Opposition to Changes to Rule 30(b)(6)
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I write to explain my opposition to the proposed changes to F.R.C.P. 30(b)(6). I currently represent plaintiffs in disability insurance claims arising under state law and ERISA. I have had my own practice representing plaintiffs for more than the past six years. For the six years before that, I worked at a large law firm doing defense work, which included defending disability and health insurance claims, defending products liability cases, and representing parties in corporate disputes.

Based on my experience both taking and defending depositions under Rule 30(b)(6), I believe the current rule works well. I have great concerns that the proposed changes will undermine the Rule's purpose and make it incredibly more difficult, if not impossible, for parties (especially plaintiffs) to obtain the facts they need to prove their cases. The proposed changes would essentially make Rule 30(b)(6) toothless and invite squabbles over the proper scope of proposed topics, whether testimony actually represents the company's knowledge and understanding, and lead to further obstruction and gamesmanship. Obviously this subverts the entire purpose of the rule. I therefore oppose the proposed changes. My thoughts and objections to the specific proposed changes are discussed below.

Inclusion of Rule 30(b)(6) topics in 26(f) conference and Rule 16 case management plan: This proposed change would be almost entirely unworkable and unfair. In my experience representing plaintiffs and defendants, you often do not know what the Rule 30(b)(6) topics will need to be until well into the case and you have gotten corporate documents (typically through motions to compel because corporate defendants will rarely divulge any document short of a court order) or deposed corporate fact witnesses. Additionally, it would require a party adverse to a corporate defendant to essentially divulge his or her litigation strategy before any meaningful discovery has been allowed to begin. It also seems likely that, down the road, a corporate defendant would seek to bind its adversary to extraordinarily preliminary topics discussed at the 26(f) conference or included in the Rule 16 case management plan. This would not only give the corporation a heads-up on the party's litigation strategy, but would further prejudice parties seeking to obtain information from recalcitrant adverse corporate parties.

Judicial Admissions: Because corporations are not actually people it is impossible to get party admissions from an employee fact witness. Thus 30(b)(6) depositions are essential to getting admissible evidence regarding the corporations knowledge, understanding, and practices. If a corporate defendant elects to send an unprepared or deliberately evasive witness to a Rule 30(b)(6) deposition it should do so at its own peril. Getting admissible evidence about a corporation's knowledge, understanding, and practices is hard enough. The proposed change would only encourage gamesmanship by the corporations and lead to even greater confusion and discovery disputes.

Supplementation of Rule 30(b)(6) testimony: This is a terrible idea. Permitting corporate defendants to supplement testimony (read: completely rewrite and change the testimony after the attorneys get a hold of the transcript) would invite gamesmanship and lead to corporations deliberately presenting unprepared and unknowledgeable witnesses and then "supplementing" the testimony with attorney argument. If this change is adopted, the committee might as well eliminate Rule 30(b)(6) in its entirety as it would render the rule useless. As the Ninth Circuit has held, a deposition "is not a take home examination." This proposed change would make it so. The proposed changes would make Rule 30(b)(6) toothless and invite gamesmanship and even further headaches and burdens for parties and the

courts.

Forbidding contention questions: If a corporate defendant is going to file its answer with 25 "affirmative defenses" and then serve evasive interrogatory or request for admission responses (this is not uncommon at all), the only opportunity to obtain a corporate admission is at a Rule 30(b)(6) deposition. The spontaneity of the deponent's response is a feature of the Rule, not a flaw. Among other things, parties are entitled to flesh out and learn what a corporation's defenses are before trial rather than trying to wade through or present deliberately obtuse or "will supplement" written discovery responses a jury. Additionally, I disagree that contention-type questions "are rarely if ever used in ordinary depositions" because, in my experience, capable attorneys regularly use these types of questions during fact witness depositions to help establish the frailty of mass copy-and-paste affirmative defenses.

Adding a provision for objections to Rule 30(b)(6): Corporate parties already object enough to impede the collection and presentation of evidence. Additionally, in my experience, when Rule 30(b)(6) topics are served the corporate defendants often object on numerous grounds anyway as part of the pre-motion "meet and confer," and the parties often end up having to take the issue to the court anyway. The last thing we need is to give corporate defendants more tools to obstruct discovery.

Duration and number of depositions: A Rule 30(b)(6) deposition should count as one deposition. Otherwise, corporations would play games by designating several employees a witnesses for one 30(b)(6) deposition. Thus, if the Rule 30(b)(6) notice identified five topics that would be covered, the corporation could designate two people for each topic ("Ms. X will testify about Topic A for the period 2014-2015; Mr. Y will testify about Topic A for the period 2016-2017) and that would be it. You would ask Ms. X about January 2016 and she would deny any knowledge because she would have been prepared to disclaim any such knowledge; thus forcing a party to burn up his or her depositions. The rules should strive to eliminate gamesmanship, not invite it. Noting that "[I]deally, such issues should be worked out between counsel" is a pleasant thought but is highly unrealistic. Counsel for large corporations do not always play nice in the sandbox with the other kids. That might be because that's who they are, that's how they practice generally, firm culture, or they're following corporate marching orders to obstruct-obstruct-obstruct.

As it stands now, Rule 30(b)(6) is an effective tool to obtain testimony and admissions from corporations. Without it, parties would never be able to nail down a corporate defendant or obtain party admissions. Corporations currently know the limits of Rule 30(b)(6) as well as the risks to them if they fail to comply or if they send an unprepared representative. The proposed changes, rather than helping eliminate gamesmanship, would encourage more games, more evasions, and more obstruction. The committee should not adopt the proposed amendments.

If you have any questions or would like to discuss further, please feel free to contact me by e-mail or at the number below.

Thank you for considering my input.

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