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Comment Regarding Possible Issues on Fed. R. Civ. P. 30(b)(6) Proposed by the Rule 30(b)(6) Subcommittee Advisory Committee on Civil Rules

Submitted by: Gray, Ritter & Graham, P.C.
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via email: *Rules_Comments@ao.uscourts.gov*

This comment is in opposition to the items suggested for amendment to FRCP 30(b)(6). We appreciate the Committee's work in this area, but respectfully suggest that changing the rule may be a solution in search of a problem.

As presently constituted the Rule provides individual plaintiffs an effective means of obtaining relevant testimony from an organization. Without this tool, plaintiffs would have no means by which to compel production of the witness, or the witnesses, who possess the knowledge of the organization as a whole. The Rule prevents the waste of time inherent in asking for multiple depositions of corporate officers, many of whom would disclaim specific knowledge of a topic.

The Rule also provides significant protections for an organization. Just a few of these include:

1) Advance notice – usually at least 30 days – of the matters for examination, "described with reasonable particularity";

2) The ability to "self-designate" who will speak for the organization. This includes persons who have never worked for the organization, but in whom the organization has confidence to testify for it;

3) The ability to name one or several persons who will cover the various topics in the notice;

4) The ability to object during the examination (Rule 30(c)(2)); move to terminate or limit the deposition (Rule 30(d)(3)(A)); and the ability to list changes to the testimony with accompanying reasons, up to 30 days after receipt of the transcript. (Rule 30(e)(1)(A)-(B)).

In our experience, there are very few disputes over Rule 30(b)(6) that cannot be resolved without court intervention. As plaintiff lawyers, we often agree to amend the notice if provided good reasons by defense counsel. Further, these depositions are often done in stages, where once one witness has been produced, the parties may revisit how many more are truly needed.

In short, the Rule, as it presently exists, functions as intended. Sophisticated corporate defendants are always capable of designating pertinent witnesses and preparing them for deposition. We are surprised that some are suggesting otherwise to the Committee.

Regarding the specific areas of the Rule identified by the Committee, we offer the following comments:

1. Inclusion of specific reference to Rule 30(b)(6) among the topics for discussion at the Rule 26(f) conference, and in the report to the court under Rule 16.

This suggestion is unnecessary, and it is unrealistic for parties to discern at such an early stage if a 30(b)(6) deposition will be needed. If Rule 26(f) were changed at all in this regard, it should be merely to include a statement of whether such a deposition is anticipated. This could be inserted in Rule 26(f)(3)(B) or (C).

2. Judicial Admissions

The commentary under this subheading is vague. However, nothing should be inserted in the Rule that would lessen the effect of the organization's witness' testimony. Again, the witness is someone who is selected by the organization, and prepared fully to testify by the company's lawyers. Inserting a gratuitous comment that testimony by such an individual is "not binding" would encourage haphazard selection of witnesses and inadequate preparation before the deposition.

The witness' testimony is not his or her own; it is the testimony of the organization. This is the purpose and effect of Rule 30(b)(6), and nothing should be added that dilutes the Rule.

3. Requiring and permitting supplementation of Rule 30(b)(6) testimony.

Permitting an organization to "supplement" the testimony of a witness it chose to speak for it would disincentivize companies from careful selection and preparation of 30(b)(6) witnesses. Further, it would allow an organization to "game" the discovery process by waiting until the last possible moment to alter its litigation position, under the guise of "supplementation."

Rule 30 already has a provision for a witness to review and change his or her testimony. Granting the further privilege of letting the organization "supplement" that testimony is unnecessary.

4. Forbidding contention questions in Rule 30(b)(6) depositions.

This proposed change would give an unfair advantage to corporate defendants. First, the corporation already has advance notice of the topics to be covered in the deposition. If topics are inquired about during the deposition that were not a part of the notice, the corporation's attorney can object.

Second, there is no prohibition in the rule against contention questions when an individual plaintiff is the deponent. Individual plaintiffs are not afforded the luxury of advance notice of the particular areas of testimony. To keep the rule even-handed, this suggestion by the Committee should be dropped.

5. Adding a provision for objections to Rule 30(b)(6).

The Committee draws a comparison between the objections allowed by Rule 34(b) and what is being proposed for Rule 30(b)(6). While this may have superficial appeal, the idea is flawed for a simple reason. Rule 34(b) operates even-handedly among the parties, while 30(b)(6) objections could serve only the interests of organizational defendants. To even the discovery scale, the Committee would have to devise a method by which the plaintiff could peremptorily limit questioning at his or her deposition. There is no need for this, nor is there a need for objections ahead of the 30(b)(6) depositions. Adding such a provision would delay and increase the costs of litigation and burden the court with unnecessary motion practice.

We would urge the Committee to study very carefully any instances in which the defense claims it was unable to move for a protective order prior to the date of the deposition. This has certainly not been our experience. If a party was dilatory either in the timing of the deposition or in moving for a protective order, this obviously does not reflect a flaw in the rule itself.

6. Amending the rule to address the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions.

We certainly agree with the Committee's observation that any issues in this area "should be worked out by counsel." To this point, counting the 30(b)(6) deposition as one deposition, regardless of the number of witnesses designated, has not presented any major issues. Counting every witness produced as a separate deposition would run the risk that organizations would purposely name several witnesses, even though one could cover most of the topics.

Summary

Thank you very much for your consideration of this comment, and your hard work in support of the Federal Rules.

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