March 20, 2017

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Hon. John D. Bates, Senior Judge
Chair, Advisory Committee on Civil Rules
U.S. District Court, District of Columbia
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue N.W.
Washington, D.C. 20001

Hon. Joan N. Ericksen
Chair, Rule 30(b)(6) Subcommittee
U.S. District Court, District of Minnesota
12W U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Re: Proposed Sketch of "Stand-Alone" Rule 30(b)(6)

Dear Judge Bates and Judge Ericksen:

This letter is written on behalf of the National Employment Lawyers Association (NELA) to offer feedback on the rough sketch of a "stand-alone" Rule 30(b)(6) provided in the November 2016 Civil Rules Advisory Committee Agenda Book. NELA requests that this letter be placed in the Agenda Book for consideration at the upcoming April meeting. As outlined in our previous letter dated September 1, 2016, our view is that the current version of Rule 30(b)(6)—which has remained essentially unchanged for over 45 years—is not in need of an overhaul.

NELA is well-situated to comment on this issue because it is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA's members litigate daily in

every federal circuit, which provides NELA with a unique perspective on how the Federal Rules of Civil Procedure actually play out on the ground.

Rule 30(b)(6) was originally added as part of the 1970 amendments to the Federal Rules of Civil Procedure. Prior to that time, organizations sometimes engaged in a tactic called "bandying," in which each employee who was deposed would disclaim knowledge of the facts in question, explaining that a different employee would be the better person to ask. *See, e.g.*, 8A Charles Alan Wright, et al., Federal Practice and Procedure § 2110 (3d ed. 2014). Rule 30(b)(6) was aimed at solving this problem, as well as other related issues.

The Advisory Committee gave three main reasons for adopting the rule. *See* Fed. R. Civ. P. 30(b)(6) advisory committee's note. First, it would reduce the difficulty in determining whether a particular employee is the "managing agent" of a party prior to the taking of the deposition. *Id.* Second, the rule would stop the practice of bandying, described above. *Id.* Third, it would make litigation less costly and more efficient for organizational parties, preventing them from being subjected to a large number of depositions of their officers by an opposing party unsure of who has knowledge of the facts at issue. *Id.* It is our view that Rule 30(b)(6), for the most part, continues to achieve these goals, and should not be changed.

Rule 1 provides that the Civil Rules should be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Indeed, over the past decade, the Civil Rules Committee has devoted a great deal of effort to making changes to the Rules with the explicit goal of speeding up litigation and making it less expensive for both the parties and the courts. As outlined in more detail below, we believe the proposed modifications to Rule 30(b)(6) would have largely the opposite effect. For the most part, they would detract from the efficiencies envisioned by the original rule, slowing down discovery, and burdening the district courts with unnecessary motion practice. In relatively simple matters, Rule 30(b)(6) often allows a party to take only one deposition in discovery, as opposed to several depositions, thus saving the party hundreds or thousands of dollars in costs for court reporters, videographers, and the like. These costs savings accrue to all parties to the litigation. As such, even where slight tweaks might make some sense, the potential improvements would be too marginal to justify engaging in the resource-intensive process of amending the rule.

Minimum Notice of Deposition

First, we oppose the imposition of a minimum number of days that a Rule 30(b)(6) deposition must be noticed before the date it is scheduled to take place (**subpart A**). As noted in the comments to the sketched rule, Rule 30(b)(1) already requires "reasonable written notice." Certain Local Rules also provide more specific guidance. *See* D.C. Colo. LCivR 30.1 ("Unless otherwise ordered by the court, reasonable notice for taking a deposition shall be not less than 14 days, as computed

under Fed. R. Civ. P. 6. Before sending a notice to take a deposition, counsel . . . shall make a good faith effort to schedule it in a convenient and cost effective manner."). In practice, our experience is that counsel handle the scheduling of Rule 30(b)(6) depositions in the same manner as other depositions, working to accommodate the schedules of the parties and the witnesses, and allowing adequate time for organizational witnesses to be identified and prepared. A separate timeframe for Rule 30(b)(6) depositions is unnecessary.

Matters for Examination

Second, we also oppose the addition of a numerical limit on the list of topics in a Rule 30(b)(6) notice (**subpart B**). In our experience, Rule 30(b)(6) depositions are used reasonably, listing a number of topics directly tied to the issues at play in the case. We have rarely experienced disputes over the number of topics listed. Imposition of a bright-line cap could encourage counsel to make each topic broader than necessary in order stay under the limit. This would make it more difficult for witnesses to prepare, and would lead to disputes over whether the topics have been described with sufficient particularity.

Objections to Notice

Third, we agree with the comment that imposition of a formal objection process (**subpart C**) would be "overkill." Under the new rule, an objection to just one topic would suspend the deposition entirely, requiring the filing of a motion to compel, briefing, and a ruling by the court. Because the 30(b)(6) is often the first deposition taken in the case, this would lead to long delays—of up to several months in some jurisdictions—before the commencement of meaningful discovery. To keep the case moving, parties would likely resort to noticing the depositions of a series of fact witness with the hope of getting the information they are looking for. This is the antithesis of the goal of Rule 30(b)(6), and runs contrary to the efficiency and reduction of costs that this Committee has worked to achieve. *See* Fed. R. Civ. P. 30(b)(6) advisory committee's note ("The provision should also assist organization which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge."). The better solution is to leave the rule as is, allowing the noticed party to take any major issues to the court, if necessary, through a motion for a protective order.

Disclosure of Exhibits

Fourth, requiring advance identification of exhibits (**subpart D**) is unworkable for several reasons. We often use 30(b)(6) depositions because of the information asymmetry that we encounter in the early stages of a case. Thus, rather than producing exhibits that will form the basis of our examination, we use the 30(b)(6) deposition to *obtain* threshold information about the types of documents that exist so we can request their production for later use. Regardless, even in later stages of the case (as noted in the comments to the sketched rule), the proposal would likely

lead to the noticing party disclosing an overabundance of material out of concern that it might forget an important exhibit and be prevented from asking about it. Further, an exhibit disclosure requirement would effectively turn Rule 30(b)(6) depositions into a live version of interrogatories. While interrogatories serve their own purpose, it is the unscripted, unrehearsed nature of live depositions that makes them valuable.

Designation of Persons to Testify

Fifth, while we agree that there are parts of the proposal relating to the designation of persons to testify (**subpart E**) that may have utility, the bulk of the changes are unnecessary. We agree that it might make sense to require the organization to identify its designees in advance of the deposition, along with the particular subjects that they will cover. However, our experience is that this already occurs in most cases. We view the remainder of the proposed subsection as largely unneeded. For instance, it is already commonly understood that an organization who fails to produce a prepared witness may be required to appear for a second deposition, potentially at their own expense. *See Worth Empls.' Ret. Fund v. J.P. Morgan Chase & Co.*, 2013 WL 6439069, at *4 (S.D.N.Y. Dec. 9, 2013) (ordering the parties to confer regarding additional witnesses or "alternative forms of evidence"); *Nacco Materials Handling Grp., Inc. v. Lilly Co.*, 278 F.R.D. 395, 401 (W.D. Tenn. 2011) (ordering additional depositions, as well as fees and costs); *Wilson v. Lakner*, 228 F.R.D. 524, 530 (D. Md. 2005) (ordering additional depositions and permitting a motion for fees and costs).

Questioning Beyond Matters Designated

Sixth, the addition of an explicit statement that a witness may be questioned only about matters on which they were designated to testify (**subpart F**) will lead to motion practice, costs, and delays. As the comments to the sketch point out, it is fairly common for minor disputes to arise in the course of a Rule 30(b)(6) deposition as to whether certain questions fall within the scope of the topics in the notice. The case law has established a manner of dealing with this issue, which works well. The widely-accepted view is contained in *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995). There, the court concluded that "[i]f the examining party asks questions outside the scope of the matters described in the notice, the general deposition rules govern (i.e. Fed. R. Civ. P. 26(b)(1)), so that relevant questions may be asked and no special protection is conferred on a deponent by virtue of the fact that the deposition was noticed under 30(b)(6)." *Id.* at 476. "However, if the deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party's problem." *Id.*

The majority of courts appear to follow this rationale. *See, e.g., Am. Gen. Life Ins. Co. v. Billard*, 2010 WL 4367052, at *4 (N.D. Iowa Oct. 28, 2010) ("The conclusion reached in *King* has been unanimously accepted by courts addressing the issue since that time."). Many courts have further held that, to prevent an "ambush" or

admissions on topics for which the witness was not prepared, counsel may note on the record its contention that answers to questions beyond the scope of the notice are fact witness testimony, not 30(b)(6) testimony. *See Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000) ("[C]ounsel shall state the objection on the record and the witness shall answer the question, to the best of the witness's ability"); *see also First Fin. Bank, N.A. v. Bauknecht*, 2014 WL 949640, at *3 (C.D. Ill. Mar. 11, 2014) ("Graymont may well wish to make clear which testimony is corporate testimony and which is not."); *Crawford v. George & Lynch, Inc.*, 2013 WL 6504363, at *5 (D. Del. Dec. 9, 2013) ("If the witness is called to testify at trial, then the trial judge is the proper authority to rule on objections to the scope or admissibility of the testimony."). The proposed rule would eliminate this practical approach, encouraging objections, fights about scope, instructions not to answer, and inevitable motion practice.

Contention Questions

Seventh, as we have explained in our previous letter to the Committee on these issues, whether a Rule 30(b)(6) witness may be asked to express an opinion or contention (**subpart G**) depends on the circumstances and should not be the subject of rulemaking. *See U.S. v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C.) ("Whether a Rule 30(b)(6) deposition or a Rule 33(c) contention interrogatory is more appropriate will be a case by case factual determination.").

Judicial Admissions

Eighth, the proposal attempting to clarify whether and when testimony constitutes a formal "judicial admission" (**subpart H**) will lead to confusion over the weight that such testimony should receive in a particular instance. Rule 30(b)(6) testimony is certainly "binding" on the organization. *E.g., U.S. v. Taylor*, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996). But whether it is given the weight of a judicial admission depends on the situation. In some cases, courts have rejected declarations contradicting prior Rule 30(b)(6) testimony under rationale akin to the "sham affidavit" rule. *See, e.g., Orthoarm, Inc. v. Forestadent USA, Inc.*, 2007 WL 4457409, at *2-3 (E.D. Mo. Dec.14, 2007) (rejecting declaration as a "sham affidavit" at summary judgment because it "directly contradict[ed]" prior Rule 30(b)(6) deposition testimony); *Casas v. Conseco Fin. Corp.*, 2002 WL 507059, at *10-11 (D. Minn. Mar. 31, 2002) (granting summary judgment based on Rule 30(b)(6) testimony and refusing to consider contradictory affidavits); *see also Rainey v. Am. Forest and Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) ("[Rule 30(b)(6)] binds the corporate party to the positions taken by its 30(b)(6) witnesses so that opponents are, by and large, insulated from trial by ambush."). In other situations, the testimony is treated as any other deposition testimony which, if later altered, may be attacked through cross-examination, impeachment, and other means. *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001); *Dow Corning Corp. v. Weather Shield Mfg., Inc.*, 2011 WL 4506167, at *5 (E.D. Mich. Sept. 29, 2011); *Johnson v. Big Lots Stores, Inc.*, 2008 WL 6928161, at *3 (E.D. La. May 2,

2008); *A&E Prods. Grp., L.P. v. Mainetti USA Inc.*, 2004 WL 345841, at *7 (S.D.N.Y. Feb. 25, 2004). Including the proposed language would cause confusion about the difference between "binding" testimony and a formal "admission." Allowing courts to analyze these issues on a case-by-case basis is the better approach.

Supplementation

Ninth, although requiring formal supplementation of Rule 30(b)(6) testimony (**subpart I**) appears at first blush to be a logical approach, we agree with the comment that inserting this language would tend to encourage a "We'll get back to you" approach, leading to delays and motion practice. Whether and when formal supplementation is necessary should be handled on a case-by-case basis.

Number of depositions / Additional Depositions

Tenth, we oppose the proposal of counting each witness designated under Rule 30(b)(6) as a separate deposition (**subpart J**). We agree that this rule could lead to confusion and, as the comment suggests, "might produce unfortunate strategic behavior." For instance, in some cases multiple witnesses are designated to cover different time periods. The noticing party should not be required to use an extra deposition due to the needs (or strategic decisions) of the organization.

On the other hand, we agree that it may be useful to explicitly allow multiple Rule 30(b)(6) notices to be served at different points in the case (**subpart K**). This would tend to reduce the burden on the organization because they would not be required to prepare witnesses on numerous topics at once. It would also encourage the noticing party to take Rule 30(b)(6) depositions only on the topics absolutely necessary, since there would be no risk of being barred from taking a second deposition later on.

In sum, Rule 30(b)(6)—while not perfect—works well in practice, and continues to achieve the efficiencies at which the rule was aimed. We encourage the Committee to leave the rule as is, thereby allowing the courts to handle issues that arise on a case-by-case basis.

NELA thanks the Committee in advance for its careful consideration of these important issues.

Sincerely,

Terisa E. Chaw
NELA Executive Director