepted feature of other FRCP discovery rules,[11] and the possibility of adding a 30-day notice provision to Rule 30(b)(6) was discussed in both written comments and live testimony[12] during the public comment period.

II. MORE PUBLIC COMMENT ABOUT RULE 30(b)(6), PARTICULARLY ABOUT INJECTING A MANDATE TO DISCLOSE WITNESS IDENTITY AT A FIXED (BUT AS YET UNKNOWN) TIME, IS HIGHLY UNLIKELY TO RESULT IN A NEW PROPOSAL DIFFERENT FROM ALTERNATIVE 1.

The Committee heard extensive testimony and received thorough written comments about possible ways to improve Rule 30(b)(6). The Subcommittee rejected the idea of going "back to the drawing board" to consider developing a different proposal.[13] After considering a great many comments about conferral over witness identity, the Subcommittee has understandably reported that "there is not a Subcommittee consensus in favor of adding a witness-identification requirement to the rule."[14] Public comment about Alternative 2 and Alternative 2A, therefore, is highly unlikely to provide the Committee with new information or points of view that lead to a eureka moment.

Public comment about Alternative 2 and 2A would inherently include discussion of many of the same troublesome issues that were raised by the previous proposal to require conferral over witness identity. By introducing new witness disclosure requirements and an inherently problematic timing issue, those alternatives would lead to collateral litigation, distraction, witness harassment and would likely convert some Rule 30(b)(6) proceedings into improper *de facto* Rule 30(b)(1) depositions. The idea of requiring organizations to "identify the person or persons it has designated by name" [15] would impose a new discovery obligation that is inconsistent with courts' current interpretation of Rule 30(b)(6) as not requiring disclosure of witness names in advance of the deposition.[16] Information about the witness is irrelevant

knowledgeable about the subjects in the notice and to prepare that witness to testify not just to his own knowledge, but the corporation's knowledge.").

[11] *See* Fed. R. Civ. P. 33, 34, and 36.

[12] Transcript of Proceedings, Public Hearing on Proposed Amendments to Federal Rule of Civil Procedure 30(b)(6) (Phoenix, AZ, Jan. 4, 2019) at pp. 108, 136, 148; Transcript of Proceedings, Second Public Hearing on Proposed Amendments to Federal Rule of Civil Procedure 30(b)(6) (Washington, DC, Feb. 8, 2019) at pp. 31, 89, 177, 281, 314, and 332.

[13] Agenda Book at 102.

[14] *Id*. at 108.

[15] *Id*. at 110.

[16] *See, e.g., Roca Labs, Inc. v. Consumer Opinion Corp.*, No. 8:14-CV-2096-T-33EAJ, 2015 WL 12844307, at *2 (M.D.Fla. May 29, 2015)(denying motion to compel identity of witnesses and stating "the identity of Defendants' corporate representatives is not relevant and Defendants are not required to identify their Rule 30(b)(6) witnesses prior to deposition."); *Klorczyk v. Sears, Roebuck & Co*., Civ. No. 3:13CV257 (JAM), 2015 WL 1600299, at *5 (D.Conn. Apr. 9, 2015)("the Court will not require Sears to disclose the name(s) or resume(s) of its 30(b)(6) witness."); *Cruz v.*

because the deponent is the responding organization, not the individual.[17] Moreover, as the Subcommittee heard repeatedly during the public hearings, disclosure of witness identity virtually ensures that the deposition will include personal questions, often involving an investigation into the private life of the individual deponent through social media or other searches and demands for the CV of the witness. [18] Such "background checks" are irrelevant to the organization's knowledge of the specified topics and irresistible invitations to harass witnesses on such personal topics as the individual's work history, financial choices and even information related to divorce proceedings. Of course, public comment would also reveal that inappropriate lines of questioning are not universal. Some lawyers have better discretion than others when presented with the temptation of such information. This is why the question of whether to reveal information about witnesses is appropriately left to the lawyers who know the facts and personalities in their case—and so it would remain under Alternative 1.

In addition, the not-yet-specified disclosure deadline of 7, 5 or 3 days before the deposition is likely to result in contentious and voluminous comments and testimony. The timing of any disclosure as required by Alternative 2 directly implicates the legal strategies of the responding party, ignores the unfortunate mischief often experienced by the producing party and the witness, and ignores the practical reality that the responding party often must modify the scope of topics covered and/or the designated witness as the deposition nears—sometimes within 24 hours before the deposition occurs. These same concerns apply to Alternative 2A because a 7, 5, or 3 day disclosure deadline would conflict with the inherently iterative process of witness selection and preparation.

CONCLUSION

Alternative 1, enhanced by a 30-day notice provision, is the best option for progress towards the Committee's objective to help lawyers confer about, and prepare for, Rule 30(b)(6) depositions. Adding a 30-day notice provision should not require republication because it is a well-understood and accepted feature of other discovery rules and was vetted during the public comment period. The Committee should conclude its work on Rule 30(b)(6) by adding a 30-day notice to Alternative 1 and recommending it to the Standing Committee for approval. The other alternative, asking for further public comment on the issues relating to a new mandate to disclose witness information with an inherently difficult to define timeframe, is highly unlikely to provide the Committee with new insight or to result, next year, in a different conclusion.

Durbin, No. 2:11-CV-342-LDG-VCF, 2014 WL 5364068, at *8 (D.Nev. Oct. 20, 2014)("the Rule 30(b)(6) deponent's name is irrelevant. Rule 30(b)(6) deponent[s] testify on behalf of the organization. *See* FED.R.CIV.P. 30(b)(6). Therefore, the court denies Cruz's motion to compel with regard to the identify of Wabash's Rule 30(b)(6) deponent because it seeks irrelevant information.").

[17] *Compare* Fed. R. Civ. P. 30(b)(6) *with* Fed. R. Civ. P. 30(b)(1).

[18] Transcript of Proceedings, Public Hearing on Proposed Amendments to Federal Rule of Civil Procedure 30(b)(6) (Phoenix, AZ, Jan. 4, 2019) at pp. 43-7, 57-8, 131-33, 159; Transcript of Proceedings, Second Public Hearing on Proposed Amendments to Federal Rule of Civil Procedure 30(b)(6) (Washington, DC, Feb. 8, 2019) at pp. 10-11, 197-98, 268.