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Rule 30(b)(6) Subcommittee

Advisory Committee on Civil Rules

Comments regarding Rule 30(b)(6)

My name is Timothy C. Bailey. I have practiced law since 1991. I am licensed in West Virginia and Kentucky and have a pending application to practice law in Georgia. I am a past president of the West Virginia Association for Justice and I continue to serve on its Board of Governors. I also serve on the Board of Governors for the American Association for Justice. I have practiced almost exclusively trial litigation for the entirety of my years practicing law. My practice has included single injury and wrongful death cases along with cases involving multiple injuries and deaths. I had the pleasure of representing several families in widely known cases including the Upper Big Branch Mine explosion, the Sago Mine disaster and the Aracoma Mine disaster. I have also prosecuted class actions on behalf of hundreds of thousands of West Virginians in the Freedom Industries Water Spill litigation. I currently represent the Central West Virginia Airport Authority in litigation involving the collapse the the runway safety extension which was built on the world's largest manmade earthen structure at the time of its failure. These cases involved complicated issues with multiple defendants with many issues of liability buried in several layers of parent/subsidiary relationships and activities. The need for Rule 30(b)(6) depositions was very important. I have reviewed the possible changes to Rule 30(b)(6) and would like to comment on how, in my opinion, if enacted they would render Rule 30(b)(6) almost useless to anyone litigating against a corporation or other organization.

First, the inclusion of Rule 30(b)(6) depositions in topics for discussion in Rule 26(f) conferences. I have never been a fan of the delay in moving a case forward occasioned by the Rule 26(f) conference. Very rarely are these conferences more than mere formalities and while awaiting that process, no productive discovery is allowed. Injecting a Rule 30(b)(6) discussion into the agenda simply lengthens the agenda and I agree that it happens so early in the case that it is somewhat difficult to discuss where the Rule 30(b)(6) fits into the discovery plan in a case. For instance, I serve written discovery and in some instances the company responses are sufficient to give me the company's position. I may not need a Rule 30(b)(6) deposition. On the other hand, if I get responses which amount to nothing more than legal posturing, I know I am going to need to simply ask a company representative the same or similar questions by deposition. Again, that is not something I will want to discuss in a Rule 26 conference. I can also see that this will be seen as an "extra

step" in the discovery process. Opposing counsel will want an entirely separate chunk of time set aside in the discovery process for 30(b)'s and that 30 or 60 day window will be "added" to the schedule. Trial dates will be moved commensurately. Justice delayed is justice denied.

Second, the issue of judicial admissions. This is absolutely shocking to me. Corporations and other organizations use these legal identities to escape personal responsibility. That is fine. These same corporations and organizations have now had their right to "free speech" upheld in the context of elections and other communications. However, these same corporations and organizations wish to have no ability to speak to their actions which may have caused serious harm or death. The jury in a case is entitled to hear the corporation's or organization's actual position on matters of fact from an actual person within the organization. In a case involving an individual as a defendant , the individual testifies. There may be experts to support that testimony on liability and damages issues. But, the individual still has to state his or her position on the facts of the case and what was the intent of the actions or omissions in the case. Why would that be different for a corporation? And, if the corporation produces the right person on the issues, why shouldn't the parties and the jury be able to rely upon the witness's testimony on behalf of the company? If this change is allowed to the Rule, corporations will simply rely on the legal arguments of their lawyers and their paid experts to set forth the companies' positions rather than produce an actual witness who can address the company's knowledge and intent. If this happens, the better rule would be that both sides in a case simply proffer their positions on the facts and then allow the experts to testify from the proffers.

Third, requiring or permitting supplementation of Rule 30(b)(6) testimony. This proposed change is more than shocking. It is an invitation for obstruction and deceit. Once the ability to supplement is allowed, the efforts to prep the witness will be downgraded. It will fall into a wait and see approach, "[N]o use in preparing so much since we can supplement." More importantly, it allows counsel to "testify" by way of supplementing testimony to "correct" any statements by the deponent which negatively impact knowledge and intent issues. Every 30(b)(6) will be supplemented and then followed by another deposition due to the supplementation. Testimony will never be final.

Fourth, forbidding contention questions in a Rule 30(b)(6). Why is a party to an action not allowed to ask another party contention questions? Isn't litigation contentious? Isn't it all about contentions? In a deposition of an individual who is party to a suit, contention questions are fair game. Why are corporations not required to clearly state their position on contentions issues on the record in the same manner? I read the idea that contention interrogatories are more fair than contention questions in depositions since you have days to answer instead of seconds. Counsel for a corporation should have the same duty to prepare their witness as counsel for the individual. Taking away contention questions because the time to answer is so short in a deposition is suspect. Taken to its logical

conclusion, contention deposition questions should be eliminated altogether, whether for the individual or the organization. Why should anyone be subjected to hard questions with a sense of urgency? Basically, what this change would mean is that no question which might actually bind the company should be asked because those can be hard questions and people need extra time to figure out a good way to avoid answering them.

Fifth, adding a provision for objections to Rule 30(b)(6). Trying to develop a set of specific objections would seem useless given that the motion for Protective Order covers the same ground. Discovery is supposed to be liberally allowed. Rather than setting up a rule that makes it harder to get a party's position on the record, require the organization to show the prejudice in moving forward as noticed. The change as discussed here is basically a shifting of the burden required to get such a deposition.

Finally, addressing how the limitation on number of depositions applies to Rule 30(b)(6). The 30(b) deponent is allowed to produce a person prepared on all issues or persons prepared or knowledgeable on discreet issues. Unless that runs into an unusual number of persons, the Rule 30(b)(6) should not count for more than one deposition. The fact that the information of a corporate party is held by multiple persons should not result in the inability to get the information. This could be left to the parties to work out and in the unusual situation where they cannot, the magistrate judges and district court judges need to craft solutions based on the unique circumstances in each case.

In sum, these proposed changes will severely limit the ability to learn corporate parties' positions on issues of fact which can be relied upon in preparation for trial. It is incongruous to me that rules are more and more being changed to force the plaintiff to divulge everything immediately (without the chance for any meaningful discovery) while allowing defendants every opportunity to withhold and avoid disclosure of relevant necessary information.

Thank you for the opportunity to submit by comments and opinions on these issues.

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