October 13, 2017

Via E-mail

Hon. John D. Bates, Senior Judge
U.S. District Court, District of Columbia
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue N.W.
Washington, DC 20001

Re: Rule 30(b)(6)

Dear Judge Bates:

We are officers of the ABA Section of Litigation, members of its Federal Practice Task Force and other Section leaders writing in our individual capacities only.

The salutary goal of the 2015 discovery rule amendments was to foster more interparty cooperation and hands-on judicial case management. Our suggestions regarding Rule 30(b)(6) are offered in the same spirit. For example, a lawyer should tell her opposing counsel what witnesses she will produce, and on which topics they will be prepared to testify. The best lawyers follow that practice, but not all lawyers do, and the present Rule has no mechanism for it. The best lawyers also meet and confer with their adversaries to iron out Rule 30(b)(6) scope issues before resorting to motion practice, just as they are obligated to do on other discovery issues. But, again, not all lawyers do that and, uniquely in today's rules environment, they are not required to.

In response to the Committee's requests for comments, some have opposed any changes to Rule 30(b)(6), arguing that the problems identified do not exist (which surprises those of us who have experienced them), that Rule 30(b)(6) disputes do not involve much judicial time, or that parties tend to resolve these disputes in a satisfactory manner. In response, we note that the number of plainly inconsistent decisions cited in the November 23, 2015, *ABA Section of Litigation Federal Practice Task Force Report on Rule 30(b)(6) Depositions of Organizations* ("Task Force Report"), a copy of which is attached, demonstrates that the problems do exist and involve judicial time, and that to the extent that lawyers resolve the issues, the lack of recognized norms and practices makes this resolution process contentious, time consuming and expensive, leading to inconsistent outcomes and burdens on similarly situated parties. For these reasons, we recommend that, at a minimum, the Advisory Committee adopt the following solutions.

I. Adopt a Protocol for Raising and Resolving Objections Short of Protective Order Motion Practice

We recommend explicit adoption of an objection/meet-and-confer procedure to work out issues arising in organization depositions beforehand, in place of the Rule's only recognized procedure: moving for a protective order. Rather than increase motion practice, we believe the adoption of such a procedure will reduce the need for motions and underscore the merit of handling 30(b)(6) issues in exactly the matter that our best litigators handle them without benefit of an existing rule structure. The amended rule could say, in substance, that:

> Notice must be served sufficiently in advance of a deposition to permit adequate preparation. The recipient must, no later than 7 days before the scheduled deposition, (i) serve any objections to the topics, and (ii) identify each witness who will be produced and each topic the witness will be prepared to address. The parties must meet and confer to resolve any issues before the deposition.

We think – contrary to the arguments of organizations whose constituents fall on one side of an informational imbalance – that this sort of protocol will not measurably prolong litigation. But if it does expand the timetable modestly, that would seem a fair enough exchange if onerous motion practice can be avoided down the line.

II. Recognize the Uniqueness of Organization Depositions in the Case Management Process

A 30(b)(6) deposition is a strange creature. The individual deponent is asked to testify under oath, but largely based on hearsay, and that hearsay testimony will become the admission (evidentiary or judicial, we're not absolutely sure – because the decisional law is inconsistent in that regard) of an entire artificial entity. Rules 26 and 16 should be amended to require the parties and the court to anticipate the special problems attendant to organization depositions, and mechanisms for resolving them.

Rule 26 should require the parties, as part of the planning for the initial management conference with the court, to address the needs of the particular case respecting:

(a) the likely need for and scheduling of Rule 30(b)(6) depositions, including the timing for notice and objections;

(b) mechanisms for presenting and resolving objections to 30(b)(6) notices;

(c) the permissibility or impermissibility of contention discovery in the 30(b)(6) depositions; and

(d) procedures for responding if the organization lacks knowledge.

The results of such discussions should be addressed at the Rule 16 Conference and reflected in the resulting Rule 16 Order.

III. Modify the Conflicting Treatment in the Notes on How to Treat Counting Issues for Organization Depositions

The notes, uttered at different times, require a 30(b)(6) deposition notice to be treated as noticing one deposition, no matter how many topics are identified and no matter how many witnesses are produced. They also provide that each 30(b)(6) witness may be deposed for seven hours. This is neither consistent nor fair. One ready solution would be to count every seven hours of 30(b)(6) testimony as a single deposition for Rule 30(a)(2)(A)(i) purposes, regardless of

the number of witnesses who testify in that seven-hour period. There may be other, better ways to approach the problem, but the internal consistency in the Rule comments disserves the courts and the litigants.

IV. Resolve Issues Upon Which Courts Disagree

The Task Force Report identified a number of topics upon which federal judges have reached conflicting conclusions regarding Rule 30(b)(6), its practice and its consequences. We respectfully suggest that the federal rules' mission is to resolve those differences, at least when one of the conflicting dispositions is not an obvious "outlier." Those issues include (1) questioning beyond topics identified in a 30(b)(6) notice, and the responsibilities of both sides' counsel when that occurs; (2) the permissibility of contention questions (and contention-oriented topics) for eliciting opinions, subjective beliefs, and legal theories of the organization; (3) the evidentiary value of testimony (whether it constitutes a judicial admission); (4) whether a second 30(b)(6) deposition, on new topics, of (A) a party organization or (B) a non-party organization, may be taken without leave of court; (5) the extent to which depositions can elicit discovery of the 30(b)(6) witnesses' preparation and document review, including with counsel; and (6) procedures for protecting third parties under subpoena. While the Task Force Report recommends solutions on many of these issues, the important thing is that the conflicts be considered and ultimately resolved to foster uniformity, eliminate uncertainty, and reduce litigation cost and expense in litigating these issues.

We look forward to continuing to work with the Advisory Committee on Civil Rules as it performs its important work, and greatly appreciate its consideration of our views.

Respectfully,

Koji Fukumura
Palmer G. Vance II
Barbara J. Dawson
Laurence Pulgram
Don Bivens
Elizabeth Cabraser
Dennis J. Drasco
Jeffrey J. Greenbaum
Michele D. Hangley
William T. Hangley
Gregory R. Hanthorn
Loren Kieve
George Kryder
Judith A. Miller
Tracey Salmon-Smith
Irwin Warren

Attachment

November 23, 2015

ABA SECTION OF LITIGATION FEDERAL PRACTICE TASK FORCE REPORT ON RULE 30(b)(6) DEPOSITIONS OF ORGANIZATIONS

INTRODUCTION

The ABA Section of Litigation Federal Practice Task Force undertook a review of current practices with respect to deposing an organization under Rule 30(b)(6). Rule 30(b)(6) depositions have been the subject of frequent well-attended CLE programs at ABA Section of Litigation Section Annual Conferences,[1] demonstrating that not only has there been much interest in the subject, but that there is much confusion on the Rule's requirements. There is also much litigation over how to interpret those requirements. Moreover, our review has enabled us to conclude that there are many issues upon which courts disagree as to the Rule's existing requirements, there are other issues upon which the Advisory Committee Notes suggest a solution which practice has demonstrated may be no longer the best approach, and there are other areas upon which practice under the Rule may be improved. Accordingly, we recommend that the Advisory Committee on Civil Rules undertake a review of the Rule and the case law developed under it with the goal of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 amendments to the Federal Rules.

BACKGROUND

Federal Rule of Civil Procedure 30(b)(6) allows a party to depose an organization through one or more witnesses designated by that organization. Adopted in 1970, it essentially

---

[1] These programs were accompanied by excellent papers which provided some of the source material for this report. *See* Michael R. Gordon and Claudia De Palma, *Practice Tips and Developments in Handling 30(b)(6) Depositions*, Prepared for ABA Section of Litigation Section Annual Conference, April 2014; David Cannella, *Can I Get a Witness? 30(b)(6) overview, plus pitfalls, practical tips and consequences*, Prepared for ABA Section of Litigation Section Annual Conference, April 2015.

has remained unchanged for more than 45 years.[2] It was adopted to curb the practice of "bandying" where organizations would produce one deponent after another, each disclaiming knowledge of information that someone in the organization almost certainly knew. 1970 Advisory Committee Note.

The Rule in its current form provides as follows:

> (6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

This report will address areas of confusion under the Rule, areas where courts have divided on the Rule's requirements, and areas for suggested improvement.

---

[2] Amendments in 1971 extended the practice to taking the deposition of a non-party organization by subpoena. The Note was amended in 1993 to address how to apply the 10 deposition numerical limit, suggesting a deposition under Rule 30(b)(6) should be treated as a single deposition, even though more than one person may be designated to testify. In 2000, with the introduction of the durational limit of one day of seven hours for any deposition, the Note was again amended to indicate "for the purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition." Finally, the style amendments were adopted in 2007, along with adding "or other entity" to the list of the types of organizations that may be named, to include limited liability companies and other forms of organization.

SUBSTANTIVE PROVISIONS

A. Knowledge.

The Rule by its terms permits a party to notice the deposition of an organization setting forth "with reasonable particularity" the matters for examination. The named organization must then designate the one or more persons who will testify about information known or reasonably available to the organization.

Contrary to the understanding of many practitioners who seek the production of the most knowledgeable person on a given subject, the Rule does not require the organization to produce the "most knowledgeable" person on a given subject or even a person with any first-hand knowledge. *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012); *Crawford v. Franklin Credit Mgmt. Corp.*, 261 F.R.D. 34, 38 (S.D.N.Y. 2009); *Rodriguez v. Pataki*, 293 F. Supp. 2d 305, 311 (S.D.N.Y. 2003). The witness must be prepared to testify about the matters described in the notice known to the organization or reasonably available to it and must consent to testify on behalf of the organization.

The Task Force considered whether there should be some preference expressed, if not in the Rule, but in the Note, for the production of a witness with first-hand knowledge if such person is available. (The Report separately addresses below the situation where there exists no one at the organization with any knowledge or reasonably available to it on the designated subjects.) Such a preference might mitigate the problem presented in *Sciarretta v. Lincoln Nat'l Life Ins.*, 778 F.3d 1205 (11th Cir. 2015), where an outside expert was spoon-fed one side of the story and could not answer any sensitive questions that the organization wished to avoid answering. We concluded that despite such potential problems, which in that case were appropriately addressed with sanctions, maximum flexibility should remain with the entity's

choice of witnesses since it will be bound by that testimony. It may choose to designate a witness who has knowledge on 5 of 6 topics and educate that witness on the 6th so that the deposition can be efficiently concluded. It may wish to designate a mid-level officer who is educated on the topics for the deposition to protect privileged communications that could be at risk by producing a more senior officer with more direct first-hand knowledge, who also has access to privileged communications. It may also choose to produce a person who will make a better witness. Since the organization will be bound by the witness's testimony, it should retain maximum flexibility as to who it may choose to designate.

B. Objections.

Presently, the Rule contains no procedure to object to a Rule 30(b)(6) deposition notice. There is no procedure to object to the scope or breadth of the topics (which are required to be described with "reasonable particularity"), to the number of topics, or to whether a witness should be produced at all. The cases make clear that the only procedure recognized by the courts to object for any of the above reasons is to move for a protective order. *See, e.g., Lykins v. Certainteed Corp.*, 555 Fed. Appx. 791, 796-98 (10th Cir. 2014); *Pioche Mines Consol. Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964); *Bearch Mart, Inc. v. L&L Wings, Inc.*, 302 F.R.D. 396, 406 (E.D.N.C. 2014); *International Brotherhood of Teamsters v. Frontier Airlines, Inc.*, No. 11-cv-02007-MSK-KLM, 2013 U.S. Dist. LEXIS 22986, at *19 (D. Colo. Feb. 19, 2013); *Fernandez v. Penske Truck Leasing Co.*, No. 2:12-cv-00295-JCM-GWF, 2013 U.S. Dist. LEXIS 14786, at *6 (D. Nev. Feb. 1, 2013). *EEOC v. Thurston Motor Lines, Inc.*, 124 F.R.D. 110, 114 (M.D.N.C. 1989). Some courts even require a protective order to be obtained before the date scheduled for the deposition to excuse appearing, *Pioche Mines Consol. Inc.*, 333 F.2d at 269, unless the district court has a local rule staying the deposition until the motion can be decided.

Id., See, e.g., Peterson v. DaimlerChrysler Corp., No. 06-cv-0108, 2007 WL 2391151, at *5 (D. Utah Aug. 17, 2007). The Committee on Federal Courts of the Association of the Bar of the City of New York suggested a remedy of a minimum notice period at least for 30(b)(6) depositions of non-parties, and an automatic stay upon the filing of a motion for a protective order. Letter from Marilyn C. Kunstler, Chair, Comm. On Fed. Courts Association of the Bar the City of New York, Sec'y, Comm. on Rules of Practice and Procedure (Apr. 3, 2013), *available at* http://www2.nycbar.org/pdf/report/uploads/20072455-LetteronProposedAmendmenttoRule45reSubpoenasforRule30b6Depos.pdf. We believe this proposed remedy does not go far enough.

While the burden on non-parties certainly needs to be appropriately addressed, we believe that an objection procedure, similar to that envisioned by Rule 45 with respect to documents, is appropriate for all Rule 30(b)(6) depositions. Lawyers may object to the number of topics, their relevance, whether they are set forth with reasonable particularity, to the place specified for the deposition, or for other reasons. After a meet and confer, the burden should be on the person seeking to take the deposition to justify the appropriateness of the notice and the topics by moving to compel.

In practice, our experience informs us that practitioners do in fact object to topics, their breadth and their particularity, and compromises are in fact sometimes reached. *See International Brotherhood of Teamsters v. Frontier Airlines, Inc.*, 2013 U.S. Dist. LEXIS at *20. But there is no uniformity in this approach, and neither the Rule nor the case law recognize such a procedure. *But see Fernandez*, 2013 U.S. Dist. LEXIS 14786, at *7 (excusing nonappearance on the ground that notice was not proper and an objection letter was sent in advance of return date).

A rule setting forth an objection procedure may wish to set a minimum time for noticing a 30(b)(6) deposition (28 days for example) with a required period for objections (14 days before the return date), of course subject to alteration by stipulation or court order. The procedure may also incorporate a requirement for the responding party to indicate who will be testifying on its behalf and on what topics, and how many witnesses it will designate.[3] The Rule could also set forth a meet and confer requirement and an award of costs and attorneys' fees if motion practice is then required.

C. Number of Topics.

Another area that is not addressed in the Rule and that has generated motion practice is in the number of topics specified for a Rule 30(b)(6) deposition. In *QBE Ins. Corp.*, a seminal case on Rule 30(b)(6) requirements, the court found nothing improper in the designation of 47 topics. 277 F.R.D. at 699. In *Heartland Surgical Specialty Hosp. v. Midwest Div., Inc.*, No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 26552, at *6 (D. Kan. Apr. 9, 2007), the court upheld 55 separate topics. *Banks v. Office of the Senate Sergeant-At-Arms* approved a notice with 35 topics, but directed the parties to develop new topics because some were intrinsically overbroad. 222 F.R.D. 7, 18 (D.D.C. 2004). In *Collins v. Experian Info. Solutions Inc.*, No. 2:11-cv-938-AKK (N.D. Ala. May 9, 2012), the court addressed a motion for a protective order challenging 38 of 71 topics. The court reviewed each of the categories and sustained objections to 31.

A number of our Task Force members consider specifying a voluminous list of topics to be an abuse of the Rule. The organization has a duty to prepare a witness on each topic and if

---

[3] The New York Commercial Division recently revised its Rule 11-d and 11-f, effective December 1, 2015, to more closely model Fed. R. Civ. P. 30(b)(6). It requires the responding party to designate one or more persons not later than 10 days before the deposition. If subjects are set forth in the notice and a particular person is requested to testify on behalf of an entity on these subjects, the responding party may also designate a different witness if done so 10 days before the scheduled deposition.

the presumption is that a 30(b)(6) notice counts as one deposition, presumably to be completed in a 7-hour day (if a single witness is presented), it may seem hardly possible to address numerous, far-reaching and varied topics in the suggested time period. Some feel that a reasonable number of topics, set forth with "reasonable particularity" should not exceed 10 without court approval.

Others feel that setting forth topics with "reasonable particularity" requires a certain amount of precision and the greater the number of topics, the more directed the witness preparation can be. Another way to address the problem is to indicate that if more than 10 topics are designated, for each 10 topics, the notice should count as an additional deposition toward the presumptive limit of 10 depositions.

A number of cases focus on the duty to prepare witnesses for a 30(b)(6) deposition and the consequences that occur when the witness is not adequately prepared or responds "I don't know."[4] One thing clear from these cases is that there is a considerable duty to prepare witnesses that goes beyond that required for an ordinary fact witness. During these cost-sensitive times when many lawyers are required to strictly budget costs of each deposition, any litigation budget can be destroyed by the efforts required to properly prepare witnesses for 30(b)(6) depositions, particularly when there is a great number of topics specified. With the goal of the 2015 Rule revisions to reduce costs of discovery, some consideration should be given to the situation where an abusive number of topics is presented. A proposed solution in the next section may go a long way to control potential abuses.

D. <u>Number of Witnesses</u>.

The Advisory Committee Note, amended at two different times, suggests solutions for how the Rule 30(b)(6) notice counts toward the presumptive limit of 10 depositions and the 7-

[4] Later in this report we address the extent to which an "I don't know" answer can be later contradicted.

hour single-day presumptive time limit. The Note adopted in 1993 suggests the notice counts as a single deposition no matter how many witnesses are needed, and the Note adopted in 2000 suggests that the questioner can have up to 7 hours for each witness designated. *Sabre v. First Dominion Capital, L.L.C.*, No. 01 CIV 2145 BSJ HBP, 2001 U.S. Dist. LEXIS 20637 (S.D.N.Y. Dec. 10, 2001) at *1. There appears something inconsistent and inadequate with those solutions.

The Task Force believes that solutions suggested by the Advisory Committee, at two different times in reaction to two different rule changes, may no longer be the fairest result. If a notice covers four topics, which can easily be covered in one 7-hour day, and three topics can be addressed by one witness and the fourth topic by a second, why does it make a difference how many witnesses are needed to cover the topics? Without exceptional circumstances, logic would dictate that the depositions of both witnesses be covered in a single day. Similarly, if multiple witnesses are needed on a multiplicity of topics, if each witness will be questioned for a seven-hour day, there seems to be no reason not to count each 7-hour deposition as a separate deposition. To the extent questioning of separate witnesses will be allowed to cover more than one day, each witness should be counted as a separate deposition.

Thus, we recommend that time be the governing factor in determining how many depositions are taken. Thus, if the topics can be addressed by one witness, a single deposition in a seven-hour day would be the norm. The same should be true if a second witness is needed for a minor topic that can also be addressed in a single day.[5] If multiple witnesses are needed for substantial areas, unless the parties agree otherwise, then generally there should be seven hours

---

[5] The New York Commercial Rule 11-d, effective December 1, 2015, counts multiple witnesses as a single deposition, but requires the deposition to be completed in a single 7-hour day, unless the parties agree to extend it, or the Court grants an extension, which shall be freely granted.

for each, with each seven-hour day counted as a separate deposition. Similarly, if a single witness is produced but so many topics are noticed that 7 hours does not suffice, and the parties agree to continue beyond the day, the continuation should count as an additional deposition. We would expect the parties to discuss and work out these issues after the witnesses are designated under the objection procedure followed by the meet and confer that we propose.

E. Questioning Beyond the Topics.

A related question that arises is whether a 30(b)(6) witness will be allowed to be questioned beyond the topics listed? If so, what is the binding impact of such testimony, and how will those questions count toward the seven-hour limit, and how many depositions are expended toward the 10 deposition limit?

Most courts will allow a 30(b)(6) witness to be questioned beyond the confines of the topics listed in the notice. *Am. Gen. Life Ins. Co. v. Billard*, No. C10-1012, 2010 U.S. Dist. LEXIS 114961, at *12 (N.D. Iowa Oct. 28, 2010); *Crawford*, 261 F.R.D. at 38; *Philbrick v. eNom Inc.*, 593 F. Supp. 2d 352, 363 (D.N.H. 2009); *Falchenberg v. NY State Dep't of Educ.*, 642 F. Supp. 2d 156, 164 (S.D.N.Y. 2008), *aff'd*, 338 Fed. Appx. 11 (2d Cir. 2009); *FCC v. Mizuho Medy Co.*, 257 F.R.D. 679, 682 (S.D. Cal. 2009); *Eng-Hatcher v. Sprint Nextel Corp.*, No. 07 Civ. 7350 (BSJ)(KNF), 2008 U.S. Dist. LEXIS 67052, at *14, *16 (S.D.N.Y. Aug. 28, 2008); *UniRAM Tech., Inc. v. Monolithic Sys. Tech., Inc.*, No. C 04-1268 VRW (MEJ), 2007 U.S. Dist. LEXIS 24869 (N.D. Cal. Mar. 23, 2007); *Bracco Diagnostics Inc. v. Amersham Health Inc.*, No. 03-6025 (SRC), 2005 U.S. Dist. LEXIS 26854, at *5-7 (D.N.J. 2005); *Cabot Corp. v. Yamulla Enters.*, 194 F.R.D. 499, 500 (M.D. Pa. 2000); *Detoy v. City & County of S.F.*, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000); *Overseas Private Inv. Corp. v. Mandelbaum*, 185 F.R.D. 67, 68 (D.D.C. 1999); *Edison Corp. v. Secaucus Town*, 17 N.J. Tax 178, 182 (Tax Ct.

1998); *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995). Several courts have said no. *Bilek v. Am. Home Mortg. Servicing*, No. 07 C 4147, 2010 U.S. Dist. LEXIS 80041, at *6 (N.D. Ill. Aug. 9, 2010); *Paparelli v. Prudential Ins. Co.*, 108 F.R.D. 727, 729-30 (D. Mass. 1985). Those that allow questioning beyond the notice appear to treat the answers not as binding on the organization, but as ordinary 30(b)(1) answers of any fact witness. *Falchenberg*, 642 F. Supp. 2d at 164; *King*, 161 F.R.D. at 476.

To the extent that an organizational witness is questioned beyond the list of topics, to what extent should an objection or notation on the record[6] that the questioning strayed beyond the specified topics be required so that the questioner can withdraw or revise the question if so desired, and if not, so that all parties will be aware that the answer will not bind the organization? In addition, how should those questions be counted toward the seven-hour and single deposition guideposts?

Our Task Force believes that a practical approach should be followed. Questioning should be permitted beyond the scope of the notice if it will avoid the need to recall the witness and the questioning can be completed in a single day. If there is a desire to take the witness's deposition on a different set of topics for which the answers are not binding on the organization, the witness should be able to be recalled as a fact witness with a separate notice but should be questioned on different subjects. The 30(b)(6) organizational witness versus 30(b)(1) fact witness distinction should not be used as an excuse to question a single witness on the organization topics for 14 hours without court permission.

---

[6] Some suggest that noting on the record that the questioning strayed beyond the topics is not in fact an objection, for which the grounds are limited, because the person defending the deposition is not attempting to preclude the testimony but simply noting that the evidential impact is different.

As to the need for objections or statement on the record when questions stray beyond the subjects listed in the notice, better practice seems to require that such objections or noting be made. *Whiting v. Hogan*, No. 12-CV-08039-PHX-GMS, 2013 U.S. Dist. LEXIS 35381, at *37 (D. Ariz. Mar. 14, 2013) (stating that deponent's counsel "may note on the record that answers to questions beyond the scope of the Rule 30(b)(6) designation are not intended as the answers of the designating party and do not bind the designating party"); *Detoy*, 196 F.R.D. at 367 ("If Defendants have objections to . . . questions outside the scope of the 30(b)(6) designation . . . counsel shall state the objection on the record and the witness shall answer the question, to the best of the witness's ability."). An objection or noting will enable the questioner to restate the question to fall within the scope of topics so that the transcript results in "binding" testimony, the parties may be able to resolve disputes as to whether the questions are within the scope, and all parties may be appropriately guided by the impact of the answers to such questions. But the real question is must an objection be made when the deposition rule only requires objections to the form of the question that can be corrected, not to the substance of the questions? Practitioners on the Task Force have different views on this question.

F. <u>Reasonable Particularity</u>.

We have found that there is much litigation over the detail needed in the required designation of topics. The Rule requires topics to be described with "reasonable particularity." Some courts have described the standard as "painstaking specificity." *Burke v. Glanz*, No. 11-CV-720-JED-PJC, 2013 U.S. Dist. LEXIS 120818, at *4 (N.D. Okla. Aug. 26, 2013); *Health Grades Inc. v. MDX Med. Inc.*, No. 11-cv-00520-PAB-BNB, 2013 U.S. Dist. LEXIS 59271, at *8-9 (D. Colo. Apr. 25, 2013); *Whiting*, 2013 U.S. Dist. LEXIS 35381, at *34; *Kelly v. Provident Life & Accident Ins. Co.*, No. 1:09-cv-00070-jgm, 2010 U.S. Dist. LEXIS 134623, at *5 (D. Vt.

Dec. 20, 2010); *McBride v. Medicalodges Inc.*, 250 F.R.D. 581, 584 (D. Kan. 2008); *EEOC v. Thorman & Wright Corp.*, 243 F.R.D. 421, 426 (D. Kan. 2007); *Sprint Commc'ns v. Theglobe.com Inc.*, 236 F.R.D. 524, 528 (D. Kan. 2006); *Prokosch v. Catalina Lighting Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000). Other courts have clarified that references to "painstaking specificity" do not alter or heighten the standard expressed in the rule – reasonable particularity. *Espy v. Information Techs, Inc.*, No. 08-2211-EFM-DWB, 2010 U.S. Dist. LEXIS 36594, at *4 (D. Kan. Apr. 13, 2010).

Courts have warned that an overly broad Rule 30(b)(6) notice "subjects the noticed party to an impossible task," because where it is not possible to "identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible." *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000). Thus, "[l]isting several categories and stating that the inquiry may extend beyond the enumerated topics defeats the purpose of having any topics at all." *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 125 (D.D.C. 2005).[7]

We have considered whether a different standard of specificity should be set forth. The standard should result in topics that contain enough detail to guide the organization as the subjects for which witnesses must be prepared and to avoid being blindsided. We could not articulate a better standard and believe the "reasonable particularity" standard appears sufficient for the task.

G. Contention Depositions.

Can Rule 30(b)(6) depositions be used to obtain opinions and subjective beliefs of an organization or as contention depositions? Courts are split. *Compare Radian Asset Assurance*

---

[7] Courts have rejected the use of catchall phrases such as "including but not limited", or "any other matters relevant to this case." *Alexander v. FBI*, 188 F.R.D. 111, 120-21 (D.D.C. 1998).

Inc. v. Coll. of the Christian Bros. of N.M., 273 F.R.D. 689, 691-92 (D.N.M. 2011) (contention depositions proper), *Great Am Ins. Co. of N.Y. v. Vegas Constr. Co.*, 251 F.R.D. 534, 539 (D. Nev. 2008) (deposition may explore corporation's position, beliefs and opinions), *and United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996) (stating that Rule 30(b)(6) permits questioning on not only facts but subjective beliefs and opinions of the corporation), *with SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (rejecting 30(b)(6) contention topics on the ground that they are invasive of attorney work product doctrine). Courts have also found improper topics focusing on discovery responses, *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986); *Smithkline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952, 2000 U.S. Dist. LEXIS 667, at *27-32 (N.D. Ill. Jan. 21, 2000); *McGarrah v. Bayfront Med. Ctr. Inc.*, 889 S. 2d 923, 926 (Fla. Dist. Ct. App. 2004), factual basis of defenses, *Krasney v. Nationwide Mut. Ins. Co.*, No. 3:06 CV 1164 (JBA), 2007 U.S. Dist. LEXIS 90876, at *9-10 (D. Conn. Dec. 11, 2007); *In re Indep. Serv. Orgs. Antitrust Litig.*, 168 F.R.D. 651, 654 (D. Kan. 1996) (stating that the company has a right to get the factual basis but not through a 30(b)(6) deposition); *Northup v. Acken*, 865 So. 2d 1267, 1272 (Fla. 2004), and information obtainable from other sources, such as a request for production of documents. *Smithkline Beecham Corp.*, 2000 U.S. Dist. LEXIS 6687, at *27-32 (denying a 30(b)(6) deposition on certain topics because the information could be obtained through less intrusive means).

The Task Force believes 30(b)(6) depositions should be confined to factual matters and not permitted to extend to contentions, defenses, opinions or legal interpretations. The purpose of such depositions is to establish facts available to the organization. We believe the purpose is undermined if witnesses are required to address legal theories, contentions, etc. Such questions have a great potential to invade the work product doctrine and constitute an abuse of the

purposes for which the rule was established. To the extent discovery of a party's contentions should be permitted at all, there are other discovery devices for this purpose.

H. Evidentiary Value – Contradicting Answers.

May an answer at a Rule 30(b)(6) deposition be contradicted by the organization at trial or on summary judgment, to what extent, and under what circumstances? Will such answers be treated like judicial admissions or like ordinary deposition testimony that may be theoretically (but not practically) subject to contradiction on summary judgment or trial?

The purpose of a Rule 30(b)(6) deposition "is to create testimony that will bind the corporation." *Sanders v. Circle & Corp.*, 137 F.R.D. 292, 294 (D. Ariz. 1991) (citing *GTE Products Corp. v. Gee*, 115 F.R.D. 67, 68 (D. Mass 1987)); *Resolution Trust Corp. v. Farmer*, 1994 U.S. Dist. LEXIS 8755, *5 (E.D. Pa. June 23, 1994). *See also Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626, 638 (D. Kan. 1999); *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C 1996). Although the testimony is binding, the majority view is that such testimony does not constitute a judicial admission – which is not only binding, but cannot be contradicted by the party at trial or on appeal of the same case. *Industrial Hard Chrome, Ltd. V. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000). Instead such testimony "is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes." *Id. See also State Farm. Mut. Auto. Ins. Co. v. New Horizon, Inc.*, No. 03-6516, 2008 U.S. Dist. LEXIS 37571 (E.D. Pa. May 7, 2008); *Weiss v. Union Cent. Life Ins. Co.*, 28 Fed. Appx. 87, 89 (2d Cir. N.Y. 2002); *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001); *R&B Appliance Parts, Inc. v. Amana Co.*, 258 F.3d 783, 786 (8th Cir. 2001); *Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp.*, 441 F. Supp. 2d 695, 723 n.17 (M.D. Pa. 2006); *A&E Prods. Group, L.P. v. Mainetti USA, Inc.*, No. 01 CV 10820, 2004 U.S. Dist. LEXIS 2904, at *19

(S.D.N.Y. Feb. 25, 2004); *Med. Serr. Grap., Inc. v. Lesso*, Inc., 45 F. Supp. 2d 1237, 1254 (D. Kan. 1999); *W.R. Grace & Co. v. Viscase Corp.*, No-90-5383, 1991 U.S. Dist. LEXIS 14651, at *4-*5 (N.D. Ill. Oct. 15, 1991). Some cases however do not permit contradiction. *See e.g.*, *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 993 (E.D. La. 2000); *Rainey v. American Forest & Paper Ass'n.*, 26 F. Supp. 2d 82, 94-5 (D.D.C. 1998) (testimony is binding and no contraction may be subsequently introduced).[8]

Some on the Task Force believe that the majority rule is the appropriate one, and that Rule 30(b)(6) testimony should be treated like any other deposition testimony. While it is binding as an admission, it may be later explained or supplemented. If the purpose is to obtain the testimony of the organization, once obtained, it should be treated as an admission by the organization – the witness, like the testimony of any other witness. While failure to adequately

---

[8] A related issue upon which courts are divided, but is not limited to Rule 30(b)(6) depositions, is the extent to which a witness can change a deposition answer substantively under Rule 30(e) giving a witness 30 days to review the transcript. Rule 30(e) also provides "if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them." This rule has been read somewhat narrowly by certain courts, which had held that Rule 30(e) does not:

> allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination.

Greenway v. Int'l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992). Other courts, however, have construed Rule 30(e) as permitting substantive changes as long as the deponent timely provides an explanation for each change. *See, e.g., Innovative Mktg. & Tech. L.L.C. v. Norm Thompson Outfitters, Inc.*, 171 F.R.D. 203, 205 (W.D. Tex. 1997); *Podell v. Citicorp Diners Club, Inc.*, 914 F. Supp. 1025, 1034 (S.D.N.Y. 1996) (after plaintiff changed deposition testimony on material matter, ruling that Rule 30(e) allows deponent to make changes in deposition even if changes contradict the original answers and reasons for changes unconvincing). The Seventh Circuit has taken a middle-ground approach, allowing substantive changes provided that they do not contradict the original testimony. *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000).

prepare will not be a good explanation, there seems to be no good reason to give such testimony judicial admission status. But similar to fact witnesses trying to contradict deposition admissions in opposing summary judgment, we would expect courts to be very reluctant to permit subsequent explanations to defeat summary judgment sought based upon such admissions.

Others believe a higher standard should be required to contradict admissions made during a Rule 30(b)(6) deposition, and all envision participation by the court in its supervisory role so that all parties will be aware of how such efforts will be treated at trial. Some feel the higher standard should be akin to asking the court for permission to withdraw an admission made under Rule 36. These members believe that even if the court grants relief, the original testimony would of course be admissible along with the new testimony and the explanation of why it has changed.

I. Organizations Without Knowledge

Courts have struggled with the right approach to the situation where the organization has no present employee with knowledge of designated subjects or to which the information is not reasonably unavailable to it. As an initial matter, the fact that employees with the knowledge have left the organization will not relieve the organization of the obligation to prepare. Organizations are required to review prior deposition testimony, documents, deposition exhibits and interview former employees so it can be in a position to produce an educated witness to speak for the organization. *Harris v. New Jersey*, 259 F.R.D. 89, 92 (D.N.J. 2007); *Calzaturficio S.C.A.R.P.A., s.p.a. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 38-39 (D. Mass. 2001); *Bank of New York v. Meridien Biao Bank Tanz.*, 171 F.R.D. 135, 151 (S.D.N.Y 1997); *United States v. Taylor*, 166 F.R.D. 356, 361-62 (M.D.N.C. 1996).

But the Rule contains a limitation. It requires the designated persons to testify about information "known or reasonably available to the organization." *Dravo Corp. v. Liberty Mut. Inc. Co.*, 164 F.R.D. 70, 76 (D. Neb. 1995).

Courts have struggled with situations when the information may not be reasonably available to the organization. The organization may have filed for bankruptcy protection and a trustee receives a notice when the company has no employees. Prior employees may not be willing to talk with the trustee or current counsel for the organization. There may be criminal investigations pending and all knowledgeable witnesses may have taken the Fifth Amendment. Or as in the case of *QBE Insurance Corp.*, an insurer subrogee who paid out a claim and was pursuing a recovery for what it paid, found itself in a position where its insured refused to cooperate with it and provide the needed information. Some courts have found that an organization cannot be subject to Rule 37 sanctions if it does not know the answer on a subject after diligent inquiry. *Black Horse Lane Assoc., LP v. Dow Chemical Corp.*, 228 F.3d 275 (3d Cir. 2000); *Resohlon Trust Corp. v. S. Union Co.*, 985 F.2d 196, 197-8 (5th Cir. 1993). Others have applied sanctions and addressed the issue as a failure to properly prepare, or when the information was not available applied "consequences," such as barring the presentation of any information at trial on the issue, not as a sanction but as a natural result of a failure to make the information available in discovery. *QBE Ins. Corp.*, 277 F.R.D at 681, 698-9.

The Task Force believes that the Rule should be amended to set forth a procedure to address the situation where a witness is truly not available to the organization on a given subject. Along with a procedure for setting forth objections, the Rule could provide an opportunity to state in writing in response to the Notice that there is no witness with knowledge of the information reasonably available to it, setting forth the circumstances, and stating why another

witness cannot be sufficiently prepared. A requirement of the present Rule is that the witness designated by the organization must also "consent to testimony on its behalf." If there is not a knowledgeable person willing to testify on its behalf (usually a former employee) and not a current employee who can be educated, there should be in place a mechanism for the responding party to so state. As an alternative, the response could designate what documents or persons possess the relevant information and where the persons or documents may be found, if not reasonably available to the organization. By proceeding in this manner, a court may be able to address the situation in advance of a futile deposition leading to allegations of a failure to prepare, requests for sanctions, etc.

Consequences should appropriately flow from such an election but they should not be punitive. If a party identifies a knowledgeable witness who will not cooperate with it, or identifies a source of documents not within its custody or control, the organization should not be barred from subsequently presenting that witness testimony, or such documents, obtained through subsequent subpoena or other discovery. The problem however is a thorny one crying out for a mechanism to resolve it beyond case by case litigation.

J. Rule 30(b)(6) Depositions of Non-Parties by Subpoena under Rule 45

Rule 45 addressing subpoenas to non-parties recognizes that undue burden and expense should not be imposed on non-parties. The Rule, recently amended, continues to recognize the distinction between parties and non-parties. A witness may only be compelled to give testimony within the District in which the witness is served or within the 100 mile territorial limitation. Rule 45 contains a procedure for a non-party to object to the production of documents, placing the burden on the party seeking the documents to undergo the expense of a motion, if an accommodation cannot be reached. Non-parties, as stated, are protected against "undue burden."

But the Rule does not similarly protect Rule 30(b)(6) depositions of the organization sought through subpoena.

Rule 30(b)(6) itself tersely addresses the organizational deposition of a non-party: "A subpoena must advise a nonparty organization of its duty to make this designation." While Rule 45 seeks to protect non-parties from "undue burden or expense" and a non-party may object to subpoenas to produce documents, the Rule contains no ability for the subpoenaed organization to object to topics or to the production of a witness at all.

What if the only knowledgeable witness is a person beyond the 100 mile limit? To what extent may a party circumvent the 100 mile limit by asking for the Rule 30(b)(6) deposition of a non-party organization by subpoena with knowledge that the only witness with knowledge is beyond the subpoena power? Must the organization interview that witness and prepare a witness within the territorial limit with the knowledge of the witness beyond the reach of a subpoena? At least one court, appropriately in our view, has said no. In *Wultz v. Bank of China*, 293 F.R.D. 677, 680 (S.D.N.Y. 2013), the court found that the subpoenaed party need not produce a witness located beyond the 100-mile territorial boundary and by extension, need not educate a witness on topics upon which only employees located outside that limit have knowledge.

The same court also found that there is not the same burden to prepare witnesses when the organization sought to be deposed is a non-party. The court found the Rule 45 requirement to protect non-parties from "undue burden" lessens the burden of preparation imposed upon parties. *Id.* at 680.

The Committee on Federal Courts of the Association of the Bar of the City of New York proposed in 2013 that greater protections for Rule 30(b)(6) should be a given to non-parties. It recommended a minimum notice period (21 days), an explanation of the need for the testimony,

and an automatic stay of such deposition if a motion for a protective order were filed by the non-party.

The Task Force believes these protections are warranted but not sufficient. We have already recommended a procedure for objections to apply to all requests for Rule 30(b)(6) depositions. At a minimum, such a procedure should apply to non-parties subjected to Rule 30(b)(6) organizational depositions by subpoena. Moreover, the burden of asking for an order compelling the deposition should be on the party seeking the deposition, rather than on the non-party to seek a protective order, in the same manner as Rule 45 requires with respect to the production of documents. In addition, protection for the 100-mile territorial limit should apply and be recognized in a rule tailored for Rule 30(b)(6) depositions through subpoena. Moreover, we agree that the burden to prepare witnesses should be consistent with the limitation to protect third parties from undue burden and expense. Thus, we recommend the Rule 45 also be amended to address the separate problems applicable to Rule 30(b)(6) deposition notices to non-parties through a Rule 45 subpoena.[9]

K. Multiple Organization Depositions

Since leave of court is required to take a second deposition of the same witness, is leave of court required if the examiner seeks to serve a second Rule 30(b)(6) notice on an organization

---

[9] Members of the ABA Section of Litigation Council and its Federal Practice Task Force previously recommended that the amendments to Rule 45 include a recognition of a duty to inform adverse parties when documents are received pursuant to subpoena, in addition to the requirement to serve a copy of a subpoena for documents on all parties. Our experience indicated that the explicit requirement would avoid problems litigators experience when documents are produced weeks or months after a subpoena return date, a prevalent occurrence. For some inexplicable reason the Advisory Committee declined to incorporate that requirement (presumably on the assumption that such documents are routinely made available). That lack of such a requirement in the Rule continues to cause problems. *See* Petrie v. Elec. Game Card, Inc., 761 F.3d 959, 967 n. 9 (9th Cir. 2014). If Rule 45 is amended to address Rule 30(b)(6) depositions, and even if it is not, we strongly recommend that this deficiency be corrected.

on different topics? Again courts have not answered this question in the same way. First, as an initial matter, to proceed a second time on the same topics should certainly require leave of court. Some cases require leave of court even if the topics sought to be inquired into are different. *See, e.g., Ameristar Jet Charter Inc. v. Signal Composites Inc.*, 244 F.3d 189 (1st Cir. 2001); *Terry v. Unified Gov't of Wyandotte Co.*, 2011 U.S. Dist. LEXIS 20581, at *11 (D. Kan. 2011); *State Farm Mutual Auto. Ins. Co. v. New Horizon Inc.*, 254 F.R.D. 227 (E.D. Pa. 2008). At least one court says leave of court in that situation is not required. *See Quality Aero Tech. v. Telemetrie Elektronik*, 212 F.R.D. 313, 319 (E.D.N.C. 2002); *See* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE §2104, at 14 (3d ed. 2010). *Wright and Miller* suggests a second deposition should be permitted (without leave of court) if the topics are different but it certainly would count as a second deposition. It also suggests a different result in the case of a subpoena upon a non-party, who should not be unduly burdened. *See* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE §2104 (3d ed. 2010).

The Task Force believes court permission should not be required for a second deposition of the organization on different topics (if they are truly different topics and not efforts to redepose the witness on some areas previously covered), subject to the organization's right to move for a protective order to prevent abuse. The new discovery rules aimed at controlling costs and focusing on staged or iterative discovery make it appropriate in certain cases to limit topics to certain core issues, to be followed at a later time with more expansive questioning on other topics, if necessary. In these circumstances, each deposition would count as a separate deposition.

L. Discovery of Preparation

A frequent question that arises at all depositions is: "what did you do to prepare for this deposition?" It inevitably invokes a work product objection to the extent it seeks to explore conversations with counsel and even when it seeks to explore what documents were reviewed, particularly when the review was directed by counsel. Courts are split. *Compare Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985) (documents reviewed invokes work product when counsel selected documents for review by client); *with N. Natural Gas Co. v. Approximately 9117.53 Acres*, 289 F.R.D. 644 (D. Kan. 2013) (selection process not protected).

Since the extent of preparation of a 30(b)(6) witness is a proper area of inquiry, the Task Force believes that counsel should have some latitude to explore the extent to which a witness was properly prepared. Work product and privilege objections should still have a place when it comes to discussions with counsel, except when such discussions provide the basis for the education of the witness and the facts that are sought to be conveyed. We believe requiring a comprehensive listing of the documents reviewed in preparation for a deposition, particularly when the selection was made by counsel, does properly invoke protected work product. Nevertheless, a questioner who shows a witness particular documents can certainly inquire of the witness whether the witness is familiar with the document and when it was last reviewed.

CONCLUSION

It is clear that over the last 45 years, Rule 30(b)(6) practice has resulted in not only much confusion among practitioners as to what it requires, but also the development of many issues upon which courts have been divided. We recommend that the Advisory Committee on Civil Rules undertake a thorough review of the Rule and conflicting case law and resolve all issues

upon which courts have divided on the interpretation of the Rule. Throughout this Report we have recommended solutions on areas where courts have been divided.

We have also recommended changes to the Rule that we believe will improve practice in taking organizational depositions. These recommendations will reduce overall litigation cost by providing mechanisms to resolve issues that frequently arise before time is needlessly spent posturing at the actual deposition with the witness present. These include mechanisms for (1) providing for an objection procedure to set forth objections to the number, scope and particularity of topics listed; (2) to identify the witness or witnesses to be produced; and (3) to address the situation when there is not a witness who has knowledge of the topics requested or who can be educated. The recommendations also include a specific provision to protect organization non-parties whose 30(b)(6) deposition is sought to be obtained by subpoena. The recommendations further seek to reconcile an apparent inconsistency in the Note that provides that the organizational deposition counts as one deposition toward the ten deposition limit regardless of how many topics are listed and how many witnesses are designated, but that each designated witness may be separately deposed for seven hours. By adopting these proposed improvements and resolving the numerous conflicts, we believe practice will be greatly improved, greater certainty will be achieved, and time and expense will be greatly reduced in deposing organizations.