WALKUP, MELODIA, KELLY & SCHOENBERGER
Founded in 1959

August 4, 2017

Via Electronic Mail Only

Rule 30(b)(6) Subcommittee Advisory
Committee on Civil Rules

Re: *Comment regarding the changes to Fed. R. Civ. P. 30(b)(6) proposed* by the Rule 30(b)(6) Subcommittee Advisory Committee on Civl Rules

This comment is submitted in opposition to most of the Rule 30(b)(6) Subcommittee Advisory Committee's proposed changes to Fed. R. Civ. P. 30(b)(6). As a plaintiff's personal injury firm that frequently handles actions against organizational and corporate defendants, Rule 30(b)(6), and its California counterpart, play an essential role in our efforts to seek answers and gather information without having to parse enormous organizational structures to do so. The Subcommittee's proposed changes would, in various ways, unfortunately hinder the fact-gathering process for which the Rule 30(b)(6) is prescribed. Furthermore, these changes would slow litigation, increase motion practice, and open the door to unnecessary gamesmanship and abuse.

I. Specific Reference to Rule 30(b)(6) Among Topics for Discussion at the Rule 26(f) Conference and in the Rule 16 Report to the Court.

Because the Rule 26(f) conference and the Rule 16 report both occur at the earliest stages of litigation, it is impossible for plaintiffs to have a clear plan regarding 30(b)(6) depositions at that time. Plaintiffs often serve 30(b)(6) deposition notices after responses to written discovery shed light on previously undisclosed issues and facts. Furthermore, 30(b)(6) depositions often reveal the need for more 30(b)(6) deposition testimony on newly discovered topics.

Any required discussion of 30(b)(6) depositions as part of the 26(f) conference and the Rule 16 report should be preliminary and nonbinding. Anything more specific would place a burden on the plaintiff to set out a plan before it is possible to determine what the plan should be.

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II. Amendments Regarding Judicial Admissions and Supplementation of Testimony.

Because plaintiffs rely on what they learn during discovery to build their case and prepare for trial, it is essential that 30(b)(6) testimony is not used as a tool for sandbagging. Both the amendment regarding judicial admissions and supplementation of testimony may lead to exactly that.

For this reason, any amendments clarifying that Rule 30(b)(6) deposition testimony is not a judicial admission or allowing for supplementation should also clarify that such testimony is "binding," and define clearly what that means: that the witness is speaking as the organization rather than as an individual, and that its testimony should bear on that organization in the same way as it would on an individual party. Without this clarification, the Subcommittee invites corporate entities to prepare its witnesses inadequately, and engage in gamesmanship by offering supplemental declarations that contradict earlier testimony.

Our colleagues at McGinn, Carpenter, Montoya & Love suggest that, should an organization seek to change its position from one given at a 30(b)(6) deposition, it has the burden to prove that the information forming this change was not known or reasonably available to them at the time of the deposition. *See Rainey v. American Forest and Paper Ass'n, Inc.* 26 F. Supp 2d 82, 94 (D.D.C. 1998). If the Committee does issue any amendment regarding judicial admissions, I support the addition of this burden-shifting approach.

III. Forbidding Contention Questions.

My concern in codifying a prohibition of contention interrogatory questions in deposition is that there is inherently gray area between what is and is not a contention question. They often straddle the line between basic facts and facts supporting a contention. Codification of a bar on questions that one attorney construes as a contention will dramatically increase the number of instructions not to answer at deposition, which in turn will only lead to more motion practice.

If the Committee does issue guidance regarding contention interrogatories at deposition, it should not permit counsel to instruct a deponent not to answer on the basis of this objection. Instead, like other form objections, it should only be an objection that can be lodged in deposition,

ruled on later as necessary, and not a basis to instruct a witness not to answer.

IV. Adding a Provision for Pre-Deposition Objections to Rule 30(b)(6) Deposition Notices

The relevance of a particular line of questioning often becomes evident only through the context provided by the deposition setting. The rules of discovery already dictate, in detail, the parameters and scope of questioning at deposition.

Allowing a party to object to a line of questioning before the deposition begins will only create yet another hurdle to getting depositions on calendar and completed. It will also make the actual deposition much more cumbersome, with parties spending time arguing about what the parameters of their pre-deposition objections were, instead of simply objecting to questions as appropriate during the deposition.

V. Amendments to Address Limits on the Duration and Number of 30(b)(6) Depositions.

If the subcommittee addresses this subject with an amendment, it should do so by codifying the Committee Notes, which provide that one day should be allowed for each person designated, and that the 30(b)(6) deposition counts as one of the ten for the limit, regardless of how many individuals are designated to testify. Any deviation from these guidelines will lead to gamesmanship, with defense counsel designating multiple individuals for the purpose of bringing plaintiffs to their deposition limit.

Thank you for your time and consideration.

Very truly yours,

SPENCER J. PAHLKE

SJP/sas