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Comments on proposed Rule 30(b)(6) changes
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I want to thank the committee for taking on this task, which though technical, is important. It sounds as though you have received many thorough and thoughtful comments thus far, but Rule 30(b)(6) and its local state equivalent has been a pet peeve of mine for years. I saw a news report of the committee's work and thought I would comment. These views are my own, not the firm's as a whole.

I understand the origin of the rule as an attempt to remedy "bandying," when each corporate representative claims not to have knowledge on some key factual issue and points to others, who similarly demur. In my experience, however, no advocate waits until an instance of bandying has occurred to take a 30(b)(6) deposition. I have received notices at the outset of oral discovery that list, as topics, most or every element and salient factual point in the case and require that the corporation provide all information "known or reasonably available." The rule is effectively used to force the corporation to marshall its evidence on those topics. I laud the committee's suggestions that the rule be revised (i) to clarify that the testimony will not constitute judicial admissions, (ii) to forbid contention questions and (iii) to allow supplementation, but those changes may not be wholly adequate: A contention question is in the eye of the beholder; and given potential sanctions, no advocate will want to instruct a witness not to answer what he believes to be a contention question or to suspend a deposition if deadlines are tight. And if a corporate defendant is deemed to have presented the evidence known or reasonably available, it has few avenues for rebutting or supplementing the testimony with other evidence, thus giving the 30(b)(6) testimony the practical effect of a party admission. That may be an appropriate result in a situation where bandying has occurred—the corporation must take a position if its witnesses have not—but it seems prejudicial or burdensome at an early stage of discovery.

Along with this is the burden that the proponent often imposes by propounding vague or broad topics for the deposition. It is often difficult to satisfy the duty under Rule 30(b)(6) to prepare the witness when the parameters of the questioning are potentially extensive. And again, where contentions are included, the witness almost has to become part of the trial team and be able to argue the case for the corporate party. Further, there is a common strategy of taking an early 30(b)(6) deposition, and then noticing up depositions for the same individuals that testified in the 30(b)(6), giving the interrogator two bites at the apple. Granted, there are remedies for these ills: for instance, vague or broad topics could be objected to as lacking the "reasonable particularity" requirement in the rule, but I find that where a dispute occurs, enforcement of the requirement is not strict.

The committee's most effective suggestions may be to require the parties to consider Rule 30(b)(6) depositions at the Rule 26(f) conference, to allow for objections (which, candidly, I've always thought implicit in the rules), and to defer contention topics as with Rule 33(a)(2). Indeed, I would ask the committee to consider going further and recommend that Rule 30(b)(6) deposition be permitted only if agreed to, as part of a Rule 26(f) conference or subsequently, or with court approval. That may seem extreme—and I agree that counsel willing to act in good faith can often work out the issues—but before a party can impose on another the duty of marshalling evidence and educating witnesses on topics, there should be some agreement or demonstration that the duty is appropriate to the circumstances. Those circumstances may extend beyond "bandying": in asymmetrical discovery, an individual suing a corporation might properly use Rule 30(b)(6) to cost-effectively discover the case. But counsel could most profitably address that as part of the discovery conference.

I hope these thoughts are not totally redundant of the others you have received. Again, I believe that the committee's work on this point is significant and I want to express my gratitude for your efforts. I look to your further reports.

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