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VIA EMAIL

Hon. Joan N. Ericksen
Chair, Rule 30(b)(6) Subcommittee
c/o Rules_Comments@ao.uscourts.gov

Dear Judge Ericksen,

Thank you for this opportunity to comment on issues regarding Rule 30(b)(6) depositions. The Subcommittee's solicitation of public participation early in the process is very much appreciated.

I am a partner at Milberg LLP. Milberg is widely recognized as a leader in defending the rights of victims of corporate and other large-scale wrongdoing. The Firm's practice focuses on the prosecution of class and complex actions in many fields, including securities, corporate fiduciary, ERISA, consumer, False Claims Act, antitrust, bankruptcy, mass tort, and human rights litigation. We find that Rule 30(b)(6) depositions are often the most effective route to the heart of discovery, enabling us to draft more targeted document requests, interrogatories and identify essential witnesses for additional depositions.

Based on a review of minutes and reports of the Advisory Committee and Rule 30(b)(6) Subcommittee, and the written comments submitted to date, there does not appear to be a compelling need to amend the Rule at this time. Rather, the clear consensus seems to be that, while disagreements regarding the scheduling and content of 30(b)(6) depositions are not uncommon, the vast majority are resolved by counsel without the need to involve, or even inform, the court. And there is no evidence that disputes over 30(b)(6) depositions have become more frequent or virulent in recent years, even as discovery in general has grown in complexity, expense and importance in litigation. This comports with our general experience, which is that Rule 30(b)(6), as currently written, functions well enough in practice.

Further, some of the amendments contemplated by the Subcommittee might actually work at cross-purposes to the Committee's recent efforts to make discovery more efficient and less expensive. For example, there can be little doubt that a new procedure permitting formal written objections to Rule 30(b)(6) notices would result in objections being served in response to virtually every 30(b)(6) notice, as they are to every set of document requests and interrogatories. Written objections would, in turn, lead to motion practice – and protracted delay – far more often than receiving parties now seek a protective order. Meanwhile, the existing Rule adequately protects the rights of parties receiving 30(b)(6) notices. No one could credibly claim that the absence of a rule allowing for formal objections prevents a company's counsel from contesting

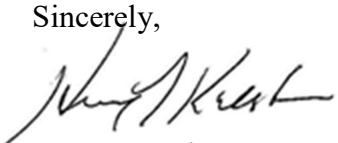
the proposed date or list of topics in a 30(b)(6) notice. The suggested change would only result in less cooperation, more delay, and more expense, with no real benefit.

Another consideration is that it can be useful for counsel to have flexibility in dealing with some of the issues on which the Subcommittee has considered rulemaking. For example, it is not uncommon for counsel to negotiate an integrated solution on the issues of the scheduling of a 30(b)(6) deposition, the duration of the deposition, whether it will be counted as one deposition or more, disclosure of witness names, topics to be covered, and whether the designated witnesses may be deposed at a separate time on subjects within their personal knowledge. The positions taken by the parties on these issues, and the relative importance of the issues to each party, varies significantly depending on the facts of the case, the purpose(s) of the deposition, and the stage of the litigation at which it occurs, among other factors. Fixed rules on some or all of these issues will constrain counsels' attempts to cooperate in forging appropriate compromises in a given set of circumstances.[1]

On the other hand, the proposed addition of Rule 30(b)(6) to the topics for discussion at the Rule 26(f) conference and the Rule 16 report might have some salutary effect, assuming that the intent is purely to flag the potential use of Rule 30(b)(6) but without the obligation to provide details of topics and duration, which may be premature to specify at that time. As other submissions have pointed out, in most cases the 26(f) conference and Rule 26 report occur too early in the case for a detailed discussion of 30(b)(6) to occur. However, there may be situations where the prospect of a 30(b)(6) deposition will provide added incentive for a corporate party to produce information on an expedited and less formal basis. We have found, for example, that some companies prefer to provide information about their data systems and document repositories voluntarily rather than prepare their IT personnel for a 30(b)(6) deposition. The inclusion of Rule 30(b)(6) among the subjects for discussion early in the litigation may assist some litigants in reaching similar agreements.

Thank you again for your consideration.

Sincerely,



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[1] If and when the Committee does amend Rule 30(b)(6), I would urge consideration of a provision stating that more than one deposition may be noticed in a case where circumstances warrant. It is unrealistic and counterproductive to require a party seeking a 30(b)(6) deposition early in litigation to anticipate every topic on which examination of a company witness may be needed; indeed, it is often impossible to do so. Where counsel cannot negotiate a solution, the party desiring the deposition may be forced into an unfortunate choice: to forgo an early deposition that might streamline discovery, or draft a broad 30(b)(6) notice simply to preserve topics for possible later depositions. Neither of those solutions serves the goals of just, speedy and inexpensive litigation.