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Committee Members Attending in Person:

HON. JOHN BATES, Chair

HON. DAVID G. CAMPBELL

PROFESSOR EDWARD COOPER

PROFESSOR DANIEL COQUILLETTE

HON. JOAN ERICKSEN

PROFESSOR RICHARD MARCUS

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P R O C E E D I N G S

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3 JUDGE BATES: Good morning. We're going to start
4 pretty promptly here today.

08:59:47 5 I'm John Bates, the chair of the Advisory Committee
6 on Civil Rules. I'm joined up here today by Dave Campbell,
7 the chair of the Standing Committee on Rules; by our chair of
8 the subcommittee dealing with Rule 30(b)(6), Judge Joan
9 Ericksen. Other members of the committee are reporters and
09:00:08 10 the reporter for the standing committee, or the former
11 reporter for the standing committee. And we appreciate your
12 coming here today.

13 We have a pretty full lineup of witnesses to hear
14 from this morning that will run into this afternoon a little
09:00:23 15 bit, I'm sure. I want to thank you in advance, all of you,
16 for your appearances today and for the written submissions as
17 well that we've already received.

18 There are 25 witnesses scheduled. It's a tight
19 schedule. We've only allotted seven minutes per witness. I
09:00:41 20 apologize for that, but we really have no choice if we're
21 going to hear from all of you.

22 To leave time for a question or two, I would urge you
23 to try to say what you'd like to say in five or six minutes
24 because there may be members of the committee who have a
09:00:59 25 question that they would like to ask you. So if you can shoot

09:01:03 1 for that, I would appreciate it.

2 Again, we appreciate your cooperation and your input
3 into the rulemaking process as we deal with proposed
4 amendments to Rule 30(b)(6) of the Federal Rules of Civil
09:01:14 5 Procedure.

6 With that, we're going to turn to the first witness,
7 and our first scheduled witness is John Griffin.

8 MR. GRIFFIN: Good morning. What a difference it
9 makes from a few years ago when we had a facet -- a whole
09:01:30 10 facet of issues before us. Today we talk about a more
11 discrete issue, the venerable uniquely American Rule 30(b)(6).

12 I come to talk to you from a perspective of
13 representing people with disabilities who have opened up doors
14 through 30(b)(6) and what has been done with that rule in
09:01:48 15 important cases around our country.

16 As some of you know, I've assisted court security
17 officers who guard the federal judiciary around the country.
18 And Rule 30(b)(6) has helped make changes to the way the
19 Marshals Service deems CSOs fit for duty. Formerly CSOs, if
09:02:07 20 they needed a hearing aid in order to pass the hearing test,
21 they were fired. Rule 30(b)(6) allowed us to generate topics
22 about audiology, risks, what's important on the job, that sort
23 of thing, to the point now where the Marshals Service actually
24 judges people's ability to hear, period, with or without a
09:02:25 25 hearing aid.

09:02:26 1 Likewise, topics with the Marshals Service and cases
2 involving CSOs has helped the Marshals Service with
3 cardiology, endocrinology, and vision issues when cases have
4 come up with respect to court security officers.

09:02:40 5 Changes were made that made the judiciary safer
6 because of the discreteness of the topics that allowed
7 witnesses from the agency to candidly talk about the agency's
8 position on these issues.

9 Now, in other ways, in other important cases, I
09:02:55 10 practice, as you know from the last time, commercial cases,
11 but represent people with disabilities.

12 Some of you may recall in Washington, because of NPR
13 and the Washington Post, a case tried before Judge Anthony
14 Trenga, which involved a lot of 30(b)(6) testimony. There
09:03:12 15 were several issues that the FBI had with a young man who had
16 been selected to go to Quantico. He had his left hand blown
17 off in a grenade. He was an Army Ranger. At Quantico, he was
18 kicked out of academy because of the perception that he
19 couldn't shoot with his weak hand.

09:03:29 20 What happened in that case where there were topics of
21 deposition testimony under Rule 30(b)(6). The FBI first
22 claimed that agents had to be able to shoot with nondominant
23 hand in order to be qualified, and the notice included that
24 topic.

09:03:45 25 It turned out that in the history of the FBI, only a

09:03:49 1 handful of times had any agent ever shot with the weak hand
2 and mayhem generally ensued.

3 Second, the FBI claimed in written discovery that
4 they never had anyone with a serious hand issue in the force,
09:04:03 5 that they can't have someone and never had people with a blown
6 off hand or a paralyzed hand.

7 The 30(b)(6) deponent, under oath, shared how the FBI
8 had several agents who had their hands, one even blown off
9 with a grenade, and others with paralysis and other types of
09:04:22 10 issues where the agent was declared fit for duty despite
11 something happening to the off hand.

12 Third, we learned under 30(b)(6) something else
13 different from the written discovery, that when FBI agents
14 take a firearms test, they don't have to hit the -- take any
09:04:37 15 of the shots with the off hand if they don't want to. They
16 can elect to pass so long as they achieve enough points with
17 their strong hand. In other words, points are points. Not
18 how they accumulate them.

19 Now, think about that.

09:04:51 20 The written discovery in those cases did not elicit
21 those frank answers. And following the case of the young man
22 in Virginia, Judge Trenga, the district judge, ordered
23 reinstatement, Director Comey elected not to appeal, and that
24 young man was chosen by his class when he was reinstated and
09:05:10 25 now serves our country.

09:05:12 1 He came after other 30(b)(6) testimony had changed
2 other ways. The FBI now employs agents who use insulin
3 injections as special agents. It took a jury trial and
4 30(b)(6) testimony by the FBI and a trial in Judge James
09:05:27 5 Robertson's court to make that happen.

6 More recently, we had 30(b)(6) testimony in the first
7 jury trial of the nation presided over by former chief judge
8 Royce Lamberth about a service dog for a veteran with PTSD.
9 30(b)(6) testimony generated the important testimony the jury
09:05:44 10 relied on in finding that that accommodation in that workplace
11 was reasonable.

12 Now, some people say that the committee shouldn't
13 look at such a discrete issue, but I commend the committee;
14 all rules need to be reevaluated. The committee, it seems to
09:06:01 15 me, hasn't thrown anything else -- what's the word I'm looking
16 for -- hasn't done anything radical or incendiary as some of
17 the comments have stated. Rather, the committee has taken
18 something and made it better by having a conferral process.

19 Some of you may know that Texas has patterned its
09:06:17 20 rule after 30(b)(6), and 199.2(b)(1) does have one of the
21 improvements that the committee is considering, a requirement
22 that the organization designate the witness a reasonable time
23 before --

24 PROF. MARCUS: Can I interrupt with a question.

09:06:34 25 MR. GRIFFIN: Go ahead.

09:06:34 1 PROF. MARCUS: We use the word in our rule
2 "designate." You seem to say Texas treats that as meaning
3 inform the other side; is that correct?

4 MR. GRIFFIN: That is correct.

09:06:46 5 PROF. MARCUS: Has that caused any problems and would
6 a rule that required that accomplish the goals you think we
7 should be trying to accomplish?

8 MR. GRIFFIN: It's a worthy goal. In 35 years,
9 there's not a reported case on a disagreement over what's a
09:06:59 10 reasonable time before the deposition.

11 JUDGE JORDAN: Is there a difference between
12 identifying a witness and meeting and conferring about a
13 witness?

14 MR. GRIFFIN: Meeting and conferring, in our view, is
09:07:11 15 a help. There's been a lot of chatter and overwrought
16 statements about people meeting and conferring about either
17 the top --

18 JUDGE JORDAN: Is there a difference?

19 MR. GRIFFIN: Sure.

09:07:23 20 JUDGE JORDAN: So the Texas rule is an
21 identification, not a meet and confer.

22 MR. GRIFFIN: Absolutely. It's only identification
23 and the Texas rule has only that facet. I think that the
24 committee's done better with the meet and confer. The
09:07:36 25 comments as I've read them, some use the words "incendiary"

09:07:41 1 and "radical," but they're from the vantage point of either
2 the organization or the party who seeks the deposition.

3 What you've done is create something that's very
4 balanced. The noticing party has to or should confer about
09:07:55 5 scope of the topics so that you can make sure your topics --
6 you don't see the judge in a motion for the first time, you
7 can discuss them with the other side. Likewise, the
8 organization's discrete obligation is to name the designee.
9 The meet and confer doesn't require them to -- doesn't require
09:08:11 10 us to tell who it is. But it does have some help that both
11 sides know the other's perspectives so you know that before
12 you face a motion after the deposition. And of course
13 procrastinating on the designation, waiting for the last
14 minute, invites the very problems the rule is designed to
09:08:29 15 prevent.

16 JUDGE ERICKSEN: Does the Texas rule have a meet and
17 confer aspect or is it simply --

18 MR. GRIFFIN: It does not.

19 JUDGE ERICKSEN: -- simply notice. Has that worked
09:08:44 20 all right?

21 MR. GRIFFIN: It has for 35 years. There are no
22 reported cases on it. In our practice, generally -- if I'm
23 presenting an organization a few days before the deposition,
24 I'm telling them who it is so that they can save their
09:08:56 25 questions and not waste a bunch of questions that they would

09:08:59 1 normally ask in a deposition.

2 But the meet and confer of discrete issues, I think
3 as a noticing party, and I represent companies too, as a
4 noticing party, I want to know problems with the notice. If
09:09:11 5 there's an argument that it's not sufficiently particularized,
6 let's talk about it. Maybe we can combine some topics.

7 Likewise, if I'm an organization, I don't want to
8 hear from it after the fact in a motion that my witness was
9 the wrong witness or was not sufficiently prepared or briefed
09:09:26 10 to address the topics. Those are good things.

11 JUDGE BATES: Mr. Griffin, any last comments?

12 MR. GRIFFIN: Sure.

13 Finally, courts have done a good job policing the
14 rule as it is. It is not a judicial admission, those
09:09:42 15 depositions. Yet nobody can ambush, a company can't ambush
16 someone when their witness doesn't know an answer to a
17 question. It ought to be supplemented.

18 If you did nothing it wouldn't be a crisis, but what
19 the committee's proposed is a good improvement on what's
09:09:58 20 already there and therefore I commend the committee's draft
21 for your consideration.

22 JUDGE BATES: Thank you very much, Mr. Griffin.

23 MR. GRIFFIN: Pleasure.

24 JUDGE BATES: Our next witness will be Lisa LaConte.

09:10:10 25 MS. LaCONTE: Good morning. Thank you for the

09:10:12 1 opportunity to come and speak with you. My take is going to
2 be a little bit different.

3 I want to give you a little bit of background. I'm
4 with the law firm of Heyl Royster Voelker & Allen, and have
09:10:20 5 practiced for 30 years primarily in the area of mass tort,
6 toxic torts, asbestos litigation in state and federal courts
7 in Illinois and Missouri.

8 My real issues and comments perspective today come
9 from my role as national counsel representing a corporation
09:10:39 10 that began in the 1920s in the -- and representing the -- in
11 the asbestos litigation across the country. So we face the
12 issue of 30(b)(6) witnesses, not only in federal court, but
13 state court as well. In virtually every case this is a issue
14 and topic that comes up regularly. And we face notices for
09:11:04 15 those depositions regularly.

16 So there's some unique challenges when you are
17 talking about litigation such as the asbestos litigation that
18 deals with companies that have very long history, companies
19 who are a conglomeration of acquisitions, mergers, and sales
09:11:25 20 over many years, and you're talking about a product or a
21 premises of that company that may no longer exist, it may have
22 been bought or sold or acquired later on. So the idea of
23 identifying someone with knowledge about all these myriad
24 topics becomes quite a challenge. So it's certainly something
09:11:45 25 to deal with on a regular basis.

09:11:48 1 I certainly recognize that the committee has spent a
2 lot of time considering the amendment to 30(b)(6). My
3 position and my request is that the committee today consider
4 not adopting the proposed amendment but frankly re- --
09:12:04 5 considering some revisions to the proposed amendment that we
6 think will provide real meaningful change as we proceed in the
7 litigation.

8 The concept of meet and confer is certainly not
9 anything new to any of the lawyers that are in this room, and
09:12:20 10 I think you would expect that most of us do that on a regular
11 basis on topics and issues in a case regardless of a mandate
12 to do so.

13 However, the mandated meet and confer requirement in
14 the proposed amendment merely, in our view, creates a
09:12:39 15 discovery obligation that is new but provides no meaningful
16 change or meaningful means for us to move the litigation
17 forward more efficiently, less costly the matter, or to
18 streamline judicial resources in any way.

19 Merely mandating the meet and confer aspect of a
09:13:02 20 30(b)(6) notice is not going to do anything but create an
21 infinite loop and an infinite opportunity for disputes to
22 arise and costs to be incurred because there's no companion
23 outline of a process to raise objections and a means to have
24 those objections to the notices resolve before the deposition.

09:13:28 25 JUDGE BATES: On the meet-and-confer aspect, we've

09:13:30 1 been told by others that good lawyers with 30(b)(6)
2 depositions generally do have conversations.

3 MS. LaCONTE: We do.

4 JUDGE BATES: They do have a meet and confer.

09:13:41 5 MS. LaCONTE: We do.

6 JUDGE BATES: Why would that having as that as part
7 of a rule really change things all that much?

8 MS. LaCONTE: Well, by making it a mandated process,
9 you interject a requirement that sometimes is not necessary.
09:13:54 10 Sometimes we can resolve things easily. Sometimes the meet
11 and confer is not going to be the way that you resolve the
12 issue.

13 JUDGE BATES: But wouldn't that happen even with the
14 language in the rule? If it's easy to resolve, it will be a
09:14:10 15 30-second conversation.

16 MS. LaCONTE: And those aren't the problems that we
17 bring to the court. But that doesn't create the issues that
18 we see when we have 30(b)(6) issues.

19 And I'll be very honest, we don't have an issue that
09:14:24 20 requires court intervention in every single notice that we
21 receive. But when the parties equally on both sides have an
22 issue that either their clients insist that they hold their
23 ground or the lawyers are adamant about the relevance or other
24 objections to the deposition notices, there's no means for us
09:14:46 25 to address how we go forward when each side is going to hold

09:14:51 1 their ground.

2 JUDGE JORDAN: That's a separate issue, though;
3 right? You're talking about a notice as to meet and confer.
4 What is -- what's the problem with a meet and confer? You've
09:15:03 5 said it's a problem. If lawyers are doing it anyway, what's
6 the problem with having it in the rule?

7 MS. LaCONTE: Well, the problem is that you're
8 requiring a process that is not going to resolve the problem.
9 There's an easier way to resolve the process.

09:15:21 10 Again, I'm not objecting to the concept of meeting
11 and conferring. But to make that a discovery obligation, I
12 think it's not going to get us the meaningful change that we
13 would like to see in the rule.

14 JUDGE JORDAN: It's not so much that the meet and
09:15:36 15 confer is a problem as the draft doesn't have things in it
16 you'd like to have? Am I understanding that right?

17 MS. LaCONTE: Yes. With respect to the topics, the
18 scope of the deposition, yes.

19 So by providing a means for the parties to raise
09:15:52 20 objections and a means to have those objections ruled on
21 before the deposition goes forward, I think would provide the
22 meaningful change that the concept of meet and confer you may
23 think is going to get us there, but when both sides hold their
24 ground, there's no means in the rule to address those issues
09:16:11 25 and get us past that hump to produce the witness and have an

09:16:16 1 appropriate deposition taken.

2 JUDGE BATES: Is there a mechanism for objections
3 formally in the rules now for Rule 30 -- not specifically
4 30(b)(6), but Rule 30 depositions?

09:16:27 5 MS. LaCONTE: I don't believe so. We reference --

6 JUDGE BATES: So why do we need one for Rule 30(b)(6)
7 if there isn't one for depositions generally? Doesn't the
8 process work all right, not just for 30(b)(6) but for all
9 depositions?

09:16:39 10 MS. LaCONTE: No, I don't believe so because 30(b)(6)
11 notice is so different than a witness's deposition on the
12 basis of personal knowledge. The usual fact witness
13 depositions, party depositions, expert depositions are focused
14 on specific facts of the case or limited to the knowledge of
09:16:57 15 those witnesses, as opposed to 30(b)(6) witness who is
16 speaking on behalf of the corporation.

17 And, you know, the notices that we receive have 50,
18 75, sometimes 100 areas of inquiry that go back into history,
19 back way beyond the personal knowledge of the witness, outside
09:17:18 20 of the scope of the particular limited facts of the case, and
21 that's where we get into the disputes of the scope of the
22 30(b)(6) deposition.

23 JUDGE BATES: Do you have any final comments you'd
24 like to make for us?

09:17:32 25 MS. LaCONTE: Well, the final thing that I'd like for

09:17:34 1 you to take away is that by providing a framework for the
2 parties to address their objections and resolve their
3 objections before the depositions go forward would be a very
4 meaningful change. It would streamline the deposition
09:17:48 5 process, the objection process, it would eliminate unnecessary
6 motion process practice, and that just bogs down the whole
7 process of the case. And I think you would find that it
8 resolves a number of the issues that you're going to hear
9 about today.

09:18:03 10 Thank you for your time.

11 JUDGE BATES: No further questions.

12 Thank you, Ms. LaConte.

13 The next witness will be James McCrystal.

14 Welcome.

09:18:15 15 MR. McCRYSTAL: Morning, Your Honors.

16 I'm here this morning on behalf of the DRI, which is
17 a membership group of over 20,000 lawyers that practice in the
18 civil courts of the United States, including federal courts.

19 And they routinely encounter issues with
09:18:40 20 Rule 30(b)(6) in the federal courts and the analog in many
21 state courts. And the guidance that this panel creates by
22 writing rules and offering committee notes guides not only the
23 federal judges applying these rules, but state judges that
24 also have to consider issues that arise in the context of
09:19:00 25 taking testimony from an organization.

09:19:04 1 Our comments are directed at things that are not
2 included in the present draft that we think are important for
3 consideration. Paramount is that it is unclear in practice
4 whether the limitation on the number of depositions or the
09:19:27 5 length of depositions conducted under Rule 30 apply to an
6 organizational deposition.

7 And the reason I say this is that, as you know in
8 rule changes from 2015, the number of interrogatories and the
9 number of witnesses were limited. So now the dynamic has
09:19:52 10 shifted to potentially, well, let's get the organization to
11 produce someone who will give us all the information that we
12 couldn't have obtained through the 25 interrogatories or the
13 limited number of witnesses in time we have to take testimony
14 from percipient witnesses.

09:20:08 15 And our concern is that without -- at least in your
16 comments -- knowing that those principles apply to this type
17 of discovery deposition leaves us where we're down the rabbit
18 hole. Where suddenly this type of deposition becomes the
19 dominant and becomes uncontrolled by the normal limits of time
09:20:33 20 and length and number of witnesses.

21 PROF. MARCUS: So what you're saying is that your
22 goal is that the committee note add a reference to the
23 existing 26(b)(1) proportionality provision? That's the
24 solution?

09:20:50 25 MR. McCRYSTAL: I think by noting that this type of

09:20:54 1 organizational deposition counts as one of the witnesses or
2 that the seven-hour rule applies --

3 PROF. MARCUS: But the committee in 2000 does address
4 that issue, doesn't it?

09:21:11 5 MR. McCRYSTAL: With regard to this type of
6 deposition, I'm not sure, Professor, that it does
7 specifically.

8 JUDGE BATES: If you assume it does, is there really
9 that much of a problem? You say this issue comes up, and I'll
09:21:25 10 grant you that it probably does come up between the lawyers,
11 they have a discussion. It doesn't wind up with a lot of
12 motions practice or a lot of wasted time or taking the judge's
13 time to resolve that, does it? We haven't seen cases like
14 that.

09:21:42 15 MR. McCRYSTAL: I think you're correct on that,
16 Your Honor. But what I'm concerned about is the future, not
17 the past. And I think that this is an excellent opportunity
18 for the committee to make it clear in its comments that you
19 believe there is a framework here, because otherwise what
09:21:57 20 we've done is expanded into another universe where
21 interrogatories aren't important, I'll just issue a 30(b)(6)
22 notice and I'll actually get to interrogate someone who is
23 supposed to know what otherwise I would have done in an
24 interrogatory.

09:22:11 25 JUDGE JORDAN: Isn't that a separate issue though?

09:22:14 1 The -- that's -- the issue that you put on the table is that
2 the numbers and length limitation should apply, and we've got
3 a few years experience now with the 2015 amendments. If there
4 were a problem with this, would we see some information that
09:22:35 5 shows, hey, this is a regular problem?

6 MR. McCRYSTAL: I think lawyers are reluctant
7 generally to go before the court with issues like this because
8 it's contextual, and some judges are very active in the
9 management of their dockets. Those who say you can't, this
09:22:53 10 rule encourages the judge can put an order on saying that you
11 can't file papers before you conferred with me or my office
12 first, I don't want that paperwork, let's work it out. And,
13 yes, lawyers do that. But there are a number of occasions
14 where clearly framing the issues for them that, yes, seven
09:23:15 15 hours, yes, a limited number of witnesses --

16 PROF. MARCUS: If it's contextual, doesn't that mean
17 the circumstances of a given case are important?

18 MR. McCRYSTAL: Yes.

19 PROF. MARCUS: Then a specific across-the-board limit
09:23:30 20 might be inconsistent with that.

21 MR. McCRYSTAL: All of these rules were written with
22 the changes over the past 20 years to encourage management
23 techniques to be applied by the district judges and to cause
24 the parties to confer with each other without the
09:23:45 25 arbitrariness of an absolute rule.

09:23:48 1 I agree with you, Professor. I don't encourage an
2 absolute rule. But I do encourage the litigants be mindful of
3 those limits and the judges respect the opinion of a committee
4 in its notes that these limits have meaning in the context of
09:24:05 5 litigation.

6 Yes, you can have more than 25 interrogatories. Yes,
7 you can take a deposition for longer than seven hours by
8 agreement. Yes, you can have more than ten witnesses by
9 agreement or by court order.

09:24:16 10 This rule with regard to 30(b)(6) doesn't contain
11 references to that, and I think it would be assistive if it
12 did.

13 JUDGE CAMPBELL: Mr. McCrystal, what exactly would
14 you have us put in the committee note?

09:24:34 15 MR. McCRYSTAL: I think I can draft language for you,
16 but my concept would be --

17 JUDGE CAMPBELL: Concept, yeah.

18 MR. McCRYSTAL: -- that reference to (1) and (2) of
19 Rule 30 are to be considered as guiding the practice under
09:24:54 20 30(b)(6).

21 With that, I appreciate the questions and I look
22 forward to your deliberations.

23 JUDGE BATES: We appreciate your testimony,
24 Mr. McCrystal. Thank you.

09:25:11 25 Our next witness will be Sandra Ezell.

09:25:22 1 MS. EZELL: Good morning.

2 JUDGE BATES: Good morning.

3 MS. EZELL: I am here as a 28-, almost 29-year lawyer
4 first admitted in 1990. I'm admitted to practice in Illinois
09:25:34 5 and Virginia, and as a 54-year-old woman will be admitted in
6 California in a few weeks.

7 JUDGE BATES: I don't know congratulations or
8 condolences.

9 PROF. MARCUS: Congratulations.

09:25:50 10 MS. EZELL: Both, I think, is the answer.

11 But that's where the trials are and so that's where
12 I'm headed. I'm a trial lawyer. And for most of these, 27 of
13 these 28 years, I have been defending corporate clients who
14 design, build, and make things against people who sue them for
09:26:08 15 injuries that they allege are caused by them.

16 And in conjunction with that I have defended or been
17 assistive in defending hundreds of 30(b)(6) depositions or the
18 state corollary depositions, and I'm here today to address the
19 proposed amendment from this experience.

09:26:33 20 I support this committee's proposed concept of a meet
21 and confer with regard to the matters for consideration or to
22 be addressed.

23 I particularly draw the committee's attention to your
24 report where you indicate that one of the things that would be
09:26:54 25 helpful to the meet-and-confer process on the issues for

09:27:00 1 consideration would be the documents that the noticing party
2 plans to use at the deposition be identified.

3 In my experience, the noticing party and the
4 responding party don't necessarily speak the same technical
09:27:16 5 language, the same terms of art. I deal with a lot of
6 scientific terms. And even within the same industry,
7 companies who deal in the same products don't speak the same
8 terms. And so people on different sides of the aisle, and
9 generally the defendant, the defendant and plaintiff don't
09:27:35 10 speak the same terms.

11 But if you identify the documents that you're going
12 to be discussing, it makes it much easier to know what that
13 deposition is going to be about. It makes it --

14 JUDGE BATES: Would it be fair to require the
09:27:49 15 noticing parties to identify the documents to be used without
16 the noticing party knowing who the witness is?

17 MS. EZELL: Yes.

18 JUDGE BATES: How so? If you know the witness, you
19 might choose one set of documents versus another set of
09:28:03 20 documents or some subset of those documents. It would seem to
21 make it inefficient if the noticing party has to produce the
22 documents but doesn't know who the witness is.

23 MS. EZELL: So litigation is separated into different
24 events, and the 30(b)(6) deposition is the time to take facts
09:28:24 25 and information from the company about certain topics. And so

09:28:30 1 that is not the time, like an expert deposition or a 30 -- a
2 30 Section (1) deposition, a 30(a) deposition, to take
3 individual information. That is the time to find information
4 from the company about discrete topics. And if you have
09:28:53 5 through the course of interrogatories and requests for
6 production obtained documents that you want additional
7 information about, putting the company on notice that these
8 are the documents that you want to know more about is the best
9 way to get the information about those documents.

09:29:13 10 JUDGE JORDAN: How does that answer the question put
11 to you, ma'am? If you know who the witness is, would it not
12 make a difference in the documents selected? And if that's
13 true, why is it fair to demand that the inquiring party
14 identify the universe of documents while not knowing who the
09:29:36 15 witness is?

16 MS. EZELL: The witness in a 30(b)(6) deposition is
17 not there in their individual capacity.

18 JUDGE JORDAN: Given. Understood.

19 MS. EZELL: They're there as the company.

09:29:50 20 JUDGE JORDAN: That's understood.

21 MS. EZELL: And so who the individual is on that day
22 is irrelevant to the exercise on that day.

23 We had another attorney who spoke --

24 JUDGE BATES: I don't see how that really would be
09:30:03 25 true. There might be documents that the witness was copied

09:30:06 1 on, even though they aren't being examined as to their
2 individual knowledge, you would have documents that would be
3 more relevant to talking to that witness about the company
4 information.

09:30:18 5 MS. EZELL: Whether or not somebody was copied on a
6 document is something that is -- the document speaks for
7 itself. But whether or not that person knows about that
8 information is not what they're there for. That's about their
9 personal knowledge. They're there to answer questions about
09:30:37 10 the state of the company's knowledge on particular topics.
11 And I think that the questions that you're asking are merging
12 the two --

13 JUDGE BATES: If you were conducting the deposition
14 and someone said X and you had a document indicating they were
09:30:52 15 copied that said, no, Y, wouldn't you want to be able to
16 examine them on that?

17 MS. EZELL: Well, yes, I'm sure that I would. But
18 that is not the purpose of a 30(b)(6) deposition. Within a
19 company, the larger the company, I imagine, the more
09:31:14 20 exponential the issue. But even within a small company, if
21 the question is what is the definition of Y, you're going to
22 have multiple documents that would show that different people
23 within that company would define it differently, but the
24 company is going to eventually come up with a definition of
09:31:32 25 that and there are going to be multiple discussions before

09:31:35 1 that is defined. And the --

2 JUDGE JORDAN: Does your approach not lead to an
3 overdesignation of documents? Because what it sounds like
4 you're saying is because the company gets to pick who it wants
09:31:48 5 to pick and it should be irrelevant who that voice is for the
6 company, the other side, the inquiring side, then has an
7 incentive, strong incentive, to not narrow the number of
8 documents that your party needs to be prepared to answer, but
9 to get a sort of data dump because they don't know who they're
09:32:14 10 getting in the seat of the witness.

11 MS. EZELL: In my experience I've never been able to
12 figure out a way to limit the documents that the other side
13 requests. However, I think that they would not permit the
14 company to limit that by saying if you take these documents,
09:32:33 15 we'll give you a witness. I mean, that's not a decision they
16 would permit the company to make anyway. They're going to
17 decide.

18 JUDGE JORDAN: So you think this is a data dump
19 anyway?

09:32:48 20 MS. EZELL: Depends on what the issue is. No, I
21 don't think there's a data dump. I think the questions are
22 asked usually long before the deposition and the documents
23 that are responsive are given.

24 MR. SELLERS: Well, let me ask a question. When you
09:33:03 25 select the witnesses to be designated in a 30(b)(6)

09:33:05 1 deposition, do you take into account the job duties of the
2 person you selected who might be relevant to the subject of
3 the deposition?

4 MS. EZELL: It depends on the company. In some cases
09:33:15 5 there's nobody left alive at the company who knows.

6 MR. SELLERS: Understood. But if there is somebody
7 around who -- I understand that may be the occasion, but if
8 there's somebody at the company who has background or
9 knowledge of a particular subject, wouldn't you -- unless they
09:33:29 10 are ill-suited to be a witness for other reasons, wouldn't you
11 prefer somebody who has some knowledge on that subject?

12 MS. EZELL: It sounds like the answer should be yes,
13 but the answer is so often it really doesn't matter. If their
14 purpose within that company is so instrumental to doing that
09:33:50 15 job, if they really need to be building those widgets and
16 while this litigation is really important to us but the
17 widgets are really important to the company, it doesn't matter
18 if my preference would be to have that witness. I get
19 somebody else.

09:34:06 20 JUDGE BATES: Ms. Ezell, can I ask you one last
21 question.

22 MS. EZELL: Absolutely. I'm here for you.

23 JUDGE BATES: And ask you to be brief in your
24 response.

09:34:13 25 From your experience, does the person that's going to

09:34:16 1 testify, the witness, commonly get identified by the
2 organization to the other side before the deposition occurs?

3 MS. EZELL: No.

4 JUDGE BATES: And does the subject of who the witness
09:34:30 5 is commonly get discussed now or would the organization
6 generally refuse to do so?

7 MS. EZELL: And by identified, I mean their name is
8 not given. Certainly what happens is we would say we will
9 produce somebody who will address this issue and this issue
09:34:49 10 and this issue.

11 JUDGE BATES: I understand. I'm asking whether the
12 identity --

13 MS. EZELL: Well, I'm unclear in this process what
14 your committee means by the word identity, so I wanted to make
09:34:59 15 sure I was clear.

16 I'm sorry, your question was?

17 JUDGE BATES: Appreciate that.

18 Does the organization refuse to identify and refuse
19 to discuss? And if so, why?

09:35:10 20 MS. EZELL: I think that -- it's not that there's a
21 refusal. We get a request, we say we will produce somebody to
22 address these issues on this day at this location, and I'm
23 not -- I don't have any recollection of somebody saying tell
24 me who it is and my refusing.

09:35:29 25 JUDGE BATES: Are you ever asked who the witness is

09:35:32 1 going to be?

2 MS. EZELL: Not in my personal experience.

3 JUDGE BATES: All right. Thank you very much,
4 Ms. Ezell.

09:35:38 5 MS. EZELL: Thank you.

6 JUDGE BATES: All right. We'll turn now to the next
7 witness, John Southerland.

8 MR. SOUTHERLAND: Good morning, and thank you for
9 allowing me to be here.

09:35:47 10 I come here this morning with 14-plus years of
11 experience, and I have had the pleasure of being able to
12 represent both large corporations and also smaller locally
13 owned businesses, some may refer to as mom and pop businesses.
14 I've done it representing both the plaintiff and defendant.

09:36:06 15 I've had the opportunity to present 30(b)(6) witnesses as both
16 counsel for plaintiff and counsel for defendant in multiple
17 states and across multiple jurisdictions.

18 What I want to do this morning is, one, I'm asking
19 the committee to not pass the current proposed amendment. I
09:36:27 20 believe it is problematic. I don't believe it solves any of
21 the current problems with Rule 30(b)(6). I'm asking the
22 committee to continue this process that you've clearly engaged
23 in, with a lot of effort, to try to actually enact meaningful
24 change to the rule.

09:36:42 25 When I began analyzing the current proposal, I asked

09:36:46 1 myself three questions: Does it offer anything new? If so,
2 will it resolve any current problem? And what can be done to
3 enact meaningful change?

4 I began, and if you read my written testimony I
09:36:58 5 looked at the advisory committee comments when Rule 30(b)(6)
6 was originally enacted. And what I found from there is there
7 are essentially four purposes for the rule at that time. It
8 was to add a discovery method to improve the discovery
9 process, to reduce difficulty in identifying a particular
09:37:18 10 witness, and to be advantageous for both sides.

11 I then took those purposes and I asked myself does
12 the current proposal, does it meet the purpose and the spirit
13 of any of those goals for Rule 30(b)(6) when it was enacted?
14 And I don't believe it does.

09:37:37 15 JUDGE ERICKSEN: Can I just ask you, it seems from
16 your written commentary that your objection is primarily to
17 the identification of witnesses in advance.

18 MR. SOUTHERLAND: That is certainly the most
19 problematic area to the proposal. But, as I think
09:37:51 20 Judge Jordan asked earlier, is there a problem with the meet
21 and confer being part of the rule, and I don't believe that
22 there's necessarily an issue with a meet-and-confer
23 requirement being part of the rule. I believe the current
24 proposal does not provide enough meaningful and specific
09:38:10 25 guidance to address what that meet and confer would be.

09:38:13 1 And also the biggest issue is it does not provide any
2 process to allow the parties to resolve the dispute once
3 they've reached an impasse.

4 JUDGE BATES: Would you identify with respect to the
09:38:32 5 meet and confer what specifically you would advocate be
6 removed from the proposed language and what specifically you
7 would advocate be added in terms of specificity on the meet
8 and confer.

9 MR. SOUTHERLAND: Well, on the current meet and
09:38:47 10 confer language, the issue that I have is that it basically
11 just says you need to meet and confer and you need to continue
12 to do so as necessary. But -- and so --

13 JUDGE BATES: Anything wrong with the subjects that
14 are identified for meeting and conferring?

09:39:02 15 MR. SOUTHERLAND: I'm sorry, the subjects that are
16 identified for meeting and conferring?

17 JUDGE BATES: Topics and the names of the witnesses.

18 MR. SOUTHERLAND: I think it's fine to meet and
19 confer about the topics. I do believe that there is a problem
09:39:14 20 with identifying and meet and conferring about the identity of
21 the witness. That is obviously an issue that I have with it.

22 JUDGE BATES: In your experience, does the identity
23 of the witness get disclosed before the deposition or not?

24 MR. SOUTHERLAND: It can. I've certainly --

09:39:30 25 JUDGE BATES: I know it can. Does it usually or not?

09:39:33 1 MR. SOUTHERLAND: Well, you know -- and I don't mean
2 to mince words with you, Judge Bates, but "usually" is a
3 relative term. In my experience -- the way I would describe
4 usually, I would say usually does not. The identity of the
09:39:47 5 witness usually in my practice does not get disclosed.

6 And when I'm asked, you know, the first thing that I
7 do is I ask my client, do you have a position on this?
8 Because really at the end of the day, it's the client's
9 decision as to whether they want to identify who the witness
09:40:03 10 is.

11 In practicality I can tell you that having some type
12 of early identification of the witness, and this doesn't even
13 get into what does identifying the witness actually mean in
14 the current proposed amendment, but the practical implications
09:40:20 15 of having to identify the witness early is problematic in and
16 of themselves. One, who the specific individual is that will
17 respond to a 30(b)(6) notice is irrelevant. The witness in
18 response to a 30(b)(6) notice is the organization. That's all
19 you need to know.

09:40:37 20 And I believe you asked earlier, Judge Bates, if you
21 know who the witness is, will that affect what documents you
22 may use during the deposition. I submit to you it shouldn't.
23 Not in 30(b)(6) context.

24 And in a 30(b)(1) context, sure, that's fine, you
09:40:52 25 have to know the identity of the witness there because you

09:40:56 1 obviously have a specific reason for wanting to depose that
2 person.

3 But in a 30(b)(6) context, you've given topics of an
4 organization, and who the person shows up to testify for that
09:41:05 5 organization, who that person is should never affect your
6 preparation for that deposition because you should be
7 preparing to testify or to depose that individual
8 organization, not the specific individual who shows up on that
9 day.

09:41:21 10 JUDGE BATES: I understand, though, your position
11 there may not be any advantage to having to identify the
12 witness. What would be the problem or disadvantage to a
13 requirement that the witness be identified? Identified
14 meaning by name and title. Say seven days before the
09:41:40 15 deposition is scheduled.

16 MR. SOUTHERLAND: Sure.

17 JUDGE BATES: What would be the problem with that?

18 MR. SOUTHERLAND: And, Judge Bates, I'll give you
19 some advanced notice. I know that another of my colleagues
09:41:49 20 I've worked with over the years is going to speak to you later
21 and give you some more real world examples, but I
22 wholeheartedly agree with them because I've seen them.

23 Here's the issue: There are times, probably more
24 times than not, where I don't know seven days in advance if
09:42:04 25 that's the person that's ultimately going to testify on every

09:42:08 1 single topic in the notice. And I may get to a point in time
2 within that seven-day period where I realize that I'm going to
3 have to have more than maybe the person who I've been working
4 with and preparing up to that point.

09:42:23 5 So then let's say that I identify that witness in the
6 seven-day time period and then I realize, oh, I'm going to
7 have to identify somebody else or I'm not going to submit that
8 person for the deposition. Now I have to go back to the other
9 side and say, I know I told you that person was going to
09:42:39 10 testify, but now that's not going to be the case. You know
11 what happens then? Then the other side goes and takes the
12 30(b)(6) deposition and then they follow that up with a
13 30(b)(1) notice for the individual I named originally, and
14 that witness has to be subjected to a bunch of questions about
09:42:56 15 why they can't testify on behalf of the company they work for.
16 That's a very problematic situation, in my opinion.

17 JUDGE BATES: So it's your view that seven days
18 before the deposition, I could change that to four days, it's
19 commonplace that the identity of the witness is not even known
09:43:14 20 to the organization and it's lawyer?

21 MR. SOUTHERLAND: Not commonplace. I'm saying
22 that -- that's not commonplace. I'm saying that that's an
23 issue that can arise. I'm not saying any of that is
24 commonplace. I don't believe that there's any advance
09:43:29 25 identification rule that could ever be sufficient because it

09:43:33 1 creates a new discovery obligation on the party that has never
2 been created before and, quite frankly, flies in the face of a
3 very well settled body of case law around this country that
4 recognizes the identity of the witness in a 30(b)(6) context
09:43:49 5 is irrelevant.

6 And so I think that my time is up.

7 JUDGE BATES: Any last question for Mr. Southerland?

8 Thank you very much, Mr. Southerland. We appreciate
9 it.

09:44:00 10 MR. SOUTHERLAND: Well, thank you all and I
11 appreciate it.

12 JUDGE BATES: All right. Our next witness will be
13 Nieves Bolaños.

14 MS. BOLAÑOS: Good morning.

09:44:11 15 JUDGE BATES: Good morning.

16 MS. BOLAÑOS: First of all, I'd like to thank the
17 committee for its work on the rule changes. I understand a
18 lot of effort and time went into these proposed changes, and
19 also thank you for taking so many opportunities to allow
09:44:19 20 testimony from both sides, defendants and plaintiffs, with
21 respect to these changes.

22 I'm here today on behalf of my law firm,
23 Potter Bolaños, and as an executive board member for the
24 National Employment Lawyers Association, as well as the
09:44:34 25 co-chair for their Low Wage Worker Committee Practice Group.

09:44:38 1 My firm, Potter Bolaños, is a Chicago law firm of
2 about five attorneys, and we exclusively represent employees
3 and labor unions in both individual and class-action cases.
4 The vast majority of our cases are filed in federal court and
09:44:52 5 pursuant to federal statutes, including Title VII, Fair Labor
6 Standards Act and False Claims Act.

7 The diversity of our practice provides us the honor
8 and opportunity to represent workers from all walks of life:
9 Executives and learned professionals, as well as low-wage
09:45:12 10 workers who sometimes don't even make the legally mandated
11 minimum wage.

12 At the outset of these proceedings, it is
13 absolutely -- there's no question, individuals are at a clear
14 disadvantage when it comes to ascertaining the organizational
09:45:25 15 structures and inner workings of the companies and
16 corporations that they provide work for.

17 That fact, taken together with the reality that
18 companies control a disproportionate share of the information
19 necessary to narrow and resolve disputes and also often have
09:45:41 20 far greater resources to put into litigation for those
21 disputes, demonstrates just how important it is that these
22 rules and the discovery process generally promote efficiency
23 and fairness in order to level that playing field for all
24 those who are seeking justice in our federal courts.

09:45:59 25 Rule 30(b)(6) depositions, we found to be far more

09:46:03 1 effective, and one of the most effective ways for plaintiffs
2 with employment claims to learn some very basic information
3 about their claim and the defendants' processes.

4 These include the identification and description of
09:46:18 5 timekeeping and payroll systems, methodology and organization
6 and assessment of data that's gathered, as well as just the
7 corporate structure of their workplaces.

8 JUDGE JORDAN: Can I ask you, Ms. Bolaños, how does
9 knowing the identity of a 30(b)(6) witness in advance do
09:46:36 10 anything to advance those goals?

11 MS. BOLAÑOS: Knowing the identity of a 30(b)(6)
12 witness allows us to, in the meet-and-confer process, which we
13 find already often takes place with the more seasoned
14 attorneys on both sides of the table, it allows us to discuss
09:46:54 15 whether or not that witness is going to be sufficiently able
16 to testify to the topics that are outlined in the notice.

17 JUDGE JORDAN: Does that imply, then, that this rule
18 would make a substantive change in who gets to say who the
19 witness is? Because the assertion from the defense side, as I
09:47:12 20 understand it, is the plaintiff's lawyers, the inquiring
21 lawyers, should never have the opportunity to tell us who our
22 corporate representative is.

23 MS. BOLAÑOS: I did not read the proposed changes to
24 give me the power to say who should be testifying. I read it
09:47:33 25 to require a meet and confer on who those witnesses would be,

09:47:38 1 and then be able to offer my suggestions on why or why not
2 that person might be appropriate or able or -- able to be
3 prepared to testify on a particular set of topics.

4 JUDGE JORDAN: Can you respond -- I realize this is
09:47:53 5 not oral argument with one side or the other side, but we just
6 heard from Mr. Southerland that that would raise practical
7 problems, and he said specifically if we have to identify in
8 advance, you heard what he said, that if we have to change
9 somebody or add somebody, now we've got a dispute that we
09:48:10 10 would otherwise wouldn't have.

11 Do you have a response to that?

12 MS. BOLAÑOS: Well, I heard two things being said,
13 and one was that we might not know until four days before,
14 seven days before who we're going to designate. I find that
09:48:24 15 problematic because I think that one of the biggest problems
16 we've run into in 30(b)(6) depositions is that a witness is
17 not properly prepared to testify on a designated topic. Four
18 days before a deposition may be too soon for that witness to
19 become fully prepared on a particular topic. So I found that
09:48:43 20 concerning.

21 As to the second piece, I think -- we're a plaintiffs
22 law firm and we represent folks with pretty limited resources,
23 so there's no reason for us to notice up another deposition
24 simply to harass or harangue an individual about why they can
09:49:02 25 or cannot testify with respect to certain topics. The goal is

09:49:05 1 to get the information, to get it from the person who is most
2 prepared and able to testify as fully as possible.

3 JUDGE BATES: Do you think -- I take it you think
4 there should be a requirement in the rule that there be
09:49:25 5 conferral as to the identity of the witness.

6 MS. BOLAÑOS: That is correct.

7 JUDGE BATES: Aren't there considerations with
8 respect to choosing a witness that an organization might not
9 want to or indeed should not have to share with the other
09:49:41 10 side? And wouldn't a conferral requirement expose that?

11 MS. BOLAÑOS: Not necessarily. A conferral
12 requirement would identify the scope of the communications
13 that have occurred. If there's then a problem at the
14 deposition, we have a record and we've already done some of
09:50:03 15 the groundwork for the judge if there's a reason to bring a
16 motion and have any issue that's come up be decided by the
17 judge.

18 JUDGE BATES: And since you haven't used all your
19 time, I have one more question for you. And that is, some
09:50:17 20 have suggested a numerical limit on the number of topics. How
21 do you think that would affect the process? Would that cause
22 plaintiffs lawyers, if they were the ones noticing the
23 deposition, as they usually are, would it cause them to have
24 unreasonably broad topics if they have to fit it within
09:50:38 25 numerical limit?

09:50:40 1 MS. BOLAÑOS: I think that absolutely could be the
2 result of a strict numerical limit. I think that the
3 committee's decision to reject that as an inclusion into the
4 proposed changes recognizes that there's not a one size fits
09:50:55 5 all in these circumstances, and that the number of topics, the
6 breadth of topics will always depend on the underlying claims
7 and the nature of the cases.

8 JUDGE BATES: Any other questions for Ms. Bolaños?

9 Thank you very much.

09:51:11 10 MS. BOLAÑOS: Thank you.

11 JUDGE BATES: Our next witness will be Mark Kenney,
12 please.

13 MR. KENNEY: Good morning.

14 JUDGE BATES: Good morning.

09:51:24 15 MR. KENNEY: I'm a member of a firm called
16 Severson & Werson in San Francisco. I spent 40 years in
17 federal litigation all over the United States. I am a trial
18 lawyer, too, but I don't have a particular subject matter
19 focus. Way down deep I'm shallow.

09:51:39 20 But today I want to focus pretty narrowly on this one
21 requirement for a meet and confer about what's called the
22 identity of the 30(b)(6) witness. And I want to just ask what
23 I've been asking myself and anyone I could talk to about this
24 for weeks now, which is the existential question "Why?" What
09:52:01 25 is it -- why is it that we want to pose this requirement to

09:52:05 1 meet and confer about this thing we call identity?

2 And here's how however good the intentions of this
3 committee and the ultimate decision-makers are, you know and I
4 know that we lawyers will mess with it. And this is where the
09:52:21 5 trouble can start. So I ask why.

6 Presumably --

7 JUDGE BATES: At least you're saying the trouble
8 starts with the lawyers, not with the rule.

9 MR. KENNEY: First thing we'll do, we kill all the
09:52:34 10 lawyers, we'll be fine.

11 But we start with the proposition that in an already
12 fraught litigation environment and 30(b)(6), there is some
13 contention about it, you ask, but if lawyers are already
14 talking now, if they're already meeting and conferring with
09:52:48 15 each other about any other topics, why not force them to meet
16 and confer about this one. I do not. I have probably
17 promulgated as many 30(b)(6) notices as I've been tasked with
18 responding to them. But in responding, I do not identify
19 witnesses, and I counsel my clients not to. I think there are
09:53:06 20 very good reasons for that.

21 That begs the question, why would someone want to
22 know what the identity of the person is who is going to be
23 testifying?

24 JUDGE BATES: Tell us what the good reasons for not
09:53:16 25 identifying are as well.

09:53:18 1 MR. KENNEY: Well, here's the thing. Inseparable
2 from this meet-and-confer requirement, if meet and confer
3 means anything, it means we have to have a robust conversation
4 about this thing called identity.

09:53:32 5 Now, identity, you know that the Oxford Dictionary
6 says identity is not just name, but it's the personal
7 attributes that make that person whom and what they are.

8 JUDGE BATES: Well, why don't you read identity as
9 being name and title for the moment. Okay?

09:53:48 10 MR. KENNEY: Okay. Name and title. What could
11 possibly be wrong with identifying name and title? Well, I
12 think one of you asked if I knew that, couldn't I look that
13 person up? Couldn't I do some research on that person?

14 Now, starting with the proposition that 30(b)(6) is
09:54:07 15 about the information reasonably known to or available to the
16 corporation, as opposed to the individual witness, regular 30
17 deposition, what would you be the utility, what would be the
18 appropriate reason for looking up that person in social -- I
19 mean, you all know what a diligent, effective, energetic
09:54:31 20 lawyer will do. There will be social media research, there
21 will be research as to this person's work history, and that
22 will all likely show up in the questioning of that witness.

23 The question is whether that is appropriate, and I
24 submit to you that it is not and it is devoutly to be avoided.
09:54:47 25 And, as I say in this already fraught environment. It is not

09:54:51 1 fair, it's not appropriate, and it's not -- a deposition can
2 always be taken under Rule 30 of an individual witness if
3 someone wants to get there. But to use 30(b)(6), which is a
4 very different salutary process but for a very different
09:55:08 5 purpose, to use it to focus on the individuality of the
6 spokesperson is inappropriate.

7 MR. SELLERS: Let me ask you, when you select -- I
8 asked this before of somebody else. When you select witnesses
9 to be produced in a deposition, do you consider the job a
09:55:27 10 person held and what their knowledge may be of the subjects
11 that are designated for a deposition?

12 MR. KENNEY: Of course. Here's the point, and this
13 is why you can't separate meet and confer, in my opinion. If
14 I'm meeting and conferring, you just heard a proponent of this
09:55:43 15 rule say that the opposing party might want to know so that
16 they can discuss whether it was a proper witness.

17 Your question suggests that since I'm interested in
18 knowing the qualification of the witness, the other side might
19 be.

09:56:00 20 Here's the problem that I don't think has been
21 mentioned yet: This gets into my work product. And
22 potentially into attorney-client privileged information.
23 There may be any number of reasons why this, quote, more
24 qualified witness -- used to be a person most qualified. It's
09:56:17 25 not a PMK anymore. It's not a person most knowledgeable or

09:56:21 1 qualified. There could be any number of reasons that
2 implicate --

3 JUDGE JORDAN: It is in California.

4 MR. KENNEY: It is in California.

09:56:28 5 JUDGE BATES: But I don't understand, if you think
6 there's a work product or attorney-client problem, the lawyer
7 can handle that by declining to discuss in the meet and confer
8 some subject, just like they can say at the deposition, we
9 object to that question because you're getting into work
09:56:42 10 product. I don't understand what the problem would be.

11 MR. KENNEY: In trying to understand this question
12 why, I looked at the committee's comments, and the only
13 comments available about why the committee got to where it is
14 is that it might, quote, avoid future disputes.

09:56:59 15 But if you look at all of the literature and all of
16 the comments from proponents, it is invariably about avoiding
17 surprise, hiding the ball, hindering counsel's ability to
18 prepare, gamesmanship. Those are all of the reasons why they
19 ought to know who this person is.

09:57:19 20 There will be an argument that to have a meaningful
21 meet and confer, there has to be a discussion, as you just
22 heard, about the qualifications of the witness. To discuss
23 the qualifications of the witness inherently invades work
24 product.

09:57:35 25 JUDGE BATES: Let's set aside the meet and confer for

09:57:36 1 a moment and just talk about identity, whether a requirement
2 that the witness be identified some days in advance of the
3 deposition would really be that harmful.

4 It sounds like you're advocating the benefits of
09:57:50 5 surprise, which isn't really what our system elevates to the
6 highest favored level. You think it's better that there be a
7 surprise the day of the deposition as to who the witness is as
8 opposed to telling the other side who that witness is a few
9 days beforehand?

09:58:09 10 MR. KENNEY: Well, I respectfully reject that
11 characterization. I have no interest -- I don't need to
12 surprise them. What I -- surprise suggests that I'm going to
13 come in with someone who in some way subverts the purpose of
14 30(b)(6).

09:58:29 15 JUDGE JORDAN: No, I think the surprise here speaks
16 to your earlier comments, which is I don't want them to be
17 able to look things up about this witness. And in that
18 respect you want them surprised because you don't want them to
19 be able to look up things about the witness.

09:58:41 20 What is it about your desire on the defense side to
21 not allow advanced notice of the witness to provide an
22 opportunity for research that is significant enough to
23 outweigh the opportunity for a person on the other side to at
24 least know who is showing up in the witness chair?

09:59:04 25 MR. KENNEY: I don't want them to know because I

09:59:06 1 don't want the work of this body to be institutionalized, a
2 subversion of the salutary purpose of 30(b)(6), which is to
3 provide what the corporation knows. To respond honestly and
4 as fully and completely as possible to questions posed about
09:59:22 5 what the corporation knows.

6 JUDGE JORDAN: So the question --

7 MR. KENNEY: What is the value --

8 JUDGE JORDAN: The question put to you is how, if at
9 all, how would identifying the witness, not meeting and
09:59:31 10 conferring, but identifying the witness by name and title
11 subvert those purposes?

12 MR. KENNEY: Because it would -- it encourages -- I
13 can't think of any good reason for it other than -- and for
14 the life of me I can't think of a good reason -- other than
09:59:50 15 encouraging behavior which is completely apart from the
16 purposes of 30(b)(6).

17 JUDGE BATES: Might it not make the deposition more
18 efficient because the deposing noticing party would have the
19 opportunity to look over the documents and help to ascertain
10:00:08 20 exactly what topics this person really had the background to
21 talk about?

22 MR. KENNEY: I'm trying to think. Maybe in a nominal
23 sense, like that first half hour of the deposition. That
24 typically is what have you done, what's your resume. It might
10:00:23 25 do away with that. I think you'll spend far more time in the

10:00:27 1 meet-and-confer process than in the first half hour of the
2 deposition.

3 JUDGE BATES: All right. Any other questions?

4 JUDGE CAMPBELL: I have one for you, and I'd
10:00:33 5 appreciate other folks addressing this as well.

6 We've heard from folks who take these depositions
7 that they can't learn the identity of the witness before the
8 deposition, that's a general practice, that there is a
9 frequently recurring problem that witnesses who appear are not
10:00:51 10 prepared to testify. And we've been hearing that for 15
11 years.

12 How do we solve those problems? What can we do in
13 the rule to help ensure that the correct witness is put in the
14 chair and is prepared to testify?

10:01:08 15 MR. KENNEY: As a trial lawyer, I'll tell you that
16 I -- I know you've probably heard that anecdotally. I think
17 probably in any statistical sense it is de minimis for the
18 following good reasons. Federal judges come down with a
19 hammer when an improper 30(b)(6) witness has been put forward.
10:01:30 20 I, as a promulgator of 30(b)(6) notices, have made miserable
21 the lives of people who have put on witnesses who aren't
22 properly prepared, both in motion practice and most certainly
23 at trial, where you can play havoc with someone that comes in
24 not having taken their responsibility seriously. So I don't
10:01:49 25 think it's a problem.

10:01:53 1 JUDGE BATES: Thank you.

2 MR. KENNEY: Thank you.

3 JUDGE BATES: Our next witness, John Sundahl.

4 Mr. Sundahl.

10:02:02 5 MR. SUNDAHL: Members of the committee, thank you. I
6 am John Sundahl from Cheyenne, Wyoming, and I'm here on behalf
7 of the Defense Lawyers Association of Wyoming. Primarily
8 defense attorneys, not exclusively that. We come in
9 opposition of the rule.

10:02:18 10 When I was sitting here, I was thinking what am I
11 going to say to this august and obviously well-intentioned
12 group that has thought this thing through and has very, very
13 poignant questions, and I want back to the first presenter
14 that we had, and I think what we learned from that presenter
10:02:37 15 is that the rule seems to work just fine. We don't have any
16 reported cases indicating that there's a problem with it. To
17 the extent that there is a problem, we have a mechanism in
18 place where if the plaintiff believes that the witness is
19 inadequately prepared, he can go seek a motion for sanctions
10:02:58 20 in the federal court system. And he can do that.

21 So we have a situation in which, in Wyoming, we would
22 maybe describe as flawless. If it ain't broke, don't fix it.
23 So we have a situation where we really don't have a problem to
24 speak of.

10:03:17 25 And to the extent there is a problem, we have very

10:03:22 1 competent federal judges that can handle.

2 People always informally discuss things. Our
3 particular opposition is to the identity issue. In our
4 written comments that we provided on the 14th of December, I
10:03:37 5 sent in a couple of cases just as an example of things that
6 can go haywire when you get into a dispute about who's the
7 most knowledgeable, and if you allow the opponent to come in
8 and challenge the person that you have selected to be the
9 spokesman, and inject the deponent into the process of who is
10:04:05 10 to testify, you're creating an interesting and very
11 problematic situation.

12 JUDGE JORDAN: What if instead of meet and confer it
13 was identification only?

14 MR. SUNDAHL: I think the other would actually be in
10:04:20 15 a sense better because I don't think you have any obligation
16 to confer -- excuse me, to identify at this point. I don't
17 see any reason why it needs to occur.

18 JUDGE BATES: But what would be the harm if that were
19 a requirement?

10:04:38 20 MR. SUNDAHL: Well, to follow up on a couple of the
21 cases that I mentioned in my presentation, it promotes rather
22 than reduces the chance of challenge ahead of time regarding
23 the competency qualifications of the witness.

24 The one case that I mentioned, the one from actually
10:05:03 25 Arizona, was a case in which the person who likely was the

10:05:06 1 most problematic and the most knowledgeable, both, was the
2 supervisor of the employee who's suing on the basis of
3 harassment and discrimination. And that person wanted the
4 supervisor, who was the perpetrator, to be the one designated
10:05:24 5 as the witness because he was the immediate supervisor. And
6 that was not allowed in that case, and I think for good
7 reason. He was diametrically opposed in theory to the
8 position of the defendant organization because he was acting
9 within the scope of his employment. That's the position he's
10:05:50 10 going to be forced to take.

11 That's one example, and only one.

12 JUDGE BATES: Let me ask you this question: We've
13 heard from numerous federal judges, district judges, and
14 magistrate judges, that there really aren't Rule 30(b)(6)
10:06:04 15 issues that are brought to the court for resolution that
16 often. That to the extent that there are any issues that
17 arise, the lawyers tend to work them out. And maybe that's an
18 inefficient process and somebody needs to address that. But
19 the judges don't get burdened with it.

10:06:24 20 Do you believe if there were a requirement to
21 identify the witness seven days, five days in advance, that
22 that would lead to motions being brought to the judge that
23 this is the wrong witness? Is that really what would happen?

24 MR. SUNDAHL: In answer to your question, let me
10:06:41 25 break it into two components. Currently, where you do not

10:06:45 1 have the obligation to meet and confer, you're advising me,
2 and I concur with you, that the federal judges don't see a lot
3 of this problem being brought to their attention.

4 So we have a known in the past. If we want to
10:06:59 5 replace that known in the past with an unknown, which is what
6 happens if you now impose this requirement, then I would
7 respectfully submit that we are entering into a very gray area
8 that's unnecessary to go to.

9 JUDGE BATES: I'm not sure you answered my question,
10:07:15 10 though. Do you really believe that it would lead to more
11 motions practice with emergency motions being brought to the
12 judge immediately before the deposition?

13 MR. SUNDAHL: Yes.

14 Yes, I do. Because if there's a conflict about who
10:07:27 15 is or is not the most knowledgeable, the most proper to be
16 able to appear, and you allow your opponent to become involved
17 in that decision, then I think that that really creates
18 something that the body of law that's been established to date
19 does not support.

10:07:50 20 JUDGE ERICKSEN: So you think that identification is
21 going to lead to resurrection of the concept of the witness
22 needing to be the most knowledgeable? Because there's no
23 reference in the draft rule about the most knowledgeable.

24 MR. SUNDAHL: I understand that. But that is
10:08:04 25 inevitably -- we've heard it today. We've heard it in

10:08:06 1 questions and in the answers, that people are going to be
2 wondering and posing questions about who is or is not the
3 appropriate -- the most appropriate witness for the
4 organization.

10:08:18 5 JUDGE BATES: What if the committee note said
6 something about this is no change in the law, that you don't
7 have to have the most knowledgeable person, and also was very
8 unequivocal in stating that the choice of the witness remains
9 with the organization? Why would that create a problem?

10:08:39 10 MR. SUNDAHL: That would certainly help if that were
11 made emphatically, yes.

12 So essentially, we're coming from in Wyoming, we're
13 comfortable with the relationship that the lawyers in Wyoming
14 have with the federal courts, the willingness on the part of
10:08:56 15 the federal courts to use the rules of proportionality in
16 evaluating disputes, the willingness of the federal courts in
17 Wyoming to be able to adopt the protective order process if
18 necessary in advance of the deposition.

19 JUDGE JORDAN: You've got great judges there.

10:09:14 20 MR. SUNDAHL: We do.

21 JUDGE JORDAN: So what is the harm, though, if
22 advanced identification -- with the caveats and the advisory
23 committee note on the sort Judge Bates noted, would it not be
24 on balance a helpful thing if a witness were to be identified
10:09:34 25 and the opposing party could say, look, that's somebody we

10:09:41 1 were going to depose anyway, why don't we talk about how to
2 arrange this so that that individual only has to appear once?
3 Isn't that sort of -- doesn't that lead to efficiencies that
4 would be salutary?

10:09:55 5 JUDGE BATES: That combination of 30(b)(6) and normal
6 30 deposition.

7 MR. SUNDAHL: I agree. For example, Judge Bates,
8 when you were mentioning that somebody might be copied on a
9 document and therefore you have to figure out who the proper
10:10:07 10 person is who's going to appear, because the approach to the
11 deposition may be different, the answer to that is that if you
12 know who that person is, know that that person had a copy of
13 the document you want to inquire about, you can always do a 30
14 witness on them.

10:10:23 15 JUDGE BATES: I think Judge Conrad -- Jordan's
16 question is isn't there an efficiency from identifying the
17 witness because then there's a possibility of sort of
18 combining the two depositions that might otherwise be
19 occurring of that same individual.

10:10:40 20 MR. SUNDAHL: To be direct, yes. That is an
21 efficiency. I'm not so sure that it really makes any
22 difference. I think people actually do talk about those
23 things informally anyway. At least we do in Wyoming.

24 JUDGE JORDAN: So then the question arises if it's
10:10:56 25 happening, this won't represent much of a change, why the

10:11:00 1 vigorous concern? About, again, not talking about meeting and
2 conferring at this point, but just the question of identifying
3 the witness by name and title.

4 MR. SUNDAHL: Well, to answer the question as I have
10:11:14 5 previously, if it's not currently broken and it currently
6 works well, without the identity having to be disclosed and
7 there haven't been reported cases, why do we want to change it
8 in the first place?

9 JUDGE BATES: So one of the things that the rules
10:11:33 10 process does is receive a lot of information as to what the
11 best practices are, what the good lawyers do anyway. But a
12 rule sometimes is intended to address not just what the good
13 lawyers do, but to take that and to set it for all of the
14 lawyers to follow. If the good lawyers are doing something,
10:11:52 15 why not have a rule that all lawyers will then undertake.

16 MR. SUNDAHL: If I may be so bold --

17 JUDGE BATES: You may.

18 MR. SUNDAHL: If the bad lawyers, and there are bad
19 lawyers out there, want to use the appropriate rule of
10:12:11 20 30(b)(6) to conduct a deposition, they're going to do it in
21 any way they can do it to create the most difficulty for the
22 organization and to create the biggest advantage for the
23 plaintiff, typically. And so the bad lawyers are going to be
24 the ones that are going to be dragging the good lawyers along
10:12:34 25 if you implement that rule. I think we should really leave it

10:12:38 1 alone at all costs.

2 JUDGE BATES: Thank you very much, Mr. Sundahl. We
3 appreciate it.

4 Next we'll hear from Lee Mickus.

10:12:53 5 MR. MICKUS: Thank you very much. I appreciate the
6 chance to appear before the committee.

7 I come to you as a civil litigator with about 25
8 years of experience. I practice at a firm called
9 Taylor Anderson in Denver, but my practice is national. I
10:13:10 10 typically represent manufacturers in product liability cases,
11 mass torts, and patent litigation. And over the course of my
12 career, I've been involved in 30(b)(6) practice on dozens and
13 dozens of occasions ranging from working to identify the
14 witness to preparing him to testify, raising objections, and
10:13:27 15 ultimately defending the deposition.

16 My perspective on this rule is that the proposed
17 amendment fails to address the real needs of 30(b)(6) and
18 represents a missed opportunity. What is proposed, and in
19 particular the mandate to confer regarding witness identity,
10:13:44 20 or even as I'm now hearing, the idea of simple disclosure of
21 the name and title, will actually make 30(b)(6) depositions
22 more troublesome and more difficult.

23 Now, I want to respond to some of the questions that
24 I have heard raised about, what's the problem? Isn't this
10:14:03 25 just the defense trying to foist a surprise onto the noticing

10:14:07 1 party.

2 And my response is no. It's not about surprise.
3 It's about information that is irrelevant and information that
4 is going to become a distraction and ultimately lead to some
10:14:19 5 more disputes.

6 Why do I say that? Well, first off, it's irrelevant
7 because, as we all know, 30(b)(6) depositions are about the
8 corporate knowledge, and case after case, and I've cited them
9 to you in my written comments, the courts have determined and
10:14:32 10 said explicitly the name of the witness is simply irrelevant.

11 But why do I care? And I will tell you, in my own
12 practice it is highly unusual for the name to be disclosed in
13 advance of the deposition. Why is that -- that the case? For
14 me, in those instances where the name has been disclosed in
10:14:54 15 advance, it changes the nature of the process and the
16 deposition becomes muddled and it becomes confusing and the
17 record becomes discombobulated.

18 JUDGE ERICKSEN: Is that because the questioning
19 blurs the line between the corporate representative and the
10:15:12 20 individual?

21 MR. MICKUS: Exactly. Exactly. Because once that
22 information is put on the table, we can expect that the
23 noticing party is going to use it. Engaging in social media
24 searches, engaging in transcript reviews if the witness has
10:15:28 25 been deposed or testified previously, doing other sorts of

10:15:32 1 background.

2 And now the deposition becomes not just about what is
3 the corporate information that is reasonably available on X,
4 Y, and Z issues, it becomes what is the personal experience of
10:15:44 5 this person. What did they do at a previous employer, how did
6 the previous employer handle this same issue.

7 JUDGE ERICKSEN: Can you imagine a time when you're
8 meeting and conferring in advance about the number of topics.
9 Let's say you get deposition notice that is one of those
10:15:58 10 outlier extremes that we heard about where, say, 150 topics or
11 something.

12 MR. MICKUS: Sure.

13 JUDGE ERICKSEN: So you're meeting and conferring.
14 Can you imagine a situation in which a discussion about the
10:16:13 15 person who might be able to testify would help you mutually
16 come to a winnowing down of those topics? There's no way we
17 can have one person know this and this, we might have somebody
18 who would know this subcategory, and the deposition notice
19 could be broken down?

10:16:33 20 MR. MICKUS: You know, what I'm envisioning, as I
21 think about the scenario you've posed, is frankly a discussion
22 not just about deposition topics, I would imagine about
23 discussion about the discovery as a whole, because rarely is
24 it a case where only a 30(b)(6) deposition occurs. Usually
10:16:54 25 there are going to be other named individuals. And so the

10:16:57 1 discussion may go, okay, I've seen your 150-topic notice. All
2 right, Mr. Plaintiff's counsel, who else are you considering
3 deposing in this case? And if they tell me, okay, Joe Smith
4 and Bob Jones, I'm going to say --

10:17:14 5 PROF. MARCUS: They have to reveal that, you think.

6 MR. MICKUS: They're going to anyway.

7 JUDGE ERICKSEN: They have to if they are going to
8 depose them.

9 MR. MICKUS: If they're going to depose those people,
10 then we have that discussion as part of a broader context of
11 how discovery is going to proceed.

12 And I've actually suggested that that is the sort of
13 conversation that ought to be happening in preliminary cases.

14 PROF. MARCUS: And if that discussion leads to
15 identification of witnesses A, B, and C, who would also be
16 probably those you'd designate, you don't want to tell them
17 that?

18 JUDGE ERICKSEN: I think he's saying you might tell
19 them that.

10:17:51 20 MR. MICKUS: Conceivably, I might. But what I don't
21 want to have happen is for a deposition to degenerate into
22 this muddle where we're proceeding with a 30(a) deposition as
23 well as a 30(b)(6) at the same time, and then I've got to
24 object every third question that that's outside the scope, the
10:18:07 25 witness is no longer testifying about the corporate knowledge,

10:18:09 1 he's testifying or she's testifying about his or her personal
2 knowledge. And then, if that deposition ultimately gets
3 presented at trial, you can imagine the distraction that that
4 becomes with having to have instructions to the jury about the
10:18:23 5 capacity of the witness in giving this answer versus that
6 answer. That makes for a real mess at trial.

7 JUDGE BATES: Have you had that occur?

8 MR. MICKUS: Yes.

9 JUDGE BATES: Has it occurred in situations where the
10:18:36 10 reason that it occurred was because you identified the witness
11 in advance of the deposition?

12 MR. MICKUS: Yes.

13 JUDGE BATES: How often has that happened?

14 MR. MICKUS: Because I rarely will identify the
10:18:47 15 witness in advance, and it's because of that. In fact, three
16 or four times come immediately to mind, Your Honor, where I
17 have revealed the name and because of that the information
18 gets used and the deposition just turns into this muddled mess
19 where the -- where it becomes a less efficient process.

10:19:08 20 JUDGE ERICKSEN: The idea is because in advance of a
21 deposition, the defense or whoever is the recipient of the
22 notice, has to go get a protective order because this is
23 unwieldy or whatever the problem.

24 Then, you get to the deposition, you have a witness
10:19:27 25 who is ill prepared, and then you have a fight either during

10:19:30 1 the deposition or you have to go to court after the
2 deposition, and the idea is to try to minimize those problems
3 on either end. There is a timing difference, obviously,
4 between the -- when the two types of disputes arise.

10:19:46 5 If there is a meet and confer about the identity of
6 the witness, would that not make it more difficult to complain
7 later that the wrong person was selected?

8 MR. MICKUS: I guess I don't see that because
9 ultimately if my witness, whoever that person might be, can't
10 answer the questions because that witness was not properly
11 prepared and I didn't anticipate the direction that the
12 questioning was going to head, then that's ultimately going to
13 be on me. And I can't imagine a scenario where my opponent is
14 going to say, you give me Bob Jones and I guarantee you I will
15 never object. I don't anticipate any good advocate would ever
16 say that. What they will say is, I want Bob Jones, and, of
17 course, when I hear that, then I immediately become skeptical
18 because it is an adversarial system, and if he wants Bob
19 Jones, then I think counsel on the other side has something,
20 and I'm concerned about that.

21 And so I think frankly there is even a risk that the
22 adversarial nature could lead to more of a breakdown than more
23 of the parties coming together.

24 JUDGE BATES: Mr. Mickus, let me ask you to address
10:21:03 25 the question Judge Campbell asked earlier of another witness.

10:21:06 1 The response from that witness was it just doesn't happen.
2 The question is, if there's a problem with respect, as we hear
3 frequently, with respect to the correct witness being produced
4 and that witness being properly prepared, how can we best deal
10:21:20 5 with that from a rules perspective?

6 MR. MICKUS: Thank you. I was hoping I would get a
7 chance to address Judge Campbell's question.

8 In my perspective, some advancement would be gained
9 from the meet and confer about the topics in advance. I think
10:21:38 10 there's going to be a small step, but I agree with what we
11 have heard, that that is largely already taking place to some
12 extent.

13 But I think the better avenue is to allow an
14 objections procedure that is defined so that if -- and
10:21:52 15 ultimately, if a witness is improperly prepared, I will tell
16 you from my perspective, if that happens at a deposition, that
17 is because there was not a mutual understanding of the nature
18 of the topics that were going to be addressed at the
19 deposition.

10:22:05 20 JUDGE BATES: What do you mean objection procedure?
21 Do you mean just something that is between the lawyers, or do
22 you mean something in the rules that brings objections to the
23 court for resolution in advance of the deposition?

24 MR. MICKUS: The latter.

10:22:20 25 JUDGE BATES: That doesn't exist for any deposition

10:22:21 1 now, does it?

2 MR. MICKUS: It does not. But Rule 30(b)(6) is very
3 different.

4 JUDGE BATES: Don't you think that would increase
10:22:27 5 dramatically the amount of litigation over 30(b)(6) issues
6 that the judges have to deal with?

7 MR. MICKUS: I do not. I do --

8 JUDGE BATES: Then what's the purpose of it if it
9 won't do that?

10:22:39 10 MR. MICKUS: The purpose of it is there are going to
11 be some circumstances, some topics, some noticing counsel
12 where we just can't communicate and we, for whatever reason,
13 both sides are dug in and we have a genuine dispute about
14 discovery. Maybe it's about proportionality of a particular
10:22:53 15 topic. Maybe it's about relevance of a particular topic.
16 Maybe it's about how far that topic goes into privilege issues
17 or work product. We can envision a bunch of different
18 scenarios.

19 I never want to bring a discovery dispute to the
10:23:07 20 federal courts because I know they're not popular things on
21 the dockets. It's going to be a very, very serious issue.
22 And if I have that, then I can actually get some definition.
23 I can force a resolution and force a meeting of the mind where
24 there is an objective determination that is made: This is
10:23:30 25 what is going to be covered at the deposition.

10:23:33 1 JUDGE JORDAN: Since this is, in the end, sort of a
2 cost-benefit analysis, right, your arguments against advanced
3 identification are explicitly -- it will cause more trouble
4 than it will solve, does incorporating a Rule 45 kind of
10:23:51 5 procedure into the 30(b)(6) process, is that going to cause
6 more problems than it resolves? We've heard emphatically from
7 some of your colleagues on the defense bar side if it ain't
8 broke, don't fix it.

9 Is inserting this into the rule going to, in fact, be
10:24:07 10 more costly than beneficial?

11 MR. MICKUS: I don't think so. I think you would get
12 more benefit out of it if there is an opportunity to get the
13 definition of what the topic is and how the witness is going
14 to be able to proceed so the boundaries are established.

10:24:25 15 Usually, usually counsel can work that out. But if it can't
16 get worked out, it's going to ultimately end up in one of
17 these motions anyway where noticing counsel is going to
18 complain that my witness was not properly prepared. I want my
19 witness to be properly prepared. There is nothing good that
10:24:42 20 comes out from --

21 JUDGE JORDAN: It will. If it's really a problem, it
22 will come up. So if we invite the fight before the
23 deposition, when we don't know whether it is actually going to
24 be a problem, how is that beneficial to the system and not
10:24:59 25 just adding costs and dispute?

10:25:03 1 MR. MICKUS: I don't know that it's inviting. It's
2 allowing a procedure so that issue can be addressed where we
3 can work it out without having to go through the deposition
4 and then go through motions on the back end.

10:25:15 5 And another alternative that I know has been
6 considered is working this into the initial case conferences,
7 where discussions about the nature of the discovery plan, and
8 especially 30(b)(6)s, are laid out so I can start the planning
9 process, I can start trying to identify what the documents are
10:25:36 10 that my witnesses are going to need to review, who else in the
11 department we need to interview, all of those sorts of things.

12 So, again, it is all about developing a mutual
13 understanding so I can get my witnesses prepared, and wherever
14 that happens, it needs to happen at some point. And when the
10:25:53 15 process breaks down, that's where the breakdown occurs.

16 JUDGE BATES: All right. Mr. Mickus, thank you very
17 much. We appreciate your testimony.

18 MR. MICKUS: Thank you.

19 JUDGE BATES: Next we will hear from Bradley Smith,
10:26:01 20 please.

21 MR. SMITH: Good morning. I appreciate the
22 opportunity to testify here today.

23 My name is Bradley Smith. I'm from Jackson,
24 Mississippi. I'm with Baker Donelson in the Jackson,
10:26:19 25 Mississippi office. I've been litigating for 25 years, and I

10:26:25 1 have defended and taken 30(b)(6) depositions throughout that
2 time.

3 I want to focus today on this notice provision with
4 respect to the identity of the witness. And if I may, I'd
10:26:35 5 like to provide you all with two recent examples for two
6 companies that -- and I'll start with one that I think makes
7 it very problematic if this proposed change goes into effect.

8 There are, as you're aware, litigation with -- I
9 guess some businesses where the businesses are not in a mesh
10:27:01 10 type litigation or automotive product liability litigation
11 where they have established a very vast resource general
12 counsel procedures they receive and defend -- receive 30(b)(6)
13 notices and defend a great deal.

14 Recently, defendant, a dram shop case for a global
10:27:21 15 wine manufacturer, one of the largest in the world,
16 headquartered in California, they sponsored an event in
17 Mississippi. There was an awful accident and the 30(b)(6)
18 deposition notice was received.

19 I had actually flown to California. We got ready one
10:27:40 20 round, and then when we were back preparing two days before
21 the deposition, it became apparent to me that the witness was
22 not the appropriate witness because she would not be able to
23 answer the questions. And we had worked with her previously
24 and I had several phone conversations with her.

10:28:03 25 We had another individual from the company drive down

10:28:06 1 to San Francisco where the depositions were being held, and
2 worked all night and all day preparing for the deposition.
3 And the reason we did that was because the questions in the
4 30(b)(6) notice were numerous, but that the plaintiff's lawyer
10:28:21 5 and I both had agreed that they were arguably relevant, I
6 wanted to make certain that those questions were answered,
7 information was provided.

8 And, in fact, what Mr. Kenney said with respect to if
9 you're going to make this change, the question of why. And we
10:28:39 10 talked about harm. But if the purpose of a 30(b)(6) is for
11 that lawyer to obtain the information critical to proving
12 their claims asserted in the complaint and they designate the
13 topics that will enable them to do that, then the identity of
14 the witness is not relevant to that.

10:29:03 15 And one of -- I think, Your Honor, Justice Bates,
16 you -- I think -- I believe you said if you know the witness,
17 it would not make a difference. You mentioned I think one set
18 of documents may be focused on, and my response to that is it
19 shouldn't make a difference, and your responsibility is to
10:29:25 20 prove your claims through documents, you should determine
21 which documents are best to establish your claims. And it
22 shouldn't matter who the witnesses is.

23 In that instance, and I can count on one hand -- go
24 ahead.

10:29:41 25 JUDGE BATES: You've mentioned specific situation,

10:29:44 1 and I'm curious as to how a rule that required either or both
2 preidentification of the witness some days in advance of the
3 deposition or meet and confer on the identity of the witness
4 would have made the situation worse in that case.

10:30:01 5 MR. SMITH: Well, if --

6 JUDGE BATES: Sounds like it was a bad situation
7 anyway. How would that have made it worse?

8 MR. SMITH: An opportunistic plaintiffs lawyer. And
9 the plaintiffs lawyer in this case, we have a long
10:30:12 10 relationship, and all he cared about was getting the
11 information he wanted. He did not care about who was
12 providing the information.

13 I can count on one hand how many times I've had
14 opposing counsel ask or request identity of a witness, and the
10:30:22 15 reason is, fortunately for most of my 30(b)(6)s, they know
16 what they want and they want it and they don't care who is
17 providing it because it does not matter because a 30(b)(6) is
18 not for that purpose.

19 But in that situation, if there were a seven- or
10:30:36 20 four-day notice period, I would be in violation of that. I
21 would have called this opposing counsel as he's boarding a
22 flight from Jackson, Mississippi, flying to San Francisco,
23 saying she's not going to testify.

24 JUDGE BATES: There probably would have -- with good
10:30:55 25 counsel on both sides, it would have caused a conversation and

10:30:58 1 perhaps a two-day postponement of the deposition, so it would
2 have been better for all involved.

3 MR. SMITH: Well, I don't think it would have been
4 better for the company. It would have been more work and it
10:31:08 5 would have been -- it created a difficult circumstance where
6 there was no need.

7 The other situation was a pedicle screw products
8 liability case in Denver. The identified -- the witnesses
9 that I identified, it was a regulatory submission and approval
10:31:27 10 witness, and then the chief R&D engineering side of it. So we
11 had three witnesses that I had worked with all of them.

12 When we got to the preparation phase, and it was two
13 days in Denver preparing for this deposition, it became clear
14 to me that the chief engineer in R&D was not the engineer that
10:31:47 15 we needed to be testifying. Because of the nature of the
16 claims in terms of failure rates of the pedicle screw, the
17 medical grade surgical steel that was purchased from China, it
18 became apparent during the prep process that the lower
19 engineers are the ones that are more involved directly with
10:32:06 20 the Chinese manufacturer, those were the witnesses that needed
21 to be designated -- and this was two days before the
22 deposition -- in order to fully and adequately respond to the
23 30(b)(6) topics.

24 So I gave you that example. I mean, I was
10:32:21 25 substituting two engineers.

10:32:23 1 And I think, Mr. Sellers, when you mentioned, would
2 it not be best to -- and in that case, if I was going to give
3 the identity to the plaintiff's counsel, he would say, I want
4 the chief of R&D engineering. Right? That's who you want;
10:32:38 5 right? Well, in that circumstance, that's not the best -- I
6 found out after working two days --

7 JUDGE BATES: But you have the opportunity to say
8 that even with the rule as proposed in terms of an amendment
9 to say, no, I get to choose who the witness is. And I don't
10:32:54 10 even have to explain all of reasons for it if there are some
11 reasons that shouldn't be shared with the other side.

12 MR. SMITH: I would, Your Honor, but the proposed
13 amendment as it is now, the opposing counsel would be able to
14 make an argument that would be effective with certain federal
10:33:12 15 judges in Mississippi that, hey, they switched the witness the
16 day before or two days before. He told me he pulled the chief
17 R&D that I had been preparing for to depose him, and I had to
18 depose those lower engineers.

19 And so I just -- if the purpose is to advance your
10:33:32 20 case and get the information you want, I respectfully submit
21 that the identity does not matter. It cannot be relevant. If
22 you are truly trying to advance your claims in the complaint
23 and finding out the information, it might be helpful for
24 preliminary, as he mentioned, but I just don't think it's
10:33:52 25 necessary, and I think it can be problematic, particularly for

10:33:55 1 companies that I mentioned that don't have a large 30(b)(6)
2 practice.

3 JUDGE BATES: How about the companies with the large
4 30(b)(6) practice that you mentioned who frequently are
10:34:06 5 dealing with this? We're not looking to benefit one side or
6 the other; we're looking to -- looking for benefits to the
7 civil justice system. And wouldn't it be beneficial for a
8 noticing party to know that the witness was Joe Smith, and
9 Joe Smith then he could look up and had been a 30(b)(6)
10:34:30 10 deposition deponent for six other occasions and they could
11 look at those transcripts. Wouldn't it make it a more
12 efficient deposition?

13 MR. SMITH: It might --

14 JUDGE BATES: It might be more difficult for the
10:34:42 15 company in some ways, but certainly would be more efficient,
16 wouldn't it?

17 MR. SMITH: It might be more efficient for that
18 particular lawyer for the preliminary stuff. And I'll give
19 you an example of a --

10:34:57 20 JUDGE BATES: Not just preliminary stuff if they gave
21 previous 30(b)(6) depositions.

22 MR. SMITH: That's -- I would respectfully submit
23 that is not the purpose of it. I want to give one example
24 where that's happened for an automotive manufacturer that I
10:35:11 25 represent where the identity was provided and the plaintiff's

10:35:17 1 counsel said, I'm not going to depose him, I know what he's
2 going to say. So --

3 JUDGE JORDAN: Well, isn't that a benefit to the
4 system? Right? Didn't you, by providing that information and
10:35:30 5 the other side saying we don't need that, that kind of goes to
6 the point.

7 You've said that there are five occasions, you can
8 count on one hand the number of times people ask. So can you
9 share with us on those occasions when it was asked, did it
10:35:45 10 turn into a problem or did it turn into something perhaps
11 efficiency producing like the instance you just cited?

12 MR. SMITH: Well, it was not a problem when the name
13 was given, but it -- if it proves my point, if the particular
14 party lawyer needs the 30(b)(6), then the identity, if the
10:36:09 15 sharing of the identity makes the 30(b)(6) nonessential to his
16 case, then I question whether the requirement, the proposed
17 amendment requiring the identity to be disclosed, is doing
18 anything to help the 30(b)(6) process and to help those taking
19 the depositions get the knowledge and information they really
10:36:31 20 need.

21 JUDGE BATES: Any last question for Mr. Smith?

22 Mr. Smith, thank you very much.

23 MR. SMITH: Thank you.

24 JUDGE BATES: We'll hear next from Bill Rossbach.

10:36:41 25 MR. ROSSBACH: Thank you, all. I'm Bill Rossbach

10:36:51 1 from Missoula, Montana. I've had the opportunity to talk to
2 some of you previously as a member of AAJ at a meeting we had
3 informally about this. Some of those topics I'm not going
4 to -- were in my written materials, so I'm going to kind of
10:37:07 5 try to sort of like a little bit of a rebuttal here, kind of
6 skip around a little bit and try to address some of the
7 questions.

8 First of all, I start -- in any testimony about any
9 of the rule changes, I start with Rule 1, and does Rule 1 --
10:37:23 10 is Rule 1 advanced? Just, speedy, and inexpensive? Are those
11 principles advanced by the amendments? And my suggestion is,
12 is that the meet and confer and identity of witnesses will
13 advance just, speedy, and inexpensive.

14 Let me -- I gave some examples. I've been a trial
10:37:43 15 lawyer for almost 40 years. I've tried everything from auto
16 accidents, but mostly I try scientific and medical cases,
17 technical cases, product liability. I started doing
18 individual product liability cases right out of law school.
19 One of the first ones I mention in here was the battery case,
10:38:01 20 exploding battery case. I took one 30(b)(6) deposition and
21 settled the case. I had hundreds and of engineers and
22 documents and thousands of pages of documents. I looked
23 through the documents. I found a couple of areas that I
24 thought were really important, my expert said. We took one
10:38:17 25 30(b)(6) and settled the case.

10:38:19 1 Recently, I'm still involved in an environmental
2 case, and this addresses the issue of identification. First
3 of all, let me say I have -- I can't recall, and I'm talking
4 to my colleagues here who have done many 30(b)(6)s. In 40
10:38:35 5 years I can't remember a 30(b)(6) where we didn't have the
6 names of the witnesses at some point in the process. I can't
7 remember a single one.

8 JUDGE JORDAN: When you say at some point in the
9 process --

10:38:45 10 JUDGE BATES: You mean before the start of the
11 deposition?

12 MR. ROSSBACH: Let me get to that. Okay. I'll give
13 you my example. In one of them we learned about it two days
14 in advance.

10:38:53 15 JUDGE JORDAN: Okay. We're hearing really
16 diametrically opposite experiences --

17 MR. ROSSBACH: I understand.

18 JUDGE JORDAN: -- people saying, I've practiced for
19 four decades and I can count on one hand with fingers missing
10:39:05 20 the number of times people have asked and you say, no, it
21 happens all the time, so --

22 MR. ROSSBACH: It happened every time that I can
23 remember.

24 JUDGE JORDAN: Can I just ask you real quickly, you
10:39:14 25 said your opponents, you let opponents provide no good reason

10:39:17 1 why disclosure of names of witnesses should not be required.
2 You listened here today to people saying it will cause
3 disruption because there will be a blurring of the line
4 between ordinary Rule 30 and 30(b)(6) depositions, we'll get
10:39:33 5 into irrelevant material, there will be multiple objections
6 and perhaps need to go to the court to get the deposition
7 confined to its proper scope. That sounds like a good and
8 principled reason if it's accurate.

9 What's your response to that?

10:39:53 10 MR. ROSSBACH: Well, first of all, I never had that
11 experience in exactly that form. Part of the -- part of the
12 reason you have a meet and confer is to be able to go through
13 this and to be able to focus on the topics.

14 And let me give you an example, is a recent case, the
10:40:09 15 environmental case involving the power plant that I addressed
16 in my -- we had -- originally we set out something like 50
17 matters to be discussed, and we identified documents that
18 talked about that, and we even quoted some of the material in
19 the notice, in the specific list. They came back and said,
10:40:29 20 well, you know, this isn't very clear to us, how about this,
21 and we had this ongoing iterative process.

22 JUDGE JORDAN: Great. Meet and conferring about
23 topics. That's really not the subject of my question.

24 MR. ROSSBACH: But that's what I'm going to get to.

10:40:44 25 And then they said, okay, we're going to have four

10:40:46 1 witnesses and these witnesses are going to be available on
2 these dates. We said, fine. We started preparing. They
3 named the witnesses. A week before, they came in and said,
4 well, looks like we can do this with only two witnesses or
10:40:58 5 three witnesses, and we ended up having two witnesses in the
6 case, and those were the only witnesses that we ever needed in
7 the case.

8 JUDGE JORDAN: And if you didn't know the names of
9 the witnesses but they said we're going to do four, now we're
10:41:11 10 going to do two, would that have made a difference or would
11 you have had the same efficiency?

12 MR. ROSSBACH: Well, part of the efficiency was by
13 having the names of the witnesses, we were able to then go
14 word search the documents and make sure that we had all of the
10:41:24 15 documents covering those topics for those individuals.

16 I mean, example in the battery case, I had 100
17 engineers in various documents. When they identified the
18 witness, I was able to see which part of those documents this
19 witness was involved in and I was able to focus a little bit
10:41:45 20 better the questions that I made.

21 JUDGE ERICKSEN: Isn't that the exact muddling that
22 we heard one of the other speakers talk about? That if you're
23 asking the person about the things they actually know
24 personally as opposed to the information that they've been
10:42:01 25 made aware of as part of the 30(b)(6) process, then how do you

10:42:05 1 know when you're asking questions whether you're asking based
2 on the personal knowledge or based on the corporate
3 representative job?

4 MR. ROSSBACH: I'm not sure it matters. I mean,
10:42:17 5 you're asking the questions what was the corporation doing,
6 and then if you have a document that is dealing with that
7 particular topic, you can show it to him and help him -- I
8 mean --

9 JUDGE ERICKSEN: It has to do --

10:42:30 10 MR. ROSSBACH: -- it makes it a more efficient
11 process if you have actual specific documents that talk about
12 it. That's just the reality of taking a deposition.

13 JUDGE ERICKSEN: And so either one would be
14 admissible as substance as nonhearsay?

10:42:46 15 MR. ROSSBACH: If -- if -- if the deposition -- if
16 the deposition is -- if you're talking about the topic of the
17 deposition, if it's within the realm of the matter, I don't
18 see what difference it makes.

19 I see I'm running out of time.

10:43:04 20 JUDGE JORDAN: That seems to be precisely the point,
21 so I'll try to ask this quickly. The assertion we keep
22 hearing is the identity of the witness should be irrelevant,
23 whoever is on that witness chair has got to speak to those
24 topics and it shouldn't matter whose mouth is giving the
10:43:20 25 answer.

10:43:20 1 So what is it about knowing the identity of the
2 witness that is relevant and advances the purpose of the
3 30(b)(6) deposition?

4 MR. ROSSBACH: Okay. What it matters is that you
10:43:34 5 might have hundreds of thousands of documents involving a
6 particular topic. If you have documents that a witness has
7 particularly been involved in, it's going to be a more
8 efficient process. You're not going to be fishing around
9 looking at thousands of documents and asking thousands of
10:43:52 10 questions about a particular topic when you have particular
11 documents that that deponent knows about.

12 I would like to --

13 JUDGE BATES: So if in fact there were a requirement
14 that the witness be identified in advance, would it also be an
10:44:13 15 aid to efficiency to require the noticing party to identify
16 the documents that they were going to use at the deposition?

17 MR. ROSSBACH: I think there's a value to having some
18 of those documents. The problem is, is it's just like
19 anything, you can't anticipate where it's going to go. I try
10:44:30 20 to identify the documents. But you're going through something
21 and something comes up that's part of that matter and you have
22 just another document that you remember that may go and help
23 kind of focus the deposition further.

24 I do try to identify documents. And I think talking
10:44:46 25 about the documents, as the note says, is a very good idea. I

10:44:52 1 totally agree with that.

2 I have a point, though, that I think is important
3 here about the note for the committee and that is, is that we
4 don't -- we have plenty of procedures already in place. We
10:45:06 5 have Rule 26. Rule 26, if it's the guidepost to our meet and
6 confer, will help you and the lawyers, who are good lawyers,
7 understand. Is this proportional? Are these matters
8 proportional? Is the evidence that's coming out of these
9 matters proportional to the case? And that's already there.

10:45:28 10 And there's plenty of processes for making
11 objections, motions for protective order, they all exist
12 already. And I think the meet and confer is an important part
13 of that process. I've never had a case where we haven't had
14 some meet and confer and some discussion about who the
10:45:45 15 witnesses might be and all of that. And as a result I've
16 never had a motion practice after the motion -- after the
17 30(b)(6).

18 JUDGE CAMPBELL: So what is your concern about the
19 note?

10:45:55 20 MR. ROSSBACH: No, my concern about the note was
21 maybe add in something about the processes that already exist,
22 Rule 26, objections at the time, objections after the fact,
23 motions for protective order are all available processes that
24 we don't have to -- we don't have to create a separate set of
10:46:14 25 processes for Rule 30(b)(6). Plenty of processes exist to

10:46:19 1 protect the parties in that case.

2 JUDGE BATES: So let me carry Judge Campbell's order
3 with you and ask you from your perspective, which is the other
4 side of the V, for the most part, do you --

10:46:34 5 MR. ROSSBACH: I've defended 30(b)(6)s as well.

6 JUDGE BATES: But do you think, from your experience,
7 is there a problem with having the correct witness and a
8 prepared witness? Is that a recurring problem?

9 MR. ROSSBACH: It occurs. But I don't -- I think,
10 you know, when you're dealing -- no. It hasn't occurred in a
11 significant level for me. I mean, that's my personal
12 experience about it. But it has happened. And in those cases
13 you may have to -- you may do another supplemental 30(b)(6) to
14 get the right person or -- or it may have been a problem with
10:47:07 15 the way you set the notice up, and that's why a meet and
16 confer is important so that both sides understand exactly what
17 the question is, what are you trying to get from this.

18 And that's what happened in the most recent case,
19 huge case. Millions of dollars at stake, we took four
10:47:25 20 depositions in the case and it's ready for trial. Four
21 30(b)(6) depositions and it's ready for trial. And we talked
22 about it extensively before we got there. That's how it got
23 resolved. That's how we -- just, speedy, and inexpensive.

24 JUDGE BATES: All right. Thank you very much,
10:47:40 25 Mr. Rossbach.

10:47:41 1 Next, Patrick Fowler, please.

2 MR. FOWLER: Good morning, sir.

3 JUDGE BATES: Good morning.

4 MR. FOWLER: Thank you for giving me the opportunity
10:47:48 5 to speak. My name is Patrick Fowler. I'm with the law firm
6 Snell & Wilmer here in Phoenix. And like a number of the
7 other people with gray hair, I have been practicing for about
8 30 years, primarily representing corporate defendants and
9 product liability and business litigation. I've probably -- I
10:48:04 10 was thinking back on it, probably defended about a hundred
11 30(b)(6) depositions, and have taken a number as well.

12 The point I want to make and my concern with the
13 proposed amendment, and I would urge the committee not to
14 adopt the portion of the proposed amendment concerning
10:48:20 15 essentially the disclosure of the identity of witnesses in
16 advance of the 30(b)(6). I think it is a solution in search
17 of a problem. I think the unintended consequences of adopting
18 this part of the proposed amendment will inevitably lead to
19 the weaponization of this essentially new discovery
10:48:42 20 requirement.

21 Lawyers being lawyers, they find ways to use new
22 rules to their advantage. And I think what will happen here
23 is, as other speakers have addressed, you give the name of the
24 witness seven days, whatever, in advance. The deposition,
10:49:05 25 which is intended to be the testimony of the corporation, will

10:49:09 1 then invariably turn into a hybrid 30(b)(6) and percipient
2 witness deposition.

3 And as Mr. Mickus explained earlier, it will lead to
4 a muddled record where, if I'm defending the deposition and
10:49:28 5 there are questions asked which are clearly outside of the
6 scope of the topics in the 30(b)(6) but are unique to that
7 particular person, then I'll be having to make objections
8 repeatedly that the question is outside the scope, that it's
9 not binding on the corporation. But I can't, you know,
10:49:47 10 instruct the witness not to answer because that wouldn't be
11 appropriate.

12 So you end up with a muddled deposition which will be
13 difficult to use if and when it goes to trial.

14 JUDGE JORDAN: Has it happened to you before?

10:50:00 15 MR. FOWLER: Yes.

16 JUDGE JORDAN: Out of the hundred-plus depositions,
17 30(b)(6) depositions you've dealt with, on how many occasions,
18 if any, did the question of the identity of a witness come up
19 in advance?

10:50:13 20 MR. FOWLER: In my experience, and I practice in
21 Arizona and across the country, it's unusual for a plaintiff
22 lawyer to ask me the name of the corporate witness. In some
23 cases they infer it because it is pattern litigation and they
24 may have an assumption of who it is.

10:50:33 25 JUDGE JORDAN: But it has come up on occasion where

10:50:35 1 they've asked?

2 MR. FOWLER: It has come up on occasion.

3 JUDGE JORDAN: And has that proved problematic?

4 MR. FOWLER: It has in some cases. Not every case.

10:50:43 5 In some cases it's not been a problem.

6 Where I see the issue -- if it's a deposition,
7 30(b)(6), and there are five or ten or 15 topics, something
8 you can manageably cover in a seven-hour time frame, it's
9 usually not going to be an issue.

10:50:59 10 Where the problem arises is when I get a 95 topic
11 30(b)(6), which is supposedly going to be covered in seven
12 hours, and of course it isn't. And then the opposing party,
13 the noticing party learns the name of the corporate designee,
14 you spend days, maybe weeks getting ready for a 30(b)(6) where
10:51:19 15 there are 95 topics, and then the deposition spirals into what
16 does that person know, what did that person testify to, not as
17 a corporate representative but as a personal -- in their
18 personal capacity in a deposition three years ago. And in
19 which case the idea of a just, speedy, and efficient process
10:51:39 20 is thrown out the window because of the days and days I spent
21 preparing the witness or witnesses to cover the topics is
22 wasted.

23 JUDGE JORDAN: Did you ever have an experience where
24 you shared the identity of the witness in advance and it
10:51:53 25 produces something helpful in the way of narrowing topics or

10:51:57 1 in the way of shortening the deposition or in the way of
2 making it a more efficient process in some other way?

3 MR. FOWLER: Yes. That has happened in a couple of
4 cases where I've had a longstanding relationship with the
10:52:10 5 noticing party, plaintiff attorney, and it was a choice that
6 my client and I made as opposed to being mandated.

7 And I think mandating this, requiring that it be
8 disclosed, is where I think the problem comes in, because if
9 you are working well with the opposing counsel, if it is
10:52:33 10 pattern litigation where they probably know who the witness is
11 going to be anyway, it usually isn't an issue.

12 But as I said to start with, this is essentially
13 going to be a new discovery tool. And it will be weaponized,
14 and that will cause problems that are unanticipated.

10:52:52 15 JUDGE ERICKSEN: You normally do have a meet and
16 confer of some sort; is that right?

17 MR. FOWLER: I do.

18 JUDGE ERICKSEN: And during that you may, in unusual
19 situations, reveal the identity of the witness?

10:53:03 20 MR. FOWLER: No, not typically during that time.
21 Where we have a meet and confer, particularly if it's dozens
22 and dozens and dozens of topics. If it's a small number of
23 topics, we may have a brief phone call if the notice is clear
24 the topics --

10:53:20 25 JUDGE ERICKSEN: Let me ask you this. Sorry to talk

10:53:23 1 so fast. If the draft rule does not have the identity of the
2 witnesses, in your view, would the meet-and-confer process
3 have to be iterative? Or is the -- is the language about how
4 sometimes it's going to have to be iterative driven by the
10:53:43 5 fact that the identity of the witness can't really be
6 discussed until the topics are worked out and -- at least in
7 the rules process that is how that iterative language got in
8 there?

9 MR. FOWLER: Sure. If there are 65, 95 topics, I'm
10:54:03 10 not going to know who my witness is, my designees are going to
11 be, until I'm clear as to what the topics actually are going
12 to be.

13 That's why oftentimes I'll have the opposing side
14 send me e-mails saying, hey, I'm thinking about a 30(b)(6)
10:54:15 15 with these topics, but they're very general, it's not formal,
16 and I always respond saying, that's fine, but until you send
17 me something more specific as to what you're looking for, I
18 can't really begin my search as to who the designees will be
19 until I know what the topics are.

10:54:33 20 And so I think the meet and confer to talk about the
21 number, and I think there should be some limit on the number
22 of topics, and the description of the topics is fine and I'm
23 engaging in that already virtually all the time. It's the
24 requirement that I have to tell the other side who my
10:54:50 25 designees are to be. I just think --

10:54:54 1 JUDGE ERICKSEN: Do you not have a view right off the
2 top of your head whether or not the process would remain
3 iterative, if the language got changed?

4 MR. FOWLER: I think the process would remain
10:55:06 5 iterative because in my practice, my experience is I talk with
6 a plaintiff's lawyer, either by phone or by e-mail, going over
7 the topics they had proposed to try to narrow them down and to
8 make sure that I understand what it is they're looking for.
9 So I avoid the problem at the deposition where we didn't have
10:55:24 10 a meeting of the mind what the topic is. I just think the
11 section of the proposed amendment asking or including a
12 discussion of who the identity of the designee is going to be
13 shouldn't be included.

14 JUDGE BATES: Let me ask you about the numerical
10:55:37 15 limits, since you mentioned it.

16 What would be the need for numerical limit? Isn't
17 that a problem with the current practice? Takes care of it
18 already?

19 MR. FOWLER: I don't know, because if I get a
10:55:53 20 deposition notice that has 95 topics, and that is not an
21 outlier in my practice and the cases that I handle, and there
22 is seven-hour limit, everybody knows there's no way you're
23 going to get through even a third of the 95 topics. I prepare
24 my witness for that.

10:56:10 25 JUDGE BATES: And that's the inefficiency, that you

10:56:14 1 have to overprepare.

2 MR. FOWLER: You have to overprepare, and that allows
3 the noticing party to pick four or five of those topics,
4 knowing that I've had to prepare for 95 and get into the weeds
10:56:25 5 on four or five --

6 JUDGE BATES: But isn't that taken care of by meeting
7 and conferring on the topics even without a numerical limit
8 because you've discussed with the other side that, you know,
9 we can't do 95 topics in a seven-hour deposition, so you're
10:56:37 10 going to have to focus this a little bit better.

11 MR. FOWLER: I've had that discussion countless times
12 and they say, no, I want to include that.

13 JUDGE BATES: Seems like a pretty unreasonable
14 position.

10:56:49 15 But the second question I have on that is, wouldn't
16 limiting the number of topics cause the noticing party to just
17 state broad topics?

18 MR. FOWLER: I don't think so, because if they know
19 what they're saying to looking for, they ought to state the
10:57:06 20 topic with reasonable particularity. I mean, I get 30(b)(6)
21 topics, I want you to produce a witness to discuss all of the
22 documents that corporate defendant has produced. Well, that's
23 a nonstarter, I mean particularly in a case where we produced
24 18,000 pages of documents.

10:57:24 25 So I don't think putting a limit on the topics, the

10:57:27 1 number of topics, would be inefficient because it would
2 require the noticing party to think more fully about what it
3 is they want to get out of the deposition as opposed to it
4 just being a sanctioned fishing expedition.

10:57:44 5 JUDGE BATES: Any other last questions for
6 Mr. Fowler?

7 Mr. Fowler, thank you very much. We appreciate you
8 coming.

9 MR. FOWLER: Thank you.

10:57:48 10 JUDGE BATES: Before the break, one last witness, and
11 that will be Gray Culbreath.

12 MR. CULBREATH: Good morning. My name is
13 Gray Culbreath. I practice law in Columbia, South Carolina
14 with the law firm of Gallivan, White & Boyd, which has offices
10:58:02 15 in both North and South Carolina.

16 I practiced law for 30 years first as an officer of
17 the Judge Advocate Generals Court representing the Department
18 of the Army, and then subsequently representing corporations
19 and insurers. I'm a past president of South Carolina Defense
10:58:17 20 Attorneys' Association, a member of the American Board of
21 Trial Advocates, Federation of Defense & Corporate Counsel,
22 and Lawyers for Civil Justice.

23 The other piece I bring to this is I have taught on a
24 number of occasions, both at the state and federal level,
10:58:32 25 continuing legal education courses on Rule 30(b)(6) and

10:58:37 1 authored papers about the same. That experience, coupled with
2 the practical experience, tells me that oftentimes
3 Rule 30(b)(6) is confusing at best. The case law that comes
4 from it is contradictory often and, as I wrote in one paper,
10:58:53 5 it can be a trap for the unwary.

6 Currently the rule lacks specifics and procedures,
7 which have resulted in these conflicting standards. And my
8 concern with the proposed amendments is that continues that.
9 They create potentially a new discovery obligation through
10:59:13 10 this meet and confer without even procedural guidance as to
11 what happens when that breaks down, which it does. As a
12 result, those amendments have a clear potential to create more
13 litigation. Inconsistent with Rule 1.

14 So what happens?

10:59:33 15 JUDGE BATES: What are the procedures that you think
16 should be added to the rule?

17 MR. CULBREATH: Judge Bates, I think something along
18 the lines of Rule 45 would be an appropriate procedure. I
19 think about my other experience in South Carolina --

10:59:47 20 JUDGE BATES: Essentially an objection procedure?

21 MR. CULBREATH: An objection procedure and a time
22 period. Because I think my own experience in South Carolina,
23 I can think of district judges that do at least three
24 different ways. So you have a motion for protective order
11:00:02 25 under Rule 26, but does that mean the deposition is held in

11:00:07 1 abeyance until there's a ruling? If not, do you go forward
2 and the witness has to testify about the topics there's an
3 objection to? All of that is confused. And there's often no
4 resolution for anything.

11:00:20 5 I asked about the practical problems, does this
6 really happen? And albeit this is a state court experience,
7 in South Carolina the asbestos docket, state rules of civil
8 procedures, model federal rules. Last year -- went back with
9 one of my partners last night, and on the asbestos docket
11:00:41 10 there were 29 motions for protective order filed over 30(b)(6)
11 depositions, many of which, by different judges, didn't
12 resolve some of these issues.

13 And so this new procedure could create at best a
14 chaotic scenario because you meet and confer and you can't
11:00:59 15 agree on the topics, what's next? What's the responding
16 party's obligation?

17 JUDGE BATES: Does that not happen already in terms
18 of discussion of the topics or does the noticing party
19 identify the topics and then there's no further discussion?

11:01:15 20 MR. CULBREATH: I would say my experience,
21 Judge Bates, sometimes that -- sometimes there's a meet and
22 confer and there's a resolution, and sometimes there's not.
23 It's really dependent on the personalities and the individuals
24 involved in the case.

11:01:31 25 JUDGE BATES: Are the cases where there is a meet and

11:01:35 1 confer less efficient than the cases in which there isn't? I
2 would think the problems would be greater in the cases where
3 there is no meet and confer.

4 MR. CULBREATH: Again, I think it depends on the
11:01:44 5 personalities because lawyers are sometimes wont to argue and
6 so you get into a meet and confer and there's no resolution
7 because one side believes it's X, topic X; the other believes
8 it's Y.

9 So let me move into the identity of the witness
11:02:03 10 because I think that has equally practical problems. And the
11 panel's clarified that identity means apparently name and
12 title of the individual. But --

13 JUDGE BATES: Well, I asked you to assume that. I
14 don't want to speak --

11:02:18 15 MR. CULBREATH: Well --

16 JUDGE BATES: -- for the subcommittee or the
17 committee.

18 MR. CULBREATH: But the rule remains it's the
19 testimony of the corporation. And the comments -- previously
11:02:28 20 the case law and the comments proposed make clear the
21 organization gets to designate who it wants.

22 It's acknowledged by the proposed committee notes
23 that the choice of a designee is ultimately the choice of the
24 organization.

11:02:45 25 As one of my colleagues before said, this sounds like

11:02:47 1 a solution in search of a problem.

2 And let me finish up with really my own experience,
3 this happened in the past two months with a case, where some
4 of the evils that could come from this identity of the witness
11:03:01 5 came up, and if there had been a meet-and-confer requirement,
6 if we have had to go forward with it, I don't know how we
7 would have resolved it.

8 In that case what happened -- first, my client wasn't
9 a party to the litigation. We get a subpoena for a 30(b)(6)
11:03:18 10 deposition, documents already produced, and the other side has
11 a knowledge of the individuals involved in this discrete
12 incident that caused some damage to a product in excess of a
13 million dollars.

14 So they came to me and said, we've got these topics
11:03:33 15 and, oh, you're going to have Mr. Smith testify, aren't you?
16 I said, no, I don't think Mr. Smith's going to be the witness.
17 And I knew why Mr. Smith wasn't going to be the witness, but
18 that was based on my meeting with every witness, my evaluation
19 of those witnesses and making a decision in the best interest
11:03:48 20 of the client.

21 If we had gone forward, depending on the judge in
22 South Carolina, and I said we had to have a discussion about
23 the identity of the witness, I would have at some point said
24 to the judge, I can't tell you that. That's work product,
11:04:03 25 that's attorney-client privilege.

11:04:05 1 This lawyer was insistent. Although it got resolved
2 through some cooler heads involved in the case.

3 JUDGE BATES: You think the identity of the witness
4 at some point shortly before the deposition takes place is
11:04:17 5 protected work product?

6 MR. CULBREATH: No, Your Honor. My mistake, I didn't
7 clarify what I meant by that.

8 They wanted to know why we weren't going to use
9 Mr. Smith as a witness.

11:04:30 10 JUDGE BATES: All right. That, I understand.

11 MR. CULBREATH: And I said since we're not going to
12 use Mr. Smith, we had to do an evaluative process, and it was
13 several days before the deposition where we actually
14 determined who that witness would be.

11:04:42 15 But here, without some clarity what the process is to
16 the procedures, then you could have motions seeking to want to
17 know why this person is the witness versus that person.

18 JUDGE JORDAN: You quoted one of your colleagues with
19 the line of a problem in search of a solution -- a solution in
11:05:00 20 search of a problem. What's the -- is that not equally
21 applicable to the importation of Rule 45 into 30(b)(6) if, in
22 fact, it's the case that these seldom produced disputes that
23 have to go to the court?

24 MR. CULBREATH: Well, I think there are two pieces to
11:05:22 25 that, Your Honor. There's -- in the first instance, the

11:05:26 1 Rule 45's the topics. If you look at the case law that comes
2 out of 30(b)(6), there's far more dispute over topics,
3 numbers, so forth, as opposed to disputes over identity. And
4 when I say that, there's just not as much, appears to be,
11:05:43 5 dispute over identity as the other.

6 JUDGE JORDAN: But they are getting worked out
7 apparently. Otherwise, we'd be hearing from judges this is a
8 problem, which we're not.

9 MR. CULBREATH: Well, in my experience, at least,
11:06:01 10 again, in the district of South Carolina, some of our judges
11 have meet-and-confer requirements with the court and they get
12 worked out. Or you end up with a text order that says this is
13 how it's worked out, so there's no published decision.

14 One of our federal judges has got two asbestos cases
11:06:20 15 now that popped up in our federal system, which is rare in
16 South Carolina. And he's going to get ten, 12 motions,
17 protective order motions over 30(b)(6) this year, I'd venture
18 to guess.

19 JUDGE JORDAN: So there is a mechanism in place
11:06:38 20 that's being used to address it?

21 MR. CULBREATH: There's a mechanism, but there's not
22 clarity on the process because you can file a protective order
23 but, again, it goes to does the deposition go forward? Does
24 it not? What happens to the topics in dispute? Does the
11:06:54 25 witness have to answer those questions? Or can they be

11:06:57 1 deferred? You can't certainly instruct the witness not to
2 answer because there's no privilege to that. And that's
3 handled all over the board if you look at the cases.

4 JUDGE BATES: Mr. Culbreath, let me just ask you the
11:07:11 5 same question that others have been asked to respond to, and
6 that is whether you have seen a problem frequently with the
7 wrong witness or an unprepared witness being put forth?

8 MR. CULBREATH: I've only seen that on a handful of
9 occasions, Your Honor. And those instances, the party who
11:07:30 10 failed too put up a witness was sanctioned. I think for my
11 clients, we have no interest in going to a deposition, having
12 ill-prepared witness, and then going and having the wrath of
13 the court because we didn't follow our obligations under the
14 rule that already exists.

11:07:50 15 JUDGE BATES: Fine. With no further questions,
16 Mr. Culbreath, thank you for coming. We appreciate it.

17 We'll take a short break now. We'll try to limit it
18 to ten minutes. That means we'll resume -- I'll say we'll
19 resume at 11:20.

11:08:14 20 (Recess taken from 11:08 to 11:20.)

21 JUDGE BATES: We will resume. And our next witness
22 will be Michael Carey.

23 MR. CAREY: Thank you. Good morning.

24 JUDGE BATES: Good morning, Mr. Carey.

11:20:16 25 MR. CAREY: Michael Carey from Minneapolis,

11:20:17 1 Minnesota. Apologize for bringing my weather with me.

2 I practice at the defense firm of Bowman and Brooke.

3 JUDGE BATES: We actually blame Judge Ericksen for
4 that.

11:20:30 5 JUDGE ERICKSEN: I was trying to say it was not our
6 fault, so thanks.

7 MR. CAREY: Started off on the wrong foot.

8 I have been practicing for only 11 and a half years.
9 Compared to most of the speakers this morning I think it's on
10 the lowest end, which gives me the benefit of having a long
11 horizon to practice under the new rules. So this isn't as
12 important to them as it is to me, obviously.

13 And I say that to emphasize the point that this is
14 important. We can take our time to make sure we get it right.

11:21:01 15 And I think the process so far, I've never done this before,
16 is very interesting, and I don't know exactly how it goes back
17 and forth over the years before it finally becomes a rule, but
18 what I'm hearing so far is this notion of the identity
19 question being something that should this be a requirement and
11:21:21 20 I'm going to get to that and -- but first I want to share the
21 perspective of what I've been trained as, as a lawyer and a
22 litigator, is that you always need to be collegial,
23 professional, and that's not only it just helps you sleep at
24 night, but it's good for your client. Avoids costs, it's good
11:21:40 25 for efficiency.

11:21:40 1 And it's from that perspective that I think that the
2 spirit and the intent of including a provision about meeting
3 and conferring is the right place. And the concern, though,
4 is that the formulation and implementation of this
11:21:56 5 meet-and-confer obligation may be flawed.

6 And the reason I say that is it gives a new
7 requirement. I don't think that you can read this specific
8 language of this amendment without reading into it that there
9 is a requirement, however we're going to assume "identity" is
11:22:16 10 defined today, that the organization doesn't have to reveal
11 the name and at least the title of the deponent. And that is
12 an absolute new requirement that has never been in this rule
13 before.

14 And so the question I have is, if you're going to do
11:22:33 15 that, like, you know, maybe an analogy would be the expert
16 disclosure rule, and there's a good reason that we need to
17 know the experts' identities, to know what type of topics
18 they're going to cover, what areas of expertise, look at past
19 transcripts. And that's relevant to that determination.

11:22:50 20 If we're going to do that for corporate witnesses and
21 read into and insert a new requirement about identity, I think
22 it needs to go clear back to the drawing board and say we're
23 going to do that, and actually insert a notice requirement and
24 a timing thing, and that's not what this rule does directly.

11:23:12 25 It does that by slipping it in through a meet-and-confer

11:23:15 1 obligation.

2 And I think that's the problem here, is we're going
3 to be in a situation where it's ambiguous when you look at the
4 rule what the identification means, and when you get into the
11:23:32 5 situation where, if you look at the new requirement, it says
6 promptly, and then continuing when that obligation has to be
7 met.

8 It actually even says before you even do the notice
9 you should meet and confer about who this person's going to
11:23:50 10 be. In some cases that could be six months, eight months.
11 Not the seven days we're talking about.

12 And so you have this obligation to identify this
13 person long in advance, change -- and if that person's name
14 changes, you have to amend and call counsel again and tell
11:24:09 15 them over and over who the witness or witnesses are going to
16 be.

17 JUDGE BATES: Are you advocating that there be
18 instead of the meet and confer as to the identity of the
19 witness, instead there be simply a requirement to identify the
11:24:23 20 witness some days in advance?

21 MR. CAREY: Absolutely not. And that's what I'm
22 trying to point out, that this is what the rule I think in
23 effect will do because of its language, will kind of create
24 that requirement. It could be read that way by district
11:24:40 25 judges. And so if that's really what it's going to do, we

11:24:44 1 have to evaluate is that a proper purpose for the 30(b)(6)
2 deposition, and a lot of witnesses today have said, no, that's
3 absolutely irrelevant to a 30(b)(6), it's not the point, it's
4 to find out what the company knows, not anything about the
11:24:59 5 individual. There's case law separating those two notions.

6 And by slipping it in through the back door of a
7 meet-and-confer obligation, you're effectively, and very
8 vaguely, creating this requirement that wasn't in the rule
9 before and -- and has no place in it.

11:25:18 10 That's a whole separate discussion whether identity
11 should now be in the 30(b)(6) question. But -- and if it is
12 relevant to that determination. It's not. But this amendment
13 would effectively insert it into it.

14 And then the last point I want to make, I see I'm
11:25:38 15 already on yellow, is sort of a practical point which is I
16 like to think of the Federal Rules of Civil Procedure as sort
17 of the rules of playing in the sandbox, and we want, as
18 litigators, want to get to the merits of the case.

19 And all this does, really, in my mind, is just
11:25:54 20 creates another rule. And I like to think that the rules
21 should be simpler, not more complicated. As sort of fresh off
22 of being an associate, I would always be worried about the
23 pitfalls and the things I would miss. And if you go through
24 the federal rules you can find 30 or 40 different requirements
11:26:17 25 you have to hit and elements of each rule and procedures and

11:26:20 1 hurdles you have to jump over, and this is just adding one
2 more in.

3 And it's necessarily going to create pitfalls for
4 litigators who don't practice in federal court that much. In
11:26:30 5 every single case it's going to add costs that, you know, I
6 think a lot of people here are strong advocates for defending
7 corporations when this is being abused, but there's just lots
8 of cases where corporations sue each other and they want to
9 use 30(b)(6), and it just doesn't need to happen that you have
11:26:48 10 this extra additional obligation that really isn't necessary.

11 I mean, if it ain't broke, don't fix it, according to
12 the Wyoming Lawyers Association. I think that's the saying
13 that goes in Minnesota, too.

14 So that's all I have unless there are any questions.

11:27:05 15 JUDGE BATES: Any questions for Mr. Carey?

16 Thank you very much. We appreciate it.

17 Our next witness will be Bradley Petersen.

18 Mr. Petersen.

19 MR. PETERSEN: Thank you all very much.

11:27:15 20 My name is Brad Petersen. I'm with the law firm of
21 Slattery Petersen here in Phoenix, Arizona. I practice both
22 here locally and nationally in civil litigation. A large part
23 of my practice is defending product liability cases for
24 manufacturers.

11:27:34 25 Over the years, dozens of Rule 30(b)(6) depositions,

11:27:36 1 but also had the opportunity to notice and take Rule 30(b)(6)
2 depositions like one of my colleagues before me. I have had
3 the opportunity to prepare and present CLE presentations, both
4 locally and nationally through webinars on Rule 30(b)(6).

11:27:56 5 I've done a lot of research, read a lot of cases.

6 And through it all, I have seen this develop over the
7 years. I think there's still a lot of uncertainty in the
8 practice, particularly for younger lawyers and folks who
9 haven't spent the time going through all those, and there's
11:28:19 10 some inconsistencies in the way it is applied throughout the
11 various jurisdictions. And that can be a problem.

12 I think the amendments that we've had to Rules 1, 26,
13 and 37 have had a positive impact on the way we practice law
14 over the years and securing both the just, speedy, and
11:28:40 15 inexpensive determination, but also focusing on the merits.
16 Yet I still spend a significant amount of my time, perhaps the
17 most significant amount of time in any one case dealing with
18 Rule 30(b)(6) depositions. Some of these are those outlier
19 notices with 149 topics, 95 topics. Those things happen.

11:28:59 20 I have the luxury of doing some pretty high profile,
21 high stakes litigation, so we're generally dealing with very
22 good lawyers. But there's -- you know, plaintiff lawyers can
23 be good for lots of reasons, and sometimes it's because they
24 want to focus on the merits and win on the merits, and some of
11:29:17 25 them do seek to weaponize rules like this, which is why we end

11:29:22 1 up with 149 topic notices.

2 JUDGE JORDAN: Excuse me. You like the meet and
3 confer when it deals with the topics and notice; correct?

4 MR. PETERSEN: I advocate for it in every CLE. The
11:29:35 5 first thing I do when I get one of those notices or an e-mail,
6 like Mr. Fowler said, is to call up the other side, because
7 the first thing I want know when I've got all of these
8 obligations on me to identify, to prepare, and to supplement,
9 when I have those obligations I want to know what do you want
11:29:50 10 and how can I get there, but I think those are already baked
11 into the rules that we have.

12 JUDGE JORDAN: Have you had the experience with the
13 30(b)(6) practice that you've had of being asked for the
14 identity of the witnesses?

11:30:03 15 MR. PETERSEN: I have.

16 JUDGE JORDAN: And has that proved problematic?

17 MR. PETERSEN: In some cases yes, and in some cases
18 no.

19 As part of the meet-and-confer process, I think that
11:30:15 20 is part of what I would call the arrows and the quiver. We
21 have to meet and confer about a whole host of things, not the
22 least of which is the number of topics and the scope and
23 things like that. And if it makes sense in one case with a
24 particular plaintiff's attorney to provide that information
11:30:32 25 where we think it will be helpful, then that's one of the

11:30:35 1 things we talk to the clients and have the authority to do.
2 But that's an option out there for the lawyers to use on a
3 case-by-case basis.

4 JUDGE BATES: Those cases in which it's been
11:30:47 5 problematic, what has been the problem?

6 MR. PETERSEN: The problem is this, most often and --
7 and sometimes it even starts before we get the notice or right
8 after, where we say, hey -- let's say we've got a product
9 liability case on two defects, one is very well developed, one
11:31:01 10 of them is brand-new. The very well developed one may have
11 had 30(b)(6) depositions or state equivalent depositions taken
12 multiple times, maybe from the same witness or multiple
13 witnesses, and we say, well, rather than doing this all over
14 again, how about we give you the transcripts so you can get
11:31:17 15 the information. 30(b)(6) is about just getting information
16 to use, for litigating on the merits. Let's give you the
17 transcripts and maybe you don't have to do the deposition at
18 all.

19 Of course, the answer always is, well, let me take a
11:31:31 20 look at it, I'll read the depositions, and maybe I don't. And
21 in some cases with some plaintiffs attorneys, that has
22 resolved it. In other cases, they weaponize that. So --

23 JUDGE BATES: What does that mean, weaponize it?
24 Give me an example.

11:31:47 25 MR. PETERSEN: By way of example, they will search

11:31:49 1 these multiple transcripts for potential inconsistencies, or
2 where maybe topic wasn't fairly well developed in a notice in
3 one deposition that is now going to be more developed in this
4 deposition. And in some cases they will use that to find out,
11:32:06 5 okay, well, who's the witness going to be, and then get their
6 individual depositions.

7 And you've heard about some of the parade of
8 horribles in mixing 30(b)(1) and 30(b)(6), which does happen.
9 But inevitably in those cases which I had experience with,
11:32:22 10 some plaintiffs attorneys won't take us up on the offer. It
11 turns into a seven-hour argument about what prior transcripts
12 say, about what this is, about what perceived inconsistencies
13 are. It isn't an information-gathering process.

14 By corollary, the new area, the new defect they're
11:32:39 15 doing, they're taking a witness on, that may end in two hours
16 or three hours because it's focused solely on getting
17 information in discovery.

18 So we see this used in that way versus this way. So
19 in some cases it can help, in some cases it simply does not.

11:33:00 20 For me, and you'll see my written comments address
21 many of the issues I think you've asked here today, but for
22 me, and what I'm hearing again is "meet and confer" and
23 "identify" cannot mean the same thing.

24 "Identify" is used throughout the rules and used in
11:33:18 25 Rule 26 to mean very limited information, which to me means

11:33:24 1 when you use meet and confer about the identity it means
2 something more. It presupposes that by talking about who the
3 witness is, that there involves some sort of now a dialogue
4 about that. It doesn't mean merely identify, because that
11:33:40 5 word is used somewhere else to use very discrete information.

6 Meeting and conferring about the identity means
7 something more. And to me, I think no one other than the
8 organization who is speaking, the person who is speaking,
9 should have a say-so about who is speaking for them.

11:34:00 10 MR. SELLERS: May I ask a question, Mr. Petersen? In
11 your written statement, you list a number of factors you say
12 you consider in selecting 30(b)(6) witnesses. One is
13 witness's personal knowledge and experience. Why do you
14 consider that?

11:34:12 15 MR. PETERSEN: Well, I think, and I've talked about
16 this in CLE so I'm not divulging any sort of client
17 confidences here, but I think one of the things you do is you
18 think about how much preparation are they going to need, is
19 this going to be efficient in thinking about their prior
11:34:26 20 experience or could it get in the way.

21 We talked about it earlier, about the document from
22 witness Smith. Well, maybe that document for witness Smith,
23 who was involved in it, isn't really the corporate story but
24 one cog. Now is witness Smith going to have to go and explain
11:34:43 25 his prior document that we've now disclosed him as a witness

11:34:48 1 and say, well, yeah, I thought this but my perspective was
2 really a marketing perspective. It wasn't really a design
3 perspective. I can talk about design and I understand why the
4 choice was made but this is the corporate decision and this is
11:35:00 5 the reason why we did it, these are the things that we
6 considered, I just did it, but the other side of it. So, you
7 know, you have to consider it. Sometimes it's good, sometimes
8 it's bad.

9 JUDGE ERICKSEN: So is it your experience that fights
11:35:15 10 before the deposition involve the scope and specificity and
11 fights during or after involve the preparedness of the witness
12 in general?

13 MR. PETERSEN: Because I've done some research and
14 looked at the sanctions that are out there, I haven't had very
11:35:35 15 many, if any, experiences as to the preparation of the
16 witness. And, frankly, because of the due diligence we all
17 try to do in advance of it, I try to clear those up
18 immediately, sometimes even during breaks during the
19 deposition saying, geez, I didn't understand your scope to be
11:35:51 20 that specific about that nuance. Let me just see if we can
21 get that information for you today to be able to answer that
22 question.

23 So I don't see a lot afterwards. Before, it is
24 always about the depth, breadth, scope of the topics.

11:36:05 25 JUDGE ERICKSEN: So I was going to ask you what ideas

11:36:07 1 you had if not the current draft for dealing with ill-prepared
2 witnesses, but you might not be the person for that, so let me
3 ask you a different question.

4 Do you believe that there is any problem that the
11:36:24 5 iterative nature of the meet and confer makes it amorphous and
6 difficult to understand, whether you've done it or not, and if
7 there were not the requirement to discuss the witness
8 identity, would the meet and confer still be -- have to be
9 specified as being iterative? I mean, there's no problem that
11:36:53 10 I can think of having to be iterative unless the problem is
11 people don't know whether they've complied or not.

12 MR. PETERSEN: I think there is a problem. Without
13 guideposts to know what that means, other than what it already
14 means in the rules, we have it in the rules the same way we
11:37:07 15 have it to avoid discovery disputes as to any sort of
16 discovery device, and that is to try and avoid the dispute in
17 the first place; right?

18 And so that -- I understand that role. And that may
19 mean, I suppose, different things to different people. But I
11:37:22 20 think at the end of the day when we reach a disagreement, we
21 know we've complied as much as we could.

22 I think doing this in advance and without clear
23 guideposts as to what that means, I think it can lead to more
24 disputes that will occur. I can envision -- and I won't name
11:37:42 25 names -- but a particular plaintiff attorney calling me almost

11:37:45 1 on a daily basis saying, what are we doing today? What's
2 going on next? What are we doing now? Look, I just need some
3 time; right?

4 But I do think that is a problem and I don't think
11:37:57 5 it's necessary. I think you have a roomful of people
6 testifying almost uniformly that to some level meeting and
7 conferring is already happening, and it sounds from the
8 feedback that you've had from the bench that they're not
9 seeing the things because of that already. So adding this
11:38:17 10 amorphous --

11 JUDGE BATES: This is another if it's not broke,
12 don't fix it?

13 MR. PETERSEN: Well, I think there are some things we
14 can fix, and I've included those in my written report. And I
11:38:26 15 think there are things we can do to make it a little bit
16 better. But as to that, meet and confer, I think we're
17 already doing it. I don't think we need to include that in
18 30(b)(6) any more than we need to include it in 30(b)(1), or
19 33, or 34.

11:38:43 20 JUDGE JORDAN: I have one quick question, if I could.
21 Do you have any suggestion -- I mean, you've written things
22 like a 30-day notice requirement, maybe that's apropos -- but
23 anything specific you could say besides the witness
24 identification that would meet the problem of unprepared
11:39:02 25 30(b)(6) witnesses?

11:39:05 1 MR. PETERSEN: In what I've read about why we end up
2 with unprepared witnesses was early gamesmanship, trying --
3 you know, trying to avoid giving the information, and the
4 sanctions that are out there because of it.

11:39:20 5 I think for the people in this room at least, and
6 you're probably dealing with a different set here than
7 probably lead to most of those sorts of disputes, we don't
8 really need to worry about that very much. But I think a
9 requirement that these get served far enough in advance for
11:39:38 10 people to work them out and not, you know, 14 days before some
11 discovery deadline, oftentimes the expert discovery deadline,
12 which is when we receive these types of things. Hey, we need
13 this now because we've got reports due in two weeks or three
14 weeks or whatever it is.

11:39:54 15 If there's enough time baked in, more than what is
16 the normal notice requirement, I think that could help.

17 JUDGE BATES: Okay. Thank you very much. We
18 appreciate it, Mr. Petersen.

19 We'll hear next from Jennie Lee Anderson.

11:40:17 20 Good morning, Ms. Anderson. Good to see you again.

21 MS. ANDERSON: Good morning. Thank you for having
22 me.

23 My name is Jennie Lee Anderson. I know most of you,
24 but I practice at the law firm Andrus Anderson in
11:40:23 25 San Francisco. We represent plaintiffs exclusively in class,

11:40:27 1 individual, and mass actions.

2 I've been practicing in that capacity for almost 20
3 years, and over the course of that time I've taken multiple
4 30(b)(6) depositions in the context of antitrust cases,
11:40:39 5 consumer fraud cases, securities cases, employment cases, and
6 product liability cases.

7 One of the issues that has come up a lot today is the
8 issue of the value of knowing the identity of a witness.

9 I always request the identity of the witness in
11:40:57 10 advance and I have never been denied that information. I've
11 always had the identity of the 30(b)(6) witness prior to
12 taking the deposition.

13 The reason why that's important is because there are
14 basically two different types of 30(b)(6) witnesses. The
11:41:13 15 first is one that the corporation has chosen because that
16 person is the person they believe to be most knowledgeable and
17 they want somebody who's knowledgeable and knows what they're
18 talking about to represent the company and testify on behalf
19 of the company. Sometimes that's not always possible and
11:41:31 20 sometimes 30(b)(6) ends and deponents have to go out and
21 gather information and prepare themselves in advance.

22 The first scenario is much, much more common for the
23 reasons I stated. There's less preparation that needs to be
24 done, the person is simply more knowledgeable about the topics
11:41:50 25 in the notice, and the company can rely on them to give

11:41:53 1 accurate information.

2 JUDGE JORDAN: How would your knowing the identity
3 make a difference to that?

4 MS. ANDERSON: Because if I know the identify of --
11:41:59 5 say I've a 30(b)(6) deposition about research and development,
6 and I am told that the person being designated is the head of
7 research and development and has been for the last 12 years, I
8 know that that witness is being designated to testify, but he
9 or she is going to be testifying based on their own documents,
11:42:17 10 their own knowledge base, and their own experience at the
11 company.

12 So, therefore, it is going to assist me vastly to
13 review their custodial file and understand their background
14 and their job at the company prior to the deposition. And it
11:42:36 15 also assists a great deal in finding out exactly what topics
16 they're going to be discussing from their more personal innate
17 knowledge and -- although they're being designated to do so on
18 behalf of the company --

19 JUDGE JORDAN: Right. That gets into the question
11:42:50 20 that you've heard discussed, I assume, about the line between
21 regular depositions and 30(b)(6) and that that is a line that
22 shouldn't be crossed and creates more difficulties in
23 deposition than it is. What is your experience with that?

24 MS. ANDERSON: I disagree with that because, as I
11:43:07 25 mentioned, say the deponent is the -- we'll stick with the

11:43:12 1 research and development example. That deponent is testifying
2 on his or her personal knowledge and experience. Because
3 their personal knowledge and experience makes them the most
4 knowledgeable, the corporation has chosen to designate that
11:43:30 5 testimony to be on behalf of the corporation.

6 If I -- I should be able to cross-examine and ask
7 that witness about the testimony that is being proffered on
8 behalf of the corporation even though it is also coextensive
9 with his own personal knowledge. And I think that's different
11:43:52 10 than trying to ask a 30(b)(6) witness about something
11 unrelated to the topics at hand.

12 And I think it's very helpful and I think that it is
13 the common practice to -- you know, even if the witness was
14 not going to be head of R&D, I would still want to look at the
11:44:11 15 custodial file of the head of R&D. The fact the witness is
16 the head of R&D is going to be more efficient and more
17 effective and yield more information across the board.

18 I think that most corporations prefer to identify a
19 knowledgeable witness who will speak with knowledge and
11:44:34 20 represent the company and have the background information and
21 history before speaking on behalf of the company where
22 possible.

23 JUDGE BATES: As to the identity of the witness, what
24 is the additional advantage from a requirement to meet and
11:44:52 25 confer with respect to who the witness is?

11:44:57 1 MS. ANDERSON: Well, as I mentioned, I always request
2 the identity of the witness in advance and I've never been
3 denied that opportunity by defense counsel in my experience.

4 I think that -- I disagree with my esteemed
11:45:13 5 colleagues who are here who think that it adds a requirement.
6 I don't read it as a requirement, and several people have said
7 they have plaintiffs attorneys who don't choose to ask for the
8 identity. I don't -- I can't speculate on their decision to
9 do so. Maybe it's a discrete issue.

11:45:31 10 JUDGE JORDAN: It would have to be a new requirement;
11 right? If it's not in the rule now, they don't have to give
12 it. But if we put it in the rule and they do have to give it,
13 then it's a new requirement. Right? That's -- just is a
14 problem they're identifying. They're saying you're making us
11:45:44 15 do something which has been discretionary with us before in
16 deciding how to deal with counsel we trust versus counsel we
17 may not have any experience with and do not trust as much.

18 So how do you address the concern they're expressing,
19 which is there are lawyers out there who will use that
11:46:01 20 information to an inappropriate end, they will use it in a way
21 that leads to cross-examination questions that have nothing to
22 do with corporate knowledge of the company?

23 MS. ANDERSON: Well, I personally don't see any
24 downside in my practice of knowing the identity of the witness
11:46:18 25 in advance, but I appreciate your question.

11:46:21 1 I think that there are already in the rules
2 procedures and remedies for abuse of discovery procedures. I
3 don't think that it's -- I haven't heard any -- most of the
4 people -- sorry to be inarticulate. Most of the people who
11:46:39 5 have testified today have indicated that this doesn't present
6 a lot of problems. There have been one or two examples of a
7 rogue situation, but overall, anyone who's taken a deposition,
8 I think, would say knowing who the person you're going to be
9 deposing for the next seven hours in advance is helpful. It's
11:46:57 10 helpful in preparation. It's helpful to know the person's
11 background. It's helpful not to be surprised. It can result
12 in shortening the length of the deposition insofar as learning
13 what that person already knows versus what they had to do to
14 prepare for the -- to be the voice of the company for those
11:47:14 15 seven hours in the deposition chair.

16 So I think that there are other procedures that
17 already exist for that and any other discovery abuses --
18 abuses.

19 JUDGE BATES: Would the meet-and-confer requirement
11:47:28 20 in the rule or an identification requirement in the rule, in
21 your view, lead to more disputes, more litigation, or less?
22 Or have no effect?

23 MS. ANDERSON: I think it would -- I don't know that
24 it would -- I would say no effect or less. I already meet and
11:47:48 25 confer on my topics with most cases. Every now and then I'll

11:47:52 1 have a 30(b)(6) topic that is very discrete and it's not
2 necessary, but usually I want to talk to opposing counsel
3 about, well, what -- what am I trying to get to with these
4 topics? Do they think that they have a witness who can cover
11:48:06 5 them all? Do they feel like -- sometimes they say, look,
6 Jennie, we've got the R&D guy, he's going to try to cover
7 sales too. I'm going to say, are you sure you can get him
8 prepped enough? We've got a lot. This is big case that
9 covers ten years of information. Are you sure you can get him
11:48:23 10 prepped? And opposing counsel might say, we're going to try,
11 and if the questions aren't answered we'll work on getting
12 someone else. But that is part of this process.

13 So I already do that in my practice. And I think
14 having and encouraging more open dialogue about the identity,
11:48:38 15 the -- who's going to be testifying about what, and the topics
16 themselves just make the process flow a lot better.

17 Frequently, there will be outstanding issues that we
18 don't know whether we're going to resolve, but we can still
19 move forward with what we agree upon with that R&D depo, for
11:48:54 20 example. And if there are other topics that weren't covered
21 and opposing counsel feels it's unreasonable, we can talk
22 about that afterwards.

23 But this process, I think, is important and that's
24 why I think that there's no downside in encouraging people to
11:49:07 25 meet and confer on these issues.

11:49:09 1 JUDGE CAMPBELL: You explained why knowing the
2 identity of the witness is helpful in the first category of
3 30(b)(6).

4 Does it help to know the identity in the second
11:49:18 5 category where the person had to go collect the information
6 and is testifying solely on the basis of their due diligence
7 and collecting the information?

8 MS. ANDERSON: I think it's still helpful. I think
9 it's not as important, but I still think it's helpful to know
11:49:32 10 the identity of any witness.

11 Is that person an employee at the corporation? Is he
12 somebody who's hired to come in as a 30(b)(6) deponent?
13 That's information that I would like to know in advance.

14 Many times a 30(b)(6) witness will be testifying on
11:49:51 15 behalf of the company based on his or her own experience in
16 one area, but not in another. So I can know that he's going
17 to have personal experience about maybe HR and I can ask more
18 questions at the deposition what did he do to learn about the
19 sales division: Who did he talk to, and how did he gather
11:50:09 20 that information.

21 So I still think it provides a lot of efficiencies
22 and is very helpful, although it may not be as core as when
23 the person who's going to be covering all the topics is also
24 the person most knowledgeable.

11:50:24 25 JUDGE BATES: Any last questions for Ms. Anderson?

11:50:27 1 Thank you very much for coming. We appreciate it.

2 MS. ANDERSON: Thank you very much.

3 JUDGE BATES: Our next witness is Bina Ghanaat.

4 Morning.

11:50:41 5 MS. GHANAAT: Good morning. You pronounced my name
6 perfectly. That's rare. I appreciate that.

7 JUDGE BATES: Blind luck.

8 MS. GHANAAT: Thank you for opportunity to be here.

9 My name is Bina Ghanaat and I am an attorney with the
11:50:51 10 law firm of Lankford Crawford Moreno & Ostertag based in
11 Walnut Creek, California.

12 A little bit of background about my firm. We
13 primarily represent corporate defendants in product liability
14 and other tort actions, and part of that representation
11:51:08 15 includes serving as national counsel and asbestos counsel for
16 various corporations, numerous jurisdictions, both federal and
17 state.

18 Now, my perspective is slightly different from the
19 others who have testified before me given the unique nature of
11:51:22 20 asbestos litigation. Specifically, in asbestos litigation,
21 we're dealing with claims that happened 30, 40, 50-plus years
22 ago. So the fact of the matter is the corporation does not
23 currently have someone with it who has personal knowledge
24 going back that far, and that's what informs the opinions I'll
11:51:42 25 provide today regarding the proposed amendment to

11:51:45 1 Rule 30(b)(6).

2 I'm going to break down my thoughts into two
3 categories. First, the proposed amendment to meet and confer
4 regarding the identity of the corporate witness is an
11:51:58 5 attempted solution at a problem that doesn't exist, as others
6 before me have said; and, secondly, I think there are certain
7 common sense solutions and amendments that could be introduced
8 to streamline the 30(b)(6) process and fix what are the
9 problems that we see coming up.

11:52:17 10 JUDGE BATES: Is it a problem that doesn't exist
11 because, as some witnesses have said, they routinely ask and
12 receive the identity of the witness, or is it a problem that
13 doesn't exist because they shouldn't be entitled to the
14 identity of the witness?

11:52:34 15 MS. GHANAAT: Well, a little bit of both. First, the
16 identity of the witness is not relevant because, as others
17 before me have stated, in the context of a 30(b)(6) deposition
18 we're dealing with a corporation's knowledge, not the identity
19 of the witness. And there is case law going to that. I'm not
11:52:52 20 going to list all the cases, but footnote 11 of the LCJ
21 comment, for instance, lists all those cases, saying the
22 identity of the corporate witness is not even relevant.

23 And it's also not an issue because of the safeguards
24 that are already in place. I -- for instance, if a
11:53:09 25 corporation foolishly puts up an unprepared witness, then

11:53:17 1 they're subject to severe sanctions, and what they're going to
2 have to do is they're going to have to spend the time and
3 money and effort and prepare someone properly and put that
4 person up and have another deposition.

11:53:29 5 JUDGE JORDAN: The argument I assume I'll be hearing
6 from the other side is to the effect there's a transaction
7 cost there; right? That defense lawyers will sometimes play
8 the game where we don't have a fully prepared witness, but
9 they weren't so bad that you'll burn your credibility going to
11:53:52 10 the court. That's the way the fight seems to go.

11 So what, if any, practical advice do you have for how
12 to address the problem of unprepared witnesses? If it's not
13 meeting and conferring about witnesses and discussing it, what
14 do you suggest be done? Because it apparently is a problem.

11:54:17 15 MS. GHANAAT: Two suggestions. One would be to put
16 in a framework into the current rule to encourage early
17 discussion about the topics at issue.

18 If the other side tells me early on, such as in the
19 context of the Rule 26 conference, what specific topics
11:54:31 20 they're looking for that are relevant and specific to the case
21 at issue, that will help me go to my client earlier and try to
22 figure out, in conjunction with my client, who is the best
23 person to speak for the company, be the face of the company,
24 provide binding answers for the company. Who has the ability,
11:54:48 25 especially in asbestos cases, when they don't have the

11:54:53 1 personal knowledge, to go through thousands of documents, to
2 go through decades, 50-plus years, of corporate history. Who
3 has the right ability to actually absorb this information,
4 distill it in their mind, and then take that information and
11:55:09 5 present it in a clear and accurate manner in a way that is
6 understandable to a jury.

7 JUDGE ERICKSEN: The draft comment does make
8 reference to the fact that in some cases it might be
9 appropriate to discuss this at that early stage. What we've
11:55:27 10 heard so far is that that is true in some cases but not in
11 others, and that's why there's not a timing requirement in
12 there.

13 But does the -- in the Rule 26 stage, there's nothing
14 to preclude that as being a topic of discussion. And then
11:55:46 15 closer to the 30(b)(6), you can have a meet and confer about
16 the topics more specifically. That's what's in the draft
17 already.

18 MS. GHANAAT: Right. But the earlier, the better, of
19 course, to encourage parties not to kind of wait to the last
11:56:00 20 minute to narrow down topics.

21 Often in meet and confers, I have those so-called
22 outlier cases. In most of the litigation we do, we see those
23 deposition notices with 75-plus topics. We engage in meet and
24 confer and, unfortunately, sometimes parties just get more
11:56:18 25 entrenched in their positions and the process goes back and

11:56:22 1 forth. So the earlier we can begin that process, even if it
2 means a mandate to say specifically when to start that
3 discussion, the better it is. And that goes to the issue of
4 making sure we have the most able and prepared person on the
11:56:37 5 discrete topics at the time of 30(b)(6) deposition.

6 PROF. MARCUS: Can I ask a question about asbestos
7 litigation in particular, because my guess is as to some of
8 your clients there have been prior 30(b)(6) depositions in
9 fairly similar litigation. Do the transcripts of those prior
11:56:58 10 depositions play any role in your current cases?

11 MS. GHANAAT: Yes, they do. And that's a great
12 question. In fact, depending on the client and the case at
13 issue, if we receive a notice with certain topics, the exact
14 same topics we've seen over and over again, what we'll do,
11:57:17 15 with the client's permission, is we'll actually offer to the
16 other side, you have already deposed our corporate
17 representative on topics A, B, and C. Do you really want to
18 depose him again on A, B, and C? Or we can offer you these
19 prior transcripts on these topics, and we'll stipulate that
11:57:33 20 those transcripts can be treated as if taken in the current
21 case.

22 So they certainly do play a role.

23 JUDGE BATES: Why isn't it helpful for the other side
24 to know in advance who the witness is for just that same
11:57:45 25 purpose?

11:57:48 1 MS. GHANAAT: They don't need to know who the witness
2 is for that purpose for two reasons: One, in my type of
3 litigation, you're not dealing with someone with personal
4 knowledge. You're dealing with someone who has been educated
11:58:04 5 and who learned about the topics at issue. So it is really
6 irrelevant who the person is. And for that reason, they don't
7 need to know the identity of the person. I don't see how that
8 rolls the ball forward or how it helps.

9 JUDGE JORDAN: Well, they would know, if they knew
11:58:22 10 the identity, that, in fact, this person had been deposed
11 several times before, so they would be in a position to say to
12 you, even if you didn't say it them, why can't we use those
13 previous deposition transcripts.

14 MS. GHANAAT: Well, I submit that it doesn't matter
11:58:36 15 if Mr. X or Mr. Y or Mrs. X or Mrs. Y was the one who was a
16 prior 30(b)(6) notice and there are transcripts of their
17 depositions, because, again, we're not going on personal
18 knowledge, we're going on the company's knowledge.

19 And my duty is to prepare whoever I'm going to put in
11:58:55 20 that chair to be able to testify fully, completely,
21 truthfully, and accurately to whatever the topics may be.

22 So as long as the topics are the same and I've
23 already put up a witness, it doesn't matter who that witness
24 is as long as they can present the company position.

11:59:11 25 JUDGE BATES: Any further questions for Ms. Ghanaat?

11:59:13 1 Thank you very much for coming. We appreciate your
2 testimony.

3 MS. GHANAAT: Thank you.

4 JUDGE BATES: Our next witness will be Tim Pratt.

11:59:19 5 Mr. Pratt, good to see you again.

6 MR. PRATT: Yes. Good morning. Good morning.

7 I just want to start by thanking the committee and
8 thanking everybody here. I think of the 1.4 million lawyers
9 and judges in a country where only a few spend time working on
11:59:34 10 these kinds of things, making the civil justice system work
11 better and fairer and even -- everybody who participates, I
12 commend them for it.

13 I wear different hats today. I spent 30 years
14 practicing law, trying cases around the country, seeing a lot
11:59:47 15 of the 30(b)(6) issues that some of the defense counsel have
16 mentioned to you.

17 I'm president of Lawyers for Civil Justice, although
18 I'm not here in that institutional capacity because I'm really
19 here to talk about what I've done in the last ten years. It's
12:00:01 20 a perspective not shared before.

21 I'm general counsel of a company called
22 Boston Scientific. I was the client. I had to deal
23 internally with 30(b)(6) notices that we got. I don't want to
24 talk to you about some of the logistical --

12:00:18 25 PROF. MARCUS: As the client, how would you approach

12:00:20 1 the question of notifying the other side what specific witness
2 you would be sending to be a 30(b)(6) deposition?

3 MR. PRATT: How would I deal with that as the client?

4 PROF. MARCUS: Yes.

12:00:33 5 MR. PRATT: I mean, first of all, I think this is a
6 nonissue, Professor. I know we spent an enormous amount of
7 time this morning talking about that very issue. I think the
8 plaintiffs lawyers have said it's really not an issue. It was
9 never an issue when I was in the practice of law. I frankly
12:00:46 10 don't know whether the 30(b)(6) depositions of the company
11 that I led as general counsel, I don't know that we told
12 people that. I'm saying this rule doesn't address the problem
13 that we have.

14 PROF. MARCUS: In your experience, it's not really
12:01:01 15 the client's call, but the defense lawyer's call?

16 MR. PRATT: I don't know. I mean, I guess it's the
17 client's call. But have I ever as a client been asked do we
18 disclose it or not? Never. If somebody asks me I would
19 probably say, I did it when I was in private practice. I
12:01:19 20 would say I don't think it's actually part of the rule, is my
21 position.

22 JUDGE BATES: From your perspective, is there any
23 problem with disclosing the identity of the witness in advance
24 of the deposition? Does that create some problems from the
12:01:31 25 perspective of either the particular organization or the civil

12:01:35 1 justice system?

2 MR. PRATT: Well, I don't know. I mean, again, my
3 point is this isn't fixing the problem that we have,
4 Judge Bates. I'm telling you that. There's -- the problem I
12:01:47 5 see -- and I'll answer the question -- the problem I see is,
6 and we seem to shrug our shoulders at these comments that
7 there are 125 topics in a 30(b)(6) deposition notice, or 70 or
8 80. I think that's outrageous.

9 In the pelvic mesh litigation, which I led, was
12:02:09 10 against my company, from 2013 and 2016, there were 36
11 depositions of my Boston Scientific people. 49 days, 12,000
12 pages of deposition testimony.

13 JUDGE BATES: 30(b)(6) depositions?

14 MR. PRATT: No, no, no. Individual depositions.
12:02:24 15 After all -- including four days of 30(b)(6) deposition
16 notices from the state court case, depositions in state court.
17 With noticed 30(b)(6) depositions in the MDL.

18 After that, we got a 30(b)(6) notice that contained
19 18 parts and 50 subparts. After all of that.

12:02:43 20 I just think that is outrageous. I think it's
21 harassing when after all of that you have to deal with that
22 number of topics so they -- we want witnesses to talk about
23 things we had them talk about before.

24 And what happened, we went to court. We went to
12:03:00 25 court and had a hearing before the magistrate judge. The

12:03:04 1 magistrate judge gave us some relief, but the outcome of that
2 was one of our witnesses who testified for four full days
3 before that had to sit through two additional days of 30(b)(6)
4 depositions to talk about some of the things she talked about
12:03:20 5 and documents she was presented and all of the other
6 testimony.

7 So if a 30(b)(6) witness is going to be presented to
8 the other side, it's a good thing. I leave it to the
9 plaintiffs counsel to answer that.

12:03:31 10 But I'm saying I think this rule, Judge -- this thing
11 got started with the ABA task force and Lawyers for Civil
12 Justice joined, the problems we're seeing on the defense side
13 of 30(b)(6), and this rule doesn't fix the problem. It
14 institutionalizes something that's been a part of the practice
12:03:51 15 for a long time. You get a 30(b)(6) notice, you meet and
16 confer. But you meet and confer in the context of no
17 guidelines. And this rule does not provide the guidelines to
18 drive the meet and confer to getting improved discussion. So
19 that's my primary problem with it.

12:04:09 20 JUDGE BATES: Does that mean that what you are
21 primarily suggesting is that there be a numerical limit to the
22 number of topics?

23 MR. PRATT: Yeah. Yeah. Here's my view --

24 JUDGE BATES: And would that not, just as an example,
12:04:23 25 say, if 20 is too many topics, if there were a numerical limit

12:04:29 1 saying there could be ten topics, wouldn't that lead simply to
2 ten more generally stated topics that would still cover the
3 same territory for the company?

4 MR. PRATT: I don't think so. First of all, the rule
12:04:44 5 also requires reasonable particularity, so you can't come in
6 and say -- I mean, of the -- of the -- of the topics that we
7 got, the pelvic mesh litigation, they said they wanted to have
8 somebody discuss all aspects of physician training, all
9 aspects of sales rep training. I don't know how much broader
10 you can get from that.

11 I mean, so my view on this is that the biggest
12 problem you have if you're the client is dealing with that.
13 If you get 50, 60, 85 topics, 30(b)(6), you don't even know
14 where to start. And you know there's going to be discussions
15 to try to limit that. Once you get it limited, you have to go
16 find the witness. This isn't -- this is the season of Elf on
17 a Shelf. We don't have a witness on a shelf. We have people
18 who have day jobs, and they've got to be in a position to say
19 I'm willing to participate with lawyers and do this and speak
12:05:34 20 on behalf of the corporation. That's extraordinarily
21 difficult and emotionally draining for people.

22 JUDGE JORDAN: But that's true for any 30(b)(6), even
23 if there were one topic; right? I mean, it's an imposition,
24 but that's a piece of the system. And I don't take you to be
12:05:50 25 saying eliminate 30(b)(6) depositions.

12:05:52 1 So getting to the point of they can be harassing and
2 over the top, what is -- what is wrong with the system as it
3 exists, which you took advantage of and went to get a
4 protective order. Go to the court and say this is an over the
12:06:11 5 top kind of demand on this 30(b)(6) deposition notice we've
6 got, and give us relief.

7 MR. PRATT: You've got judges who say, I have no idea
8 what's reasonable in terms of numbers. Is 70 reasonable? 50?
9 The rules don't say that. So judges look at it and go, it
12:06:25 10 makes sense. In this case there was no limitation on the
11 number of topics.

12 JUDGE JORDAN: How could that be done in the
13 abstract, though, Mr. Pratt? How could we say for all cases
14 ten is the presumptive right number?

12:06:39 15 JUDGE BATES: Isn't an individual employment
16 discrimination case much different than a pelvic mesh case in
17 terms of the number of topics that might be appropriate?

18 MR. PRATT: Maybe, maybe not. But you also have a
19 presumptive limit of 25 interrogatories you somehow work
12:06:54 20 around that, I suggest, has prevented motion practice.

21 You have a presumptive limit of ten witnesses in a
22 case. No matter the case. And I'm sure there was outrage
23 then about, wait a minute, all cases are different.

24 And I'm not saying if ten's a presumptive limit that
12:07:10 25 that's going to cause, you know, all kinds of difficulties. I

12:07:16 1 think what it will do, it will tether the process.

2 I want to talk about just emphasizing if the
3 presumptive limit is ten, then you have some tether to what is
4 reasonable. It doesn't mean it's always going to be ten. If
12:07:29 5 you have an opportunity to object, you have the court who can
6 get involved. And I think the prospect of the court getting
7 involved on these kind of things incentivizes reasonableness.

8 And I think the prospect of avoiding duplication -- I
9 think these are things that we propose as to problems. I
12:07:48 10 think identifying the witness in advance doesn't seem to a
11 huge problem. I hear about the problem of unprepared
12 witnesses. I don't even know what that means. I have never
13 had that, I've never seen that in my practice.

14 But I will tell what you contributes to it, if it
12:08:03 15 exists. If you have to present five witnesses on 50 topics,
16 you're probably going to have somebody on the plaintiff side
17 say this person wasn't prepared to deal with this question
18 when I asked him or her the question.

19 So I think part of the unprepared witness situation,
12:08:18 20 which I don't fully understand, is more based on the idea that
21 the process is being abused and there are too many topics, and
22 trying to prepare a witness, manufacture a witness,
23 manufacture a witness, take someone who may not know it all
24 and kind of invent them into this person who can be the person
12:08:39 25 who looks at documents and comes up with this story, there's

12:08:43 1 an inherent risk that it's not going to match up perfectly
2 with what the plaintiff's lawyer is going to want.

3 And I think if you limit the topics, put some more
4 control over this process, I think you can eliminate a lot of
12:08:56 5 the problems that the ABA talked about in the task force
6 report and what else they may have talked about in their
7 submission.

8 JUDGE BATES: Any questions, other questions?

9 Mr. Pratt, thank you very much.

12:09:07 10 MR. PRATT: Thank you. I Appreciate it.

11 JUDGE BATES: Next witness is Keith McDaniel.

12 MR. McDANIEL: Good morning. I'm Keith McDaniel from
13 the McCranie Sistrunk firm in New Orleans.

14 JUDGE BATES: You are the first witness who should
12:09:23 15 say good afternoon.

16 MR. McDANIEL: Apologies. Good afternoon. Greetings
17 from New Orleans.

18 I'd like to start by thanking the committee. You
19 have a task before you, and it's one I'm sure that is not that
12:09:31 20 welcome, but I commend you for that.

21 More importantly, I commend you for the work that has
22 been done by you and others on the committees with respect to
23 Rule 16, 26, and the proportionality considerations that have
24 been worked in the discovery process.

12:09:46 25 For 30 years I have litigated largely on the defense

12:09:49 1 side in the areas of product liability and toxic tort. I have
2 defended at this stage more 30(b)(6) depositions than I care
3 to think about, although I've taken a number myself as well.

4 I think when the amendment was first talked about
12:10:06 5 with respect to 30(b)(6), the thought was that ultimately we
6 would see what I think everyone here agrees with has been an
7 outstanding outcome with respect to 16, 26 to the discovery
8 process the same sort of clarity brought to what is a very, at
9 least in my view, contentious area, and I would submit to you
12:10:29 10 that the amendment as proposed will not do that, and I would
11 urge you not to pass it.

12 Anecdotally to the question of identity of witnesses,
13 early in my practice I was defending a corporate deposition
14 for a Japanese manufacturer. Plaintiff's counsel came to me
12:10:45 15 and said, can you tell me ahead of time who's going to be
16 testifying, we don't know anything about this manufacturer. I
17 did, because I thought it was the right thing to do. We had
18 three witnesses coming from Japan. None could speak English
19 so there was an interpreter involved. We spent four days of
12:11:01 20 depositions going through their social media, where they had
21 worked in the past, and all of these things and, quite
22 frankly, hardly touched on any areas of the notice.

23 So anecdotally, I can tell you that the identity of
24 witnesses can lead to muddying of the water in the sense of
12:11:21 25 confusing the individual deposition right that one may have

12:11:26 1 versus the corporate deposition.

2 The identity of the witness is given in the rule.
3 It's the corporation. The person that is speaking, is
4 speaking for the corporation.

12:11:40 5 Now, I will tell you to the other questions,
6 certainly I have been asked for the identity of the witness,
7 and as the meet and confer which I do progresses, I can't
8 think of a deposition that I have defended that before the
9 deposition I have not said it's going to be Joe Blow. But
12:11:59 10 that is not something I could have said through a mandated
11 meet and confer when I'm also talking about the areas of the
12 deposition to be covered. There's just simply not that time.

13 JUDGE JORDAN: I'm sorry, I'm not understanding.
14 You're saying that you do give -- you do regularly identify
12:12:19 15 the witness when asked --

16 MR. McDANIEL: I do as a matter of practice so that
17 when someone comes into the deposition they know the person.
18 But that may be two days before the deposition.

19 JUDGE JORDAN: Okay. So you said but that would
12:12:37 20 create a problem with the meet and confer about the topics?
21 Did I hear that right?

22 MR. McDANIEL: At the time the meet and confer is
23 happening, typically we have a draft notice. In my practice I
24 can't think of one that does not have at least 30 items. I
12:12:52 25 have no way of knowing at that time who's going to be

12:12:56 1 addressing those. I'm just seeing those.

2 Now, as that process develops, that gels and you
3 begin to get it. But just as counsel from Jackson,
4 Mississippi noted, there have been times where that person has
12:13:11 5 changed for whatever reason, business related, personal,
6 whatever. And if the meet and confer and identity requirement
7 suggests something that is now concrete, it is, in my view,
8 creating something that is only going to cause problems in the
9 rule. And there are other areas where this rule needs clarity
12:13:34 10 that would be much more useful than interjecting this.

11 JUDGE JORDAN: What you're doing is not creating a
12 problem. The way you're handling it now with some
13 identification maybe as late as a couple days in advance, that
14 hasn't created a difficulty in your -- or it hasn't muddied
12:13:51 15 the waters in the deposition?

16 MR. McDANIEL: In my view, still more time is spent
17 on personal information with respect to the witness that has
18 been dug out of today's information world, that that is
19 unnecessary, again, in the context of what a person is
12:14:08 20 there -- and the problem is so much time often is used for
21 some of that. You then run into the issue of, well, in our
22 seven hours we didn't cover this. Well, if you had not --

23 JUDGE ERICKSEN: Have you ever had the experience of
24 opposing counsel refusing to engage in a meet and confer
12:14:28 25 process on topics?

12:14:35 1 MR. McDANIEL: I will say that I always try to get as
2 part of the 26 this discussion going, and I can say to you
3 without fail, I have never had a plaintiff's counsel at the
4 time of 26 be willing to talk about whether he's even going to
12:14:50 5 have one, much less the topics. The time --

6 JUDGE ERICKSEN: Do you think that a rule -- I know
7 you don't believe that it goes far enough. But that -- but
8 inserting a meet-and-confer requirement, do you think that
9 that would nudge people to be more willing to talk about it
12:15:09 10 because they know the rule is going to require the discussion
11 at some point?

12 MR. McDANIEL: I like the concept, again, of clarity
13 with the rule. I think a meet and confer with a certain time
14 limit would also control the late notices we get, because
12:15:27 15 invariably you will get the corporate notice of deposition
16 after written discovery is done, oftentime after personal
17 depositions have been taken of corporate witnesses, right on
18 the eve of when plaintiff's expert report is due, and it's
19 usually, oh, our experts need this.

12:15:46 20 JUDGE BATES: What do you mean by the time? When the
21 30(b)(6) takes place?

22 MR. McDANIEL: The meet and confer with respect to
23 the 30(b)(6). I'm talking about clarity with respect to a
24 process relative to -- if that process is out early enough, I
12:15:59 25 would submit, and you try to have it and then nothing happens,

12:16:03 1 and then you get 15 days before the end of discovery we're
2 going to have this, then I think at that point I'm in a
3 position to say, hey, we had this deadline ages ago to do
4 this, either you weren't prepared or didn't want to do it.

12:16:21 5 I've got something then. Just a generalized meet and confer
6 that is not specific in time, in the same way that perhaps
7 limiting the topics.

8 There needs to be more clarity into the process to
9 include objections if you can't solve things in the meet and
12:16:39 10 confer.

11 PROF. MARCUS: Have you ever asked a judge under
12 Rule 16(b) to set a time limit for 30(b)(6) depositions?

13 MR. McDANIEL: I've had the conversations with the
14 judges in Mississippi and Louisiana, and most, at least at
12:16:55 15 that conference, say let's get the discovery going and see
16 where it goes. So, no, I have not gone back and said let's
17 set a time.

18 JUDGE BATES: Sounds like you don't have that much of
19 a problem with meet and confer as to the topics, and in your
12:17:08 20 own practice, you do tend to divulge the identity of the
21 witness, at least a couple of days before the deposition. But
22 you do have some problems with meet and confer, timing and
23 other considerations, with respect to the identity of the
24 witness.

12:17:21 25 But you've also said that there needs to be other

12:17:24 1 things addressed in the rule. Could you just list the two or
2 three most important things that you think are necessary in a
3 modification of 30(b)(6)?

4 MR. McDANIEL: Time frame for the notice. Time frame
12:17:38 5 with respect to a meet and confer --

6 JUDGE BATES: For the notice? What do you mean the
7 time frame for the notice?

8 MR. McDANIEL: Emphasis of the notice of the
9 30(b)(6). Relative to either a discovery cutoff or something
10 so that we know that you --

11 JUDGE BATES: So the rule should dictate when a
12 30(b)(6) can take place?

13 MR. McDANIEL: Yes.

14 JUDGE JORDAN: You mean like 30 days in advance of
15 the deposition, you should get the topics?

16 MR. McDANIEL: Yes. Yes. And then you have a period
17 of time, just like in 45, to meet and confer and work it out,
18 and if you don't, ten days to file an objection. So that when
19 you go into the deposition, there is a ruling. Because, as
12:18:15 20 the cases as you've seen showed, it's all over the place with
21 respect to what benefit a motion for a protective order.

22 In my practice, more times than not they're filed and
23 I don't have a ruling by the time of the deposition, so we go
24 forward with it, sort of not knowing what the outcome is going
12:18:32 25 to be.

12:18:32 1 And to your question, Judge Bates, earlier about
2 witnesses being prepared to testify, in all of my years of
3 practice, I have never had that raised. And at least for the
4 defendants that I represent, the last thing we want, from an
12:18:51 5 expense and any other number of reasons, is to have a witness
6 not prepared to testify. So it's interesting to me that I
7 hear you suggesting that that is a common occurrence. I just
8 have not seen that in my practice. And I don't think
9 identifying the witness any earlier is going to change the
12:19:11 10 preparation.

11 JUDGE BATES: All right. Thank you very much,
12 Mr. McDaniel. We appreciate your testimony today.

13 We'll next hear from Philip Willman.

14 MR. WILLMAN: Let me be the second person to wish you
12:19:25 15 good afternoon.

16 Thank you for allowing DRI to participate in this
17 process. I'm here not in my individual capacity, but in my
18 capacity as president-elect of DRI.

19 DRI is a voluntary membership organization of lawyers
12:19:43 20 who defend individuals and organizations in civil lawsuits.
21 We have 20,000 members. It's a large, sprawling membership.
22 Many of our members devote either substantially or exclusively
23 their practice to federal court. Others are in state court.
24 But both categories are going to be impacted or affected by
12:20:07 25 these rule changes.

12:20:09 1 Rather than get into reasons why DRI has taken the
2 position that it has, I would like to describe the process.
3 But the position that DRI is taking is that the meet and
4 confer is a laudable goal with respect to discussing the
12:20:27 5 topics, the number of topics, but DRI does oppose the identity
6 provision in the proposed rules.

7 In addition to that, we have put together a list of
8 improvements that we think should be considered by this
9 committee.

12:20:46 10 So how do we get there? DRI has a number of parts to
11 it. One part is called the Center for Law and Public Policy.
12 And that center, we rely on volunteers to help provide us with
13 improvements to the civil justice system. And there's a rules
14 committee that is in that center that is specific to rules.

12:21:12 15 The other source of information, we have committees
16 that are in substantive law areas, such as medical device,
17 such as medical liability.

18 Now, to get to these requirements, we asked the
19 leaders of those different groups to get information from your
12:21:30 20 members of your committees as to how they perceive this rule
21 change and what problems they've had with this.

22 We're not a pure democracy. We can't get information
23 from all 20,000 members, but we rely on those two sources of
24 information to come up with our position.

12:21:48 25 And so that is how we got to the list of suggested

12:21:54 1 improvements that's in our -- in our presentation. And that's
2 how we got to the position that the identity provision is
3 something that our membership is opposed to.

4 JUDGE BATES: So from that process what is the
12:22:10 5 disadvantage of requiring meet and confer with respect to the
6 witness identification so long as the rule or the committee
7 note is really clear on the fact that the choice of witness
8 remains with the organization?

9 MR. WILLMAN: I think that the comments that we've
12:22:29 10 received is it's not all that clear. The language is
11 ultimately it's the responsibility of the responding party to
12 designate it, but what does that mean? How does that work
13 that the responding party --

14 JUDGE BATES: Well, if it were made clear through the
12:22:46 15 committee note or otherwise, then what would be the problem?

16 MR. WILLMAN: The other information -- you've heard
17 some anecdotes. For example, we've heard lawyers say, well,
18 we will identify somebody, and then two days before the
19 deposition we have to substitute that person for someone else
12:23:05 20 for various reasons. And that puts them in conflict with
21 that. And so there are problems that they've brought up to
22 us, our members, with respect to identification.

23 And you've heard also why. What's the reason for it.

24 The other -- this is truly a representative
12:23:26 25 deposition. Then why does it matter who is the person who is

12:23:31 1 providing that representation?

2 So you asked earlier, Judge Bates, I think, what are
3 the two or three recommendations that the defense bar -- the
4 defense lawyer would like to see. I would like to list out of
12:23:51 5 our suggestions, one is a clarification of notice, notice
6 requirements. Two would be a process by --

7 PROF. MARCUS: By that you mean time?

8 MR. WILLMAN: Time, yes.

9 The second would be a process by which objections can
12:24:10 10 be put to the court and resolved if there is not an agreement.

11 And the third would be to include 30(b)(6) party
12 conferences in the pretrial conferences and scheduling orders
13 as other discovery matters are enfolded into that.

14 JUDGE BATES: The second of those topics, aren't your
12:24:28 15 members able to bring objections, issues, disputes to the
16 court now through protective order motions or otherwise?

17 MR. WILLMAN: Well, some courts don't allow -- will
18 say, we don't won't protective orders before the deposition.
19 Go ahead and take the deposition and then afterwards we'll
12:24:49 20 deal with any problems there.

21 So there's a lack of consistency.

22 PROF. MARCUS: In those courts you expect that it
23 will be welcome to have an objection process that requires
24 going to court before the deposition?

12:25:01 25 MR. WILLMAN: I'm sorry, I didn't understand the

12:25:03 1 question.

2 PROF. MARCUS: I thought that's what your objection
3 process would lead to.

4 MR. WILLMAN: Right. Would be before. But what I'm
12:25:12 5 saying is there are courts that won't even take up objections
6 until after the deposition has been completed.

7 PROF. MARCUS: So we're supposed to tell them they
8 have to change?

9 MR. WILLMAN: If there was an objection process
12:25:24 10 before the deposition takes place, then all of that can be
11 ironed out before --

12 JUDGE BATES: Put another way, wouldn't the objection
13 process that you're looking for inevitably lead to more
14 litigation about 30(b)(6) issues?

12:25:39 15 MR. WILLMAN: Not necessarily. Again, you did your
16 due diligence in asking the magistrates, do you have problems
17 in this area. We did the same thing, and this is something
18 that our membership said is clearly a problem they've
19 experienced. The lack of consistency in the way in which to
12:25:55 20 deal with disputes about what is going to happen at the
21 deposition.

22 JUDGE ERICKSEN: It's hard to believe that it
23 wouldn't increase the number of cases that are brought to the
24 magistrate judges in advance, though, because what we've heard
12:26:09 25 from the defense bar early on was that there's a great

12:26:12 1 reluctance to bring these objections to the court because
2 there's no procedure and courts don't like it, it's fact
3 specific, and all the rest.

4 So you put in a rule that compels courts to accept
12:26:26 5 these motions and makes it a more -- puts grease in the
6 process. It's really hard to imagine it's not going to
7 greatly increase the number of disputes in court about it.

8 MR. WILLMAN: Then why have the process of objections
9 with the other discovery tools --

12:26:46 10 JUDGE BATES: Well, it only exists for Rule 45. It
11 doesn't exist for other depositions.

12 MR. WILLMAN: That's true. But why have Rule 45,
13 then? I mean, there's a reason for it. One of the wonderful
14 things I --

12:26:59 15 JUDGE JORDAN: One of the reasons is because it's
16 usually third parties. So that's the difference. It's not
17 a -- it's a difference with no distinction. It's a real
18 difference.

19 MR. WILLMAN: I understand.

12:27:10 20 But one of the beauties of the federal rules is
21 providing uniformity, and I think that's what the defense bar
22 is asking for, uniformity in the way in which objections are
23 taken care of.

24 Again, when you have jurisdictions that deal with it
12:27:24 25 in different ways, there's a lack of uniformity.

12:27:29 1 JUDGE BATES: Any other questions for Mr. Willman?

2 Thank you very much.

3 MR. WILLMAN: Thank you for your time.

4 JUDGE BATES: We appreciate it.

12:27:34 5 Next witness will be A.J. de Bartolomeo.

6 That look was I took a passing shot at the correct
7 pronunciation.

8 MS. de BARTOLOMEO: Yes, Your Honor, and that's fine.

9 Thank you very much for the passing shot. When you have a
12:27:49 10 name that looks likes mine, any attempt is really appreciated.

11 But, yeah, my name is A.J. de Bartolomeo. I'm a
12 partner at Milberg Tadler Phillips & Grossman, and this is my
13 first time testifying, and I'd like to say thank you very
14 much. It is really a privilege and an honor to see this
12:28:05 15 process unfolding right before your eyes and to be here.

16 Milberg Tadler is a national law firm and we
17 represent primarily plaintiffs, and I practice in the area of
18 class actions and mass torts.

19 And first of all I'd like to thank the committee. I
12:28:23 20 know the hard work that goes into to do what you all do, and
21 it really is -- has a great result. And I think the number of
22 people that want to come to testify to be heard before you
23 speaks volumes there.

24 I support the amendments as presented for a number of
12:28:44 25 reasons and -- first of all, I think it presents a fair and

12:28:47 1 balanced rule. And I think it promotes early cooperation
2 among the both sides of the -- I think it promotes early
3 discussion about the topics and how the witness is going to be
4 presented to present competent testimony on behalf of the
12:29:04 5 corporation early on.

6 JUDGE JORDAN: Can I ask you a question about that --

7 MS. de BARTOLOMEO: Yes, Your Honor.

8 JUDGE JORDAN: -- based on your letter. Why should
9 the plaintiff's representative have a say in whether or not
12:29:23 10 the corporate representative is, quote, competent to speak.

11 I think the way you framed it raises a question. Is
12 it really the obligation of the corporation to let you have
13 input into who you think is competent to speak if it's to be
14 their representative? I think that's how they would ask the
12:29:47 15 question if they were sitting here.

16 MS. de BARTOLOMEO: If my note or my submission gave
17 you that impression, then that was inartful drafting on my
18 part. I believe the corporation has absolute designation
19 power. I think the meet-and-confer process, as many others
12:30:01 20 have testified earlier today, when you talk about the witness,
21 who the witness is, whether the witness is speaking as based
22 on personal knowledge or first-hand knowledge or educated
23 knowledge, I think that meet-and-confer process helps enable
24 us to know whether the witness is going to be speaking
12:30:18 25 competently as to the topics that maybe I need to be more

12:30:23 1 specific or surgical about. To make sure both sides -- you
2 understand what I'm asking for so that you can give me a
3 witness that can speak competently about it.

4 I don't think I'm trying to interject my side into
12:30:36 5 their work product and their discussions with their clients.
6 That's their business.

7 But what I found in my practice is, unfortunately,
8 once we get to the actual 30(b)(6) deposition, I have a
9 witness who is not properly prepared, who is not competent to
12:30:53 10 speak to the topics that we have been through and made very
11 clear.

12 And I'd like --

13 JUDGE JORDAN: Does knowing the witness's name in
14 advance affect that? I mean, if you knew it, would that --
12:31:05 15 how does knowing the witness's name in advance make it more or
16 less likely that the witness who is produced will have been
17 properly prepared?

18 MS. de BARTOLOMEO: I think to the extent that other
19 people have testified earlier, and you asked the question
12:31:18 20 earlier today about knowing the identity as to an individual
21 deposition, 30(b)(1) versus 30(b)(6).

22 Quite frankly, in all candor, the only reason I want
23 to know the name of the witness is because it may be somebody
24 I am going to be deposing individually or -- and then I --
12:31:40 25 also I have corporate clients and I have to defend them. If I

12:31:43 1 am putting forward a witness that is also going to be on their
2 list for individual, I want to be a part of that
3 meet-and-confer process to talk about, okay, should we go
4 through the individual knowledge first and then we'll go
12:31:53 5 through the topics? Or how is the most efficient way to
6 handle this?

7 Because I don't want to bring my witness back and
8 forth and I don't want him or her to get the same question
9 over and over again, but I also want the information to be on
12:32:06 10 the record when he's an -- he or she is an individual or he or
11 she is a 30(b)(6).

12 And as Ms. Anderson testified earlier, and it often
13 does happen that there is somewhat of an overlap. Maybe not
14 for every topic, but your witness will be speaking as to their
12:32:25 15 personal knowledge because they are the senior VP of research
16 and development, but they also have personal knowledge and
17 first-hand knowledge based on the people they supervise, based
18 on their knowledge of the company, based on their knowledge of
19 the product.

12:32:38 20 So in order to separate that, when it's necessary to
21 separate it, it's helpful to know who, the identity of the
22 witness.

23 JUDGE ERICKSEN: But that would be a help to the
24 party responding to the subpoena. You say you don't want to
12:32:54 25 bring the person back if it turns out that they're going to be

12:33:02 1 a regular 30(b)(1) witness. But if the corporation knows that
2 that's a possibility, then currently they could say this is
3 the identity of the person.

4 But how does it help you? It's an efficiency for the
12:33:22 5 responder, but how does it help you to know that you're going
6 to be able to do two kinds of depositions on the same day
7 instead of just one?

8 MS. de BARTOLOMEO: As the noticing?

9 JUDGE ERICKSEN: Right, as the noticing party.

12:33:34 10 MS. de BARTOLOMEO: Well, I think it depends on
11 what's in my notice of the deposition topics. I'm going to be
12 preparing one way for the corporate discussion. And why am I
13 deposing this person as an individual? They're not
14 necessarily on 30(b)(6) topics, but there's some reason I want
12:33:51 15 to depose that person. Either they have personal knowledge as
16 to many of the documents, maybe they were involved in the
17 decision, let's use mass torts as an example since I do pharma
18 drugs. Maybe they were involved in the marketing of that.

19 Oftentimes with mass torts, one of the problems is
12:34:10 20 that marketing gets ahead of R&D and they might get a little
21 too enthusiastic or aggressive and say things that the R&D
22 people would not necessarily want them to put out the way they
23 did.

24 And so I want to talk to the marketing guy, but I
12:34:25 25 also want to talk to the corporation as to what the

12:34:31 1 corporation's position was on marketing.

2 JUDGE BATES: I assume from the perspective of the
3 noticing party that advanced notification of the identity of
4 the 30(b)(6) witness would add some efficiency because it
12:34:44 5 would enable you to decide, well, I want to depose that person
6 anyway and let's try to do it all at the same time, and that
7 would be more efficient for both sides.

8 MS. de BARTOLOMEO: Absolutely, Your Honor. I'm a
9 plaintiff's lawyer and I don't really want to go back and
10 forth and take this five times if we could do it in one day.

11 JUDGE JORDAN: Is there a reason to not have advanced
12 notice of topics, like 30-day advanced notice provision in the
13 rule as you've heard some people suggest here today?

14 MS. de BARTOLOMEO: I personally have no objection to
12:35:16 15 that, Your Honor. When I represent a defendant, I want as
16 much notice as possible because I need to prepare that
17 witness.

18 As a plaintiff, I know I have to get that advanced
19 notice because I have to think about what I need to prepare my
12:35:28 20 case and actually prove my case. So it's not like it's going
21 to just dawn on me two days before the end of the discovery
22 period.

23 The time seems to have started again. Do I still
24 have 53 seconds?

12:35:44 25 JUDGE BATES: I'll give you another 30 or 40 seconds

12:35:47 1 to make another point.

2 MS. de BARTOLOMEO: To wrap up. Okay.

3 I would like to point out that I do take issue with
4 the -- I think my submission said it, the number, and many of
12:35:57 5 the people on the panel identified it and so did some of the
6 witnesses. Artful drafting, we can come up with -- if it's
7 ten topics, you can make ten very broad topics. That doesn't
8 get us where we want to go. We want to be efficient. We want
9 to be surgical. Both sides want to know what we're talking
12:36:13 10 about, what we're seeking. And I think the meet-and-confer
11 process can help limit that. And at the same time, one size
12 does not fit all.

13 PROF. MARCUS: When you say you --

14 MS. de BARTOLOMEO: -- that might be five topics --

12:36:26 15 PROF. MARCUS: But when you say you have a problem
16 with the number, one thing you might be saying is a flat
17 across-the-board limit is a number that is likely to be a
18 problem.

19 MS. de BARTOLOMEO: Yes.

12:36:37 20 PROF. MARCUS: What the draft says is that the number
21 of topics is something open for discussion. Are you saying
22 that shouldn't be open?

23 MS. de BARTOLOMEO: No. I think the discussion is
24 good. But I know there was some submissions that said there
12:36:49 25 should be a limit on the topics, and the response is that's

12:36:54 1 just going to result in very broad topics, so that doesn't
2 accomplish anything.

3 JUDGE BATES: All right. No further question. Thank
4 you very much for coming. We appreciate it.

12:37:04 5 MS. de BARTOLOMEO: Thank you.

6 JUDGE BATES: Our next witness will be Amir Nassihi.

7 MR. NASSIHI: Good afternoon, everyone. Thank you
8 for letting me come and talk to you and provide my comments in
9 my individual capacity.

12:37:20 10 I'm an attorney with Shook, Hardy & Bacon in
11 San Francisco. My practice involves working with product
12 manufacturers, distributors, and retail clients in individual,
13 mass torts, and class-action litigation.

14 And most of my practice is California based.
15 Sometimes in federal court, more often in state court, which
16 essentially has a similar approach to corporate witness
17 depositions as 30(b)(6), mimics the rule, doesn't require any
18 identification. Although California, in state court practice,
19 does have an objection procedure, which is tremendously
20 helpful so you don't get the kind of disparity that you have
21 in federal court as to whether Rule 37(b) default sanctions
22 apply, et cetera, and the split in decisional law there.

23 So the focus of my testimony today is on
24 complications of injecting into the 30(b)(6) process by adding
12:38:23 25 the identification requirements.

12:38:26 1 For one thing, the timing of the proposed disclosure
2 of the witness identity will be fraught with disputes.

3 30(b)(6) witnesses are --

4 PROF. MARCUS: California state courts have a PMK
12:38:39 5 requirement; right?

6 MR. NASSIHI: They have a PMQ requirement, correct.

7 PROF. MARCUS: That does not lead to any discussion
8 as to who the person is going to be?

9 MR. NASSIHI: It -- it's -- there's no requirement to
12:38:50 10 identify the person. As a practical matter, just like with
11 30(b)(6), when it comes to the PMQ, I generally discuss with
12 the other side when the timing is appropriate. And it differs
13 from case to case. But, again, the absence of a notice
14 situation, notice requirement or any rulemaking or notice kind
15 of compounds that issue.

16 JUDGE BATES: Well, if there were to be a witness
17 identification requirement, how long? Four days before the
18 deposition? A week before the deposition? What's the problem
19 with that?

12:39:32 20 MR. NASSIHI: The problem that I've experienced with
21 disclosure, there's been times I've disclosed too early and
22 it's caused problems because --

23 JUDGE BATES: What's too early?

24 MR. NASSIHI: It depends on the situation. There may
12:39:45 25 be a situation where you're trying to prepare a witness on

12:39:48 1 topics or for corporation who has never put up for corporate
2 witness before. There may be times where, given the absence
3 of any notice in the rules, where you have short period of
4 time to meet the witness, prep the witness, see that, you know
12:40:02 5 what, this is not the right witness, we need to swap him out.
6 By that point where you run into trouble is where you've
7 identified that witness to the other side and then suddenly
8 you get a 30(b)(1) dep notice because some litigation
9 advantage might be sensed from the fact you suddenly changed
12:40:20 10 witnesses, and there is no protection in that situation.

11 Then you also have a situation where you might
12 disclose too early, which I've done as well, and then you have
13 the other side want someone else to be the witness, so they'll
14 notice him up in their individual capacity and essentially put
12:40:39 15 you in a position where you have to change designees for the
16 sake of efficiency.

17 And invariably you get disputes arise as well on --
18 on occasion as to whether someone else should be a right
19 witness. The biggest disputes I've had on that has been --

12:40:58 20 JUDGE JORDAN: How does any witness identification
21 impact that, sir? If you didn't identify the witness and they
22 discovered they had to take that particular witness, they
23 would notice the person they wanted in the individual capacity
24 anyway; right?

12:41:15 25 MR. NASSIHI: They certainly may, but they wouldn't

12:41:17 1 be able to influence your selection of 30(b)(6), your
2 selection by trying to notice up an individual who -- for
3 example, if you put up someone as a 30(b)(6) witness on prior
4 occasions and you need to move away from that and develop
12:41:32 5 someone new and the other wants that particular person and
6 expects you to put that person up, you'll suddenly get a
7 deposition notice setting that person a couple of days
8 earlier. In that situation you have to go ahead and, out of
9 efficiency, continues those hearings. You have to go ahead
12:41:47 10 and make sure to have --

11 JUDGE JORDAN: I'm having trouble following that
12 because if they really want that person, when you say they're
13 influencing your decision about who to put up for 30(b)(6), I
14 suppose that's true, but you have the right to put up whoever
12:42:00 15 you want and they have the right to serve an individual
16 notice; right? So you could -- if there were no change at all
17 in the rules and they were just as they are now, that would --
18 would that play out just the same way?

19 MR. NASSIHI: No. Respectfully, no, it would not,
12:42:16 20 because they would want that person as a 30(b)(6) in their
21 corporate witness capacity. And so suppose the corporate
22 witness is noticed for July 10th. Suddenly you'll get a
23 deposition for that individual they want to be their corporate
24 rep for July 8th, and you have a position where you have to
12:42:34 25 essentially look at efficiencies for the corporation. If

12:42:37 1 we're going to have to put this person up anyway, let's just
2 have him be the 30(b)(6).

3 JUDGE BATES: If identification of the witness to
4 testify were only five days before the deposition was
12:42:49 5 scheduled, then there wouldn't be time to have a notice of
6 another deposition occurring before that deposition. I don't
7 see how that would occur.

8 MR. NASSIHI: Well, depositions can be easily -- you
9 just get a new deposition notice in that situation. But the
12:43:05 10 point's well taken. Oftentimes, depending on when disclosure
11 occurs, oftentimes if it's close enough to a deposition,
12 you're going to go ahead and proceed with the deposition.
13 It's an easy process to renotice the deposition for a
14 different date, and there's no rules in terms of priority that
12:43:27 15 are actually institutionalized.

16 And the reality is having a rule on identification
17 presents a problem when -- on timing disputes, and we're
18 injecting a whole new source of conflict in here where there
19 currently isn't any recognized dispute. This issue was never
12:43:50 20 raised in the original litigation section letter which
21 prompted a close look at 30(b)(6). A whole host of other
22 issues which are more appropriate to be dealt with, I think,
23 we're the focus of the issues that were raised there.

24 JUDGE BATES: In your practice, do you normally
12:44:10 25 identify the 30(b)(6) witness sometime before the deposition?

12:44:15 1 MR. NASSIHI: Almost always I do at some point before
2 the deposition. There's been two particular opposing counsel
3 who have engaged in some gamesmanship where they've learned
4 the identities before the deposition. In that case, if I have
12:44:33 5 cases with them in the future, I precondition it more so. But
6 generally I do at some point. And, again, there's no one size
7 fits all as to the timing of that.

8 JUDGE BATES: We have time for one last point you'd
9 like to make, please.

12:44:49 10 MR. NASSIHI: Certainly.

11 JUDGE BATES: I'm sorry to cut you off.

12 MR. NASSIHI: Oh, by all means.

13 I would just suggest or urge that the standing order
14 that Judge Donato has in the Northern District of California
12:45:05 15 which provides presumptive limits on the numbers and treats
16 30(b)(6) as issues which have some presumptive contours to it,
17 be looked at and considered because that's been tremendously
18 helpful in the Northern District of California, and even when
19 cases are assigned to different judges. And pointing to that
12:45:23 20 as providing guidance, which can be deviated from case to
21 case, but provides some kind of guidance.

22 JUDGE BATES: What's it deviated from if there's a
23 disagreement where it requires going to the judge for a
24 resolution?

12:45:38 25 MR. NASSIHI: Just like you do with a ten deposition

12:45:40 1 limit and other limits, you have an initial case management
2 conference right around the same time as the discovery opens
3 up and you address this as part of the requirements of that,
4 what deviations there should be from the standard rules. If
12:45:52 5 it's class action, you'll say we need 15 depositions, we need
6 to deviate from this, for example.

7 JUDGE BATES: And you say as well we need 40 topics
8 for the 30(b)(6).

9 MR. NASSIHI: Exactly.

12:46:03 10 JUDGE BATES: Okay. Thank you.

11 MR. NASSIHI: Thank you.

12 JUDGE BATES: Appreciate your testimony.

13 Our next witness is Donald Myles.

14 Good afternoon, Mr. Myles.

12:46:11 15 MR. MYLES: Good afternoon. Welcome to Phoenix.

16 JUDGE BATES: Thank you.

17 MR. MYLES: I've been here for 37 years practicing at
18 the law firm of Jones, Skelton & Hochuli. My practice is
19 mainly representing major insurance carriers across the
12:46:25 20 country in bad faith litigation here.

21 With regard to 30(b)(6) depositions, almost every
22 single case involves at least one to three of these
23 depositions, and categories usually are ten to 25. We get
24 together, we negotiate that down to a manageable number and we
12:46:44 25 reach an agreement.

12:46:45 1 So the meet and confer, which is actually required by
2 the local rules, is done with regard to all of this. So it's
3 something being put into the rule that really is unnecessary
4 in which most practitioners do anyway.

12:46:57 5 JUDGE JORDAN: Can I ask --

6 JUDGE BATES: Not every state has the same local
7 rules that you have.

8 MR. MYLES: Fully understand that. But with regard
9 to common sense and practicalities and ethics, that's how 80
12:47:07 10 to 90 percent of us act all the time.

11 JUDGE JORDAN: But if you've got it in a local rule,
12 why wouldn't it be salutary to have in a national rule?

13 MR. MYLES: I'm not saying meet and confer is bad. I
14 do it in every single case. I would do it if it didn't exist.

12:47:23 15 We're talking about rules that are for really 10 to
16 15 percent of people practicing law. Otherwise we wouldn't
17 need these rules.

18 The NFL used to have a rule they would not stop the
19 clock when players were injured in the last two minutes. They
12:47:37 20 did because people complained that they needed to get -- that
21 player safety was important.

22 They then learned that 50 percent of all injuries
23 happened in the last two minutes of a football game. You
24 watch a game in the NFL now, there's a run-off because of that
12:47:52 25 because people took advantage of a rule that everyone put in

12:47:56 1 place that they thought would be positive.

2 And this rule either should not be touched or it
3 needs to be completely redone with a lot of things that both
4 the plaintiffs bar and defense bar have mentioned here.

12:48:07 5 Otherwise leave it alone.

6 If we're going to meet and confer, the moment you say
7 what we should meet and confer about, someone is going to
8 utilize to their advantage.

9 Identity. We like identity. There's social media.
12:48:21 10 We can find out so much about so many people and every
11 witness, what they've said, where they eat, who they're
12 married to. You name it, we'll have that information. It's
13 an advantage. It will be used.

14 The fact of the matter --

12:48:37 15 JUDGE BATES: In your practice, is the identity of
16 the witness to testify usually disclosed sometime, maybe a
17 short time, in advance of the deposition?

18 MR. MYLES: Any lawyer asks me, whenever I know
19 definitively I will tell them. Not a problem.

12:48:50 20 Now, I will tell you I represent the insurance
21 industry. There are big cases, medium cases, small cases. I
22 get a 30(b)(6) case of a \$100,000 case, I'm really not that
23 concerned about who I put up there as a 30(b)(6). I'll tell
24 them. They're not going to spend that much time; the case
12:49:08 25 isn't worth that much.

12:49:09 1 But in something where it's institutional in nature,
2 20-, \$40 million, that gets people's attention. That's a big
3 deal. It's a fire drill at these companies when that happens.
4 People are prepared properly.

12:49:25 5 I share that information. But in the smaller cases,
6 candidly, I'll tell them, look, we need to prepare, we need to
7 get someone. But it may be days in advance of the deposition
8 that I even meet the person.

9 And I learn by my preparation we have the wrong
12:49:41 10 person. We need to get somebody else or we're going to be in
11 a situation we do not want to be in.

12 Now you're going to make that mandatory in every case
13 that the identity has to be disclosed five days before in a
14 very compressed standard of time in cases in which there's
12:49:58 15 really an imposition on corporations.

16 Depositions of major insurance companies in this
17 country, I have 20 going on right now, and that's in Maricopa
18 County. I can't imagine what it is in California. It's going
19 on every single day all the time, and they all are the same.

12:50:18 20 Who knows most about the claims handling? What was the
21 training of all of the claim handlers? Who drafted the policy
22 language? Every single case I've seen that.

23 And like I say, 80, 90 percent of the time, no
24 problem. The people on the plaintiffs bar and the defense bar
12:50:33 25 are friends.

12:50:37 1 Half of the plaintiffs bar in this county right here
2 used to be defense lawyers. Some of them were my partners.
3 We can work this out.

4 But making it mandatory will make it a game for that
12:50:49 5 small percentage of people that don't, that are difficult.

6 I really don't have that much more to add. I would
7 encourage you either start over, which I know you do not want
8 to do, and really address a lot of the things that people have
9 raised here, or, really, if you want to put a meet and confer,
12:51:07 10 great, nationally, do it. All the good lawyers in this room,
11 plaintiffs and defense bars, do it anyway. It's not a big
12 deal.

13 But I think to put something in there that could be
14 utilized by that small percentage will be a problem.

12:51:21 15 Thank you very much.

16 JUDGE BATES: Thank you, Mr. Myles.

17 Next witness. Francis McDonald, please.

18 Good afternoon.

19 MR. McDONALD: Good afternoon. Thank you,
12:51:30 20 Your Honor. I appreciate the opportunity to appear here today
21 in Phoenix.

22 I practice in Orlando, Florida. I've been doing
23 about the same thing for the last 37 years. I represent
24 corporations, most frequently corporations that find
12:51:46 25 themselves in pattern type litigation. And most of the

12:51:51 1 comments that I would make, were I the number one witness this
2 morning, are going to mirror most of the things that you've
3 heard already today, and I'm not going to repeat them. But
4 let me just tell you what my position is as succinctly as I
12:52:03 5 can and get to the point.

6 I'm not so much concerned about an amendment to this
7 rule that would add a meet and confer provision with regard to
8 the number and the topics of the 30(b)(6) notice. Like many
9 of the other lawyers that you've heard from already today, we
12:52:20 10 engage in that already.

11 When we conduct a Rule 16 meeting -- or, excuse me, a
12 Rule 26 meeting with our adversaries I encourage them to agree
13 to a provision in our report that we send to the court that we
14 will engage in a meet and confer, not so much about the number
12:52:38 15 of the topics because I don't think I could ever get a
16 pre-notice agreement on that, but certainly let's agree to sit
17 down and talk about the extent, the number, and the topics so
18 that we can at least try to work it out before we bother the
19 court with some agreement or some dispute that could be
12:52:59 20 resolved were we meeting.

21 So I'm not so much so concerned with that if it is
22 the province of the committee that we really feel we need to
23 add that and codify that best practice. So be it.

24 I'm a little bit more concerned with the
12:53:15 25 identification requirement as -- for all of the reasons you've

12:53:18 1 heard already today. I think it has the potential, and I know
2 it's not the intent of this committee that has put in a lot of
3 time and effort to try to better the civil justice system, but
4 I think it has the potential to counter the designation
12:53:34 5 mandate that's already in part of the rule, and I would not
6 want to see that become used by some, not by all, but by some
7 as a vehicle by which they could gain an advantage over an
8 organization or a corporation.

9 JUDGE BATES: In your experience, is the identity of
12:53:53 10 the witness usually disclosed in advance of the deposition?

11 MR. McDONALD: It is. And I was sitting there
12 thinking, I've had a lot of time to sit and think and recall
13 since listening to the beginning of today's proceedings, and a
14 lot of times I don't get asked. And when I think back on the
12:54:11 15 times I don't get asked who the witness is going to be who's
16 going to be designated by the corporation, I find myself
17 recalling that I didn't get asked because the opponent on the
18 other side was either new to this type of litigation or he was
19 even new to 30(b)(6) deposition to begin with, and I had not
12:54:32 20 seen he or her many times before.

21 But on those occasions when I am asked about it, if I
22 know who it is, sure, I disclose it. I don't -- I don't
23 ascribe a lot of ill will to my adversaries in doing something
24 untoward with regard to a 30(b)(6) witness because I think
12:54:53 25 they, in their right minds, know that the purpose of the

12:54:56 1 deposition or the exercise is to hear what the corporation
2 knows, not so much what the person who's deemed the mouthpiece
3 knows.

4 So I'm not so much worried about that, but sure, I do
12:55:07 5 disclose it when asked. But -- and listening to all of the
6 comments today, I think I can kind of coalesce this. This
7 timing of when notification may be required or mandated, given
8 the situations that corporations, large and small, find
9 themselves in when confronted with a 30(b)(6) notice, it would
12:55:32 10 be problematic to require something that goes a little bit
11 even beyond 24 hours' notice or 48 hours' notice.

12 If it was something the day before, maybe that's
13 starting to get into the area I would think could be
14 reasonable. But, beyond that, you create the potential for
12:55:52 15 misuse, and you create an obligation that the corporations
16 simply may not be able to comply with given their
17 circumstances.

18 So I think I'm going to be the first witness to
19 release my time to the next one. If there's no questions,
12:56:08 20 I'll be glad to sit down. But thank you for engaging in this
21 process.

22 JUDGE BATES: Thank you very much for coming. We
23 appreciate your testimony.

24 And the next witness should know that they do not get
12:56:18 25 any additional time.

12:56:21 1 The next witness will be Michael Denton.

2 Good afternoon, Mr. Denton.

3 MR. DENTON: Good afternoon. Thank you for having
4 me. I'm from a little town called Mustang, Oklahoma, which is
12:56:32 5 a suburb of Oklahoma City, sort of kind of in a separate
6 county.

7 And unlike all these folks, I don't litigate stuff
8 all over the country. I've traveled a bunch taking
9 depositions. And that's kind of one of the reasons I wanted
12:56:44 10 to come here and speak, because from my perspective as a
11 small-town lawyer, I spent the first eight years doing
12 insurance defense work, representing Suzuki in product
13 liability and doing medical malpractice defense work. Since
14 then, in the last 20 years I still represent a lot of small
12:56:59 15 businesses and banks, small construction companies. Don't
16 have any big global or corporate clients like that.

17 But when I have to go somewhere and take a
18 deposition, we've talked a lot about the identity, and it's
19 important to me because -- give you an example. In GM
12:57:12 20 litigation involving a resistive seat heater case, I know
21 Troy, Michigan so much better than I should ever know it. I
22 didn't know there was a Troy, Michigan until I went there.
23 And that's the place to stay, not in Detroit.

24 We took numerous depositions because we were playing
12:57:28 25 a game about who was who was who. We went through this

12:57:30 1 process as a 30(b)(6). Or actually it's a 3230(C)(5) in state
2 court.

3 I think everybody here would agree those are the
4 exceptions to the rule when you have counsel who's playing
12:57:41 5 games.

6 The reason it's important to me to know the identity
7 of a witness that I'm going to be deposing is do I want to
8 combine that in one trip. Can I please get on that two-hour
9 flight up to there and rent a car and drive out -- fascinating
12:57:55 10 how they number the streets up there in Detroit because of
11 Henry Ford's home -- but drive out there and take that
12 witness's deposition. First of all, on one, whether it's a
13 30(b)(6) first or the 30(a) or 30(b)(1), however -- 30(b)(1)
14 is the notice part, 30(a) just says we get to take
12:58:13 15 depositions.

16 JUDGE BATES: Would knowing the identity of the
17 30(b)(6) witness only three or five days in advance of the
18 scheduled deposition satisfy that need that you just
19 expressed?

12:58:25 20 MR. DENTON: It would be ideal to have it further in
21 advance, but if they said, hey, by the way, the first thing
22 we're going to give you on the who's -- who supervised the
23 testing done by the outside laboratory on behalf of GM is this
24 person. Great, I know I've seen that person's name on a lot
12:58:40 25 of e-mails and a lot of stuff. I'll call up opposing counsel,

12:58:43 1 look, let's make one trip instead of two. Can we agree? We
2 can either do them -- I'm thinking we can do them the say day
3 or we will make it a two-day process.

4 So the earlier we can get the information, the better
12:58:54 5 informed I am, and I can make a decision then and there and
6 avoid the extra costs, the extra time, which ultimately winds
7 up costing my client. My client has to pay for all these
8 trips back and forth, assuming there's a recovery at the end
9 of the day. It's going to deminimize -- minimize that amount
10 because he's got a --

11 (Telephone beeps.)

12 MR. DENTON: Was that me?

13 JUDGE BATES: Don't worry.

14 MR. DENTON: Okay. I don't have anything on me.

12:59:19 15 So I can see it being very beneficial to having that
16 identity provided. I don't understand the objection because
17 when I presented witnesses for 30(b)(6), I want to know who it
18 is too.

19 I will sit down with my client and I grill them
12:59:31 20 because, obviously, I'm the lawyer and I'm the one getting
21 chastised by the judge if I don't have somebody who is
22 adequately prepared. And so I don't have any problem telling
23 the other side, hey, here's who I think we need, we got Jim
24 Bob, he was the guy that did all the training. I know Jim Bob
12:59:45 25 now has been moved out to marketing, but at the time all this

12:59:48 1 stuff went down, the time frame you're looking for, we know
2 it's Jim Bob, so here's who you want to depose.

3 I don't have any problem doing that.

4 If they want to dig up stuff on Jim Bob, so be it.

13:00:00 5 We're allowed to dig up information on our adversaries and on
6 witnesses and impeach them. That's a part of this process.

7 It's an adversarial process. So I don't understand any
8 difficulties about the identification.

9 There's been a lot of talk about the number of
13:00:15 10 topics, and I've heard several people congratulate this
11 committee, which I didn't know anything about, not directly,
12 about what was going on when you guys were doing the
13 proportionality stuff.

14 But my thought was Rule 26 handles this. If somebody
13:00:28 15 gives them 145-topic notice for deposition for 30(b)(6), they
16 have the means to go to the court and get that resolved. I
17 think most lawyers will get that resolved anyway.

18 I also want to point out, though, when you look at
19 limiting artificially in advance the number of topics to be
13:00:46 20 included in a 30(b)(6), you've got to understand sometimes
21 plaintiff's counsel doesn't know. When I sued GM over this
22 resistive seat heater, my paraplegic client got burned when he
23 and his wife were on a mission trip and he turned it on
24 thinking he turned on the low-back part, but he turned on both
13:01:02 25 parts and his buttocks got blistered.

13:01:04 1 I didn't know anything about resistive seat heaters.
2 And I sure as heck didn't know anything about how GM
3 controlled all its documents and what all they contained and
4 how they -- what names they use. I can't go to GM, or if I
13:01:15 5 went to Ford and said, hey, I want to know exactly A, B, C. I
6 don't know what they call it. And it turns out a lot of these
7 big corporations will change the names and change the file
8 names and change this and change that.

9 So sometimes there's a reason that the topics are
13:01:30 10 broad. Which goes to the point of conferring. And we've all
11 talked about meet and confer, but I think in reality confer is
12 what your draft rules shows us.

13 And I think it's a great idea. Why not? Why not
14 make it an obligation. Because for that small percentage of
13:01:46 15 our practitioners that otherwise wouldn't do it, now they have
16 to.

17 And we're all going to keep notes and we're going to
18 exchange e-mails, and we're going to document our positions
19 and say, look, we've talked about this and I asked you to tell
13:01:57 20 me -- you tell me what the database is. An example is how
21 does a product manufacturer keep track of consumer reports and
22 complaints. Because they're going to tell you there's been no
23 litigation. That's not what I want to know. And I don't know
24 how to ask that. I don't know.

13:02:12 25 Robert Moss Tool Corporation calls it one thing. GM

13:02:17 1 calls it something else. Greentree Financial Services calls
2 its consumer products or consumer complaints something else.

3 So that interactive process can really help us all in
4 trying to sort this down and keep the court out of it, if at
13:02:31 5 all possible, because none of us want to be in front of the
6 judges if you don't have to be. We want to show that we can
7 be grownups, we can all get along and do what we're supposed
8 to do.

9 Does anybody have any questions? I hit the high
13:02:43 10 points. I'm like the 4:00 p.m. CLE speaker at Lake Tahoe.
11 Everybody wants to go to the lake, you don't want to listen to
12 me.

13 JUDGE BATES: Any questions for Mr. Denton?

14 MR. DENTON: Thank you so much. And everybody here,
13:02:54 15 we appreciate your work, your time. And this is, by the way,
16 a beautiful building.

17 JUDGE BATES: As they say these days, back at you.

18 Thank you very much. We appreciate you coming today
19 and all the valuable information which we have heard. And
13:03:08 20 we'll now try to assimilate and do our best with it.

21 Thank you once again. We appreciate it.

22 And that completes this proceeding.

23 (End of transcript.)

24 * * * * *

25

C E R T I F I C A T E

1
2
3 I, PATRICIA LYONS, do hereby certify that I am duly
4 appointed and qualified to act as Official Court Reporter for
5 the United States District Court for the District of Arizona.
6

7 I FURTHER CERTIFY that the foregoing pages constitute
8 a full, true, and accurate transcript of all of that portion
9 of the proceedings contained herein, had in the above-entitled
10 cause on the date specified therein, and that said transcript
11 was prepared under my direction and control, and to the best
12 of my ability.
13

14 DATED at Phoenix, Arizona, this 7th day of January,
15 2019.
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20 s/ Patricia Lyons, RMR, CRR
21 Official Court Reporter
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