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Advisory Committee on Civil Rules
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Response to Invitation for Comment on Possible Issues Regarding Rule 30(b)(6), Fed.R.Civ.Pro.

A Introduction

\ I am writing in response to the request for comments on the defense bar's proposals to tilt the discovery rules further in their favor by proposing amendments to Rule 30(b)(6), Fed.R.Civ.Pro., some of which seem appropriate in part but some of which would largely gut the rule.

I say "defense bar" because Lawyers for Civil Justice has a grand name but is a defense-bar organization. Persons interested in becoming members must state their "Defense Bar Affiliation" on their inquiry forms. See http://web.lfcj.com/contact, downloaded July 25, 2017. That does not mean their suggestions are invalid, just that they have a strong self-interest in making them and that must be kept in mind.

Corporations, public agencies, and other entities are also sometimes plaintiffs in litigation, particularly commercial litigation. They may take Rule 30(b)(6) depositions when suing another corporation, a public agency, or other entity. They thus have interests that parallel those of individual plaintiffs, transcending those of the pure defense bar.

B. My Perspective

I am a primarily a plaintiff's civil rights and employment attorney, but also work as a mediator and as an arbitrator. I have litigated cases in Alabama, the District of Columbia, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Virginia, and the State of Washington.

I consult with attorneys and advise them on procedural and substantive questions in Federal and State courts nationwide. I frequently speak to bar groups across the country on topics including discovery, and write extensively on these topics.

For decades, I have been heavily involved in the American Bar Association's Section of Labor and Employment Law, the ABA's fourth-largest entity, and was the Chair of the Section for the 2011-2012 ABA Year. I was a member of the ABA's Class Action Task Force, which prepared comments adopted by the ABA House of Delegates and presented to Congress in connection with the Class Action Fairness Act when it was under consideration.

I know over a thousand attorneys across the country, probably more on the defense side than the plaintiff side, and have often discussed discovery issues with those I meet.

I have frequently testified before Congressional committees on the performance of the EEOC, the Department of Labor's Office of Federal Contract Compliance Programs, and the Department of Justice's Civil Rights Division.

As an arbitrator, I spend a fair amount of time on discovery issues.

As a mediator in pending cases, I sometimes have to bring a dose of reality to both sides on further discovery if the case is not settled.

I understand the concerns of organizational defendants or respondents about burdens and risks, and spend part of my time trying to get arbitration claimants' counsel in particular, and the plaintiffs' employment bar in general, to understand the legitimacy of these concerns and the need to work to resolve them.

C. Overview

I have been practicing law for what will be 49 years as of mid-December. I have

generally had very cordial relations with opposing counsel, and have become close friends with some of them. I ordinarily take Rule 30(b)(6) depositions, sometimes at the outset to find out the kinds of documents available or how the parts of the employment process in question are handled, and more often after the first wave of discovery to pin down my adversary's positions and shape subsequent discovery.

The existing rule is invaluable as a means of keeping discovery costs down, and assuring that discovery is proportional to the needs of a case.

In my 48⅔ years of practice, I can only remember one case in which either party had to ask the Court to rule on a proposed Rule 30(b)(6) deposition.

In my cases, the rule is working as intended. What this means is that defense counsel ordinarily contact me well in advance of the deposition to discuss the topics, and in the course of discussing them inform me about how the defendant makes and stores records, and how the parts of the employment process in question actually work, so that the topics can be re-phrased to reduce their burden and improve their utility. In the course of these conversations, I sometimes learn of specific legitimate concerns the defendants have and we work out an approach that resolves the concerns. I do not recall any case in which we were not able to resolve a legitimate concern, except in the one instance described above.

These discussions are often useful not just in resolving concerns about the Rule 30(b)(6) deposition, but in shaping the rest of the case. They are commonly the first time after the Rule 26(f) conference where counsel for the parties can have a pragmatic discussion about the case, and the demonstration of reasonableness fairly often sows the seeds of a future settlement.

What makes the Rule 30(b)(6) process work is the fact that the rule is well-balanced now, and presents no advantage to be gained by bad behavior. If any amendments create the possibility of gaming the system to reward bad behavior, the rule will not work well and in a kind of Gresham's law bad behavior will drive out good.

D. Requiring Premature Discussions on Rule 30(b)(6) Depositions

I believe that no purpose would be served by requiring the parties and the Court to speculate about possible Rule 30(b)(6) issues, and get advisory rulings on matters that may never arise. If this is done and in the development of the case there is a specific Rule 30(b)(6) deposition and set of topics that differ from the parties' and Court's initial speculations, there would be an undue burden of seeking a change on any party hampered by the inappropriate advisory ruling.

Requiring discussion of Rule 30(b)(6) depositions in the Rule 26(f) conference of counsel and in the Rule 16 scheduling order would foreseeably create problems. There is no problem to be solved, in the eyes of anyone who is actually engaged in litigation, so

there would be no offsetting benefit.

There should not be a default answer of "more case management" in response to every discovery question. That simply increases the expense and delay of litigation, and teaches attorneys the unhelpful lesson that they can safely fail to find their own solutions.

E. It is Useful to Clarify the Weight to Be Given to Answers in a Rule 30(b)(6) Deposition

I thank the Subcommittee for raising this question, and think it would be very useful to the parties and the courts to clarify the weight to be given to answers in a Rule 30(b)(6) deposition. Case law interpreting the present rule is interesting, but does not address the point of what the Rule should say in order to make this discovery device as effective as it can be. At the same time, the Federal Judicial Center study found that much of the litigation over Rule 30(b)(6) involves the issue of the effect of Rule 30(b)(6) testimony.

This all suggests that parties and courts will be aided a great deal by an amendment that clarifies the weight to be given to answers in a Rule 30(b)(6) deposition.

The important question is what is necessary to make the rule work effectively.

It seems clear that the rule can only work effectively if the answers have a strong binding effect, to a much greater extent than other evidence, so that the corporations, public agencies, and other entities giving Rule 30(b)(6) depositions have a strong interest in ensuring the accuracy of the information.

Litigants *rely* on the answers given in these depositions to shape subsequent discovery requests and to determine what to ask witnesses in other depositions. Prejudice foreseeably and inevitably flows from incorrect answers.

If no strong binding effect is given to the answers, or if the answers are merely assumed to be immune to a hearsay objection,[1] this would give a license to corporations, public agencies, and other entities to provide misleading answers and hide the truth in Rule 30(b)(6) depositions so that their adversaries will waste time and scarce resources, and "supplement" the answers when it is too late to do any good. The policy of Rule 1 should be taken into account in framing amendments to the Civil Rules, and this result cannot be tolerated.

Corporations, public agencies, and other entities have a legitimate concern that an answer given in good faith after diligent inquiry may turn out to be wrong in light of information that comes to light only later. It is consistent with the absolute need for Rule

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[1] The reference to Fed.R.Evid. 801(b)(2)(C) on p. 2 of the Invitation to Comment is mistaken; there is no such subsection.

30(b)(6) answers to have a strong binding effect to allow such entities to seek consent of their opponents or leave of Court to change their answer on an adequate showing that their deponents conducted a diligent good-faith investigation, testified candidly and in good faith based on what they knew at the time, demonstrate that they could not reasonably have obtained the new information earlier, demonstrate that they disclosed the new information as soon as reasonably possible, and allow further discovery at the entities' expense to cure the prejudice.

I am not merely speaking of ordinary mistakes and inadvertent misstatements. These assertions made in good faith during the deposition can already be corrected by the same means as other deposition mistakes are corrected, without an amendment to Rule 30. However, it may be useful to include such problems in an amendment covering all kinds of errors.

Incorrect Rule 30(b)(6) answers have actually occurred in some of my cases. Defense counsel have contacted me to let me know that their deponent made a mistake or had incorrect information, we have sometimes gotten the deponent on the line with us and I have asked further questions informally, the defendant has shared with us the information that persuaded them the deponent had been wrong, I was satisfied defense counsel and the defendant were proceeding in good faith, we figured out what needed to be done, and we did it.

F. Rewards and Risks of Allowing or Requiring Supplementation of Rule 30(b)(6) Deposition Testimony

The reward is that the correction of good-faith mistakes in a way that avoids prejudice helps get the case resolved on its true merits, and that is a great reward.

The risk is that mentioning Rule 30(b)(6) in Rule 26(e) will lead some—not all—counsel for corporations, public agencies, and other entities to conceal the critical facts until near the end of discovery and disgorge them only after it is too late for them to have been useful in reducing the expense and delay of litigation.

The technical term for counsel who succumb to such temptations is "bottom-feeders." They exist on both sides of the "v." in litigation, and it is the proper role of rules and their enforcement to discourage such conduct by every reasonable means. We should not adopt an amendment that incentivizes bottom-feeding.

The solution is described in Part D above: allowing supplementations or changes only on the strict showings described.

G. Allowing and Disallowing Certain Contention Questions

Contention questions can usefully be separated into legal and factual contention questions, and treating mixed questions of law or fact as legal questions. An amendment

should disallow legal contention questions, but allow factual contention questions.

1. Legal Contention Questions

Interrogatories can be used for legal contention questions, and counsel can do research and consider before answering. There is a 30-day fuse on the answers, and that provides time in which to take care and avoid a mistake.

The purpose of Rule 30(b)(6) has never been to promote legal research; it has always been to promote factual research. It is a device directly to narrow factual issues, not directly to narrow legal issues.

I believe it would be an abuse of the rule to allow legal contention questions. Otherwise, only an attorney could reasonably be designated, and the discovering party would have the advantage a chess player has with a "fork" position, in which the player can in the next move remove a valuable opposing piece whichever way the discoveree opponent moves, and the discoveree opponent will suffer a serious loss no matter what move she or he makes in the interim.

In this context, the "fork" occurs because lead or senior counsel for the corporation, public agency, or other entity is best situated to know the right answers to legal contention questions. Only lead or senior counsel would potentially be able and protect the entity's interests when having to respond on the spot to legal contention questions. However, she or he will have become a witness and potentially be disqualified from the representation.

In addition, allowing legal contention questions would inevitably result in a game of "gotcha," will inevitably result in a flaring of tempers and loss of civility, will inevitably lead to requests for court rulings before the deposition continues. There will inevitably be future arguments about the parsing and meaning of the answers. And would the answers eventually be put before the jurors? If so, how would the jurors be able to evaluate whether the entity's subsequent positions in court conflicted with its counsel's answers in the deposition?

And if this is allowed, on what principled basis could we avoid allowing the parties to cross-examine each others' counsel on their briefs?

The entire enterprise would unproductively divert the resources of the parties and the courts into a theatre of the absurd. These seem to me strong reasons to disallow legal contention questions.

2. Factual Contention Questions

Factual contention questions, by contrast, should be allowed. Without them, much of the benefit of Rule 30(b)(6) would be lost.

The Answers to Complaints seldom narrow the issues, interrogatories that could serve to narrow the issues are severely limited, and requests for admissions are severely limited despite their ability to force a narrowing of the issues if they were backed up by interrogatories.[2]

The failed attempt to make litigation more efficient by limiting the devices that would otherwise have made litigation more efficient means that much of the remaining discovery now consists of torrents of paper in which the most relevant information is normally buried like a needle in a haystack, too many of the limited number of depositions are necessarily devoted to trying to make sense of the paper, and there are potential inconsistencies among the fact witnesses because no one has the whole picture. Their answers may be given in good faith, but can result in a lot of wasted effort pursuing possible lines of attack or defense that are simply not involved. A corporation's, public agency's, or other entity's view of the facts is foreseeably quite different from the good-faith but variable views of individual witnesses, who can only testify to their idiosyncratic views of the facts.

A Rule 30(b)(6) deposition answers these problems and allows the party taking the deposition to focus subsequent discovery and shape the case efficiently.

If more than 48 years of litigation experience has taught me anything, it is the critical nature of understanding exactly how the other side sees the facts, and what the other side's factual contentions really are.

Forbidding factual contention questions at Rule 30(b)(6) depositions will contrary to the goals of Rule 1 increase the time and expense of litigation by forcing the parties to pursue every rabbit that pops up in a deposition and chase it down its hole, even though only one out of ten rabbits really has a role in the case.

H. Adding a Redundant Provision for Objections to Rule 30(b)(6) Depositions

The Invitation to Comment persuasively sets forth the reasons why there are

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[2] It is astonishing to see lawyers and this Committee from time to time refer to requests for admissions as not very useful, without acknowledging that the reason for their greatly reduced utility is that there are limits on interrogatories. As a result, answering parties can freely refuse to admit without having to state the reasons for their refusals to admit. And they do, and issues are not narrowed, and expense and delay mount. In an example of life imitating art, the decades-old experiment with limiting Rule 33 Interrogatories has had the opposite of the effect for which it was intended. The "art" in question is, of course, the Walt Disney cartoon, "The Sorceror's Apprentice."

See my February 28, 2013 Comments on then-pending discovery proposals (attached) at pp. 2-4.

problems with using models developed in other rules as a substitute for a motion for protective order. The stated ground for needing a substitute is that it may take a while to get a ruling on a motion for protective order. That does not give proper weight to the procedures available in every court in the country for getting a needed ruling on an emergency basis.

The Federal Judicial Center study demonstrates the utter void when one looks for a reason justifying such a change. Plaintiffs' lawyers do not want it, defense lawyers do not want it, judges do not want it. Only law school professors want it, and those for abstract reasons unconnected to actual litigation.

Many evils would inevitably follow from adoption of any of the ideas suggested. They are all self-executing, and would allow an entity to stop a case in its tracks simply by stating an objection, reasonable or not. To the extent there is any delay in resolution of the objection, that would switch the burden to the party most injured by a delay. That is a significant problem.

Moreover, allowing self-executing objections would encourage game-playing and bottom-feeding behavior, which in turn would endanger the scheduling order, delay the case, and increase expenses. Rule 1 is not consistent with such changes.

I respectfully urge that these are not good ideas.

I. Allowing Entities to Play "Keep Away" by Altering the Counting or Duration of Rule 30(b)(6) Depositions

Here too, there is an utter void when it comes to justifications for a change in the counting or duration of Rule 30(b)(6) depositions.

A corporation, public agency, or other entity can designate as many persons as it chooses to respond to a Rule 30(b)(6) deposition's list of topics. Any change counting each designee as a separate deposition would place a golden thumb on the discovery scale, by allowing only the entity to decide how many witness depositions to allow the other side.

Indeed, what would happen if there were a change and the entity then designated fifteen persons to address the topics? This would clearly preclude all depositions of fact witnesses, but would five designees go undeposed so that the Rule 30(b)(6) topics could only be explored in part? Would that make the answers less than binding?

It would not be an acceptable answer to count each deposition of a designee as only some percentage of a deposition. It would look too much like the infamous "three fifths of a person" provision in the original Constitution, and that would be remarked upon with a resulting loss of some of the prestige the Federal courts must continue to have so as to function properly.

Altering the presumptive duration of Rule 30(b)(6) depositions to fewer than seven hours would simply exacerbate the tendency of some attorneys to "play out the clock" with lengthy speaking objections despite their impropriety, or by witnesses answering every question with a time-consuming soliloquy. This occurs with some frequency, but my experience is that when I discuss this with opposing counsel we have always been able to agree that I would get additional time to depose the witness, in lieu of asking the Court for relief.

The shorter the time limit, the greater the temptation of counsel and witness to engage in these antics, the less likely it will be that defending counsel will agree to allow more time, and the steeper the showing that counsel taking the deposition will have to make in order to get a ruling allowing more time.

Any amendment to the rules that results in more game-playing, unproductive litigation, and waste of the parties' and the Court's resources is counter to the policy of Rule 1, and is not a good idea.

J. Elevating into Rule 30(b)(6) the Advisory Committee Note on the Counting and Duration of Depositions Under the Rules

As the Invitation recognizes, the Comments of the Advisory Committee state that a Rule 30(b)(6 deposition counts as one deposition regardless of the number of designees, and that the deposition of each designee is presumptively for one day of seven hours, but these important provisions are not in the text of the rule.

Strong reasons support their inclusion in the rule. I cannot count the number of times I have had to point out this Note to plaintiffs' or defense counsel, resulting in a change of position. This is not because anyone is acting in bad faith, but because attorneys are busy. We often have to take positions after consulting the text of a rule but without consulting the Notes of the Advisory Committee.

The Notes are often not included in publications of the Rules, particularly the short versions lawyers carry with them,[3] and lawyers tend to remember the texts and not necessarily anything else.

Even when a larger and heavier publication included the Notes, the relevant text may be buried in several sets of Notes and difficult to find quickly. My copy of the Thomson Reuters edition shows notes to Rule 30 from 1937, 1963, 1970, 1971, 1972, 1980, 1987, 1993, 2000, 2007, and 2017. The Note in question occurred with respect to the 2000 amendments. To get there, in the Thomson Reuters edition one must wade through seven columns of small type before finding this in the eighth column.

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[3] My short carry-along version is "Just the Rules" from North Law Publishers, and it contains no Notes of the Advisory Committees.

Elevating this part of the 2000 Note into the text of the Rule would be a time-saver and a boon to everyone.

Conclusion

Thank you for the opportunity to provide these comments.

Respectfully submitted,

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