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Advisory Committee on Civil Rules

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I have practiced both as a lawyer representing insurance companies and defendants and as a lawyer representing plaintiffs. I have practiced law for 28 years now and the proposed changes to FRCP 30(b)(6) are not warranted. The proposed changes do not benefit anyone other than defendant corporations backing them.

Discovery is the essence of civil litigation and the only path to a just outcome. Civil litigation also is one of the tenants of democracy keeping in check forces that would subvert our institutions. The proposed changes to Rule 30(b)(6), in large part, improperly insulate parties from the consequences of bad faith discovery conduct, weaken the rights of litigants to discover relevant information and tilt the playing field in favor of corporate litigants that will play "hide the ball." Rule 30(b)(6), in its present form, provide the best discovery tool for obtaining full and complete discovery responses. This body should not condone any weakening of that tool which has operated efficiently for decades with appropriate judicial oversight. In my experience, corporate litigants do not hesitate to engage in motions practice when confronted with a Notice of Rule 30(b)(6) perceived to be violative of the Rules.

INCLUSION OF SPECIFIC REFERENCE TO RULE 30(B)(6) AMONG THE TOPICS FOR DISCUSSION AT THE RULE 26(T) CONFERENCE, AND IN THE REPORT TO THE COURT UNDER RULE 16

The discussion of Rule 30(b)(6) depositions at the Rule 26(f) conference is too soon. It is difficult to imagine what 30(b)(6) depositions may be needed that early in the litigation. If the rule were passed parties would probably indicate a pro forma designation to preserve their rights but it would have little practical impact on the process, which makes it hard to rationalize the change. Thus, the rule should not be changed in this manner.

JUDICIAL ADMISSIONS

There must be some binding effect on a 30 (b)(6)'s witness's testimony. Otherwise the rule would be worthless and taking the deposition would be meaningless. Evidentiary admissions are usually what the courts have decided are appropriate. We should let the rule remain the same.

REQUIRING AND PERMITTING SUPPLEMENTATION OF RULE 30(B)(6) TESTIMONY

As the Subcommittee points out in its Invitation for Comment, allowing supplementation would encourage wasteful forms of gamesmanship, such as intentionally failing to prepare witnesses or

introducing sham testimony. Courts routinely strike sham affidavits, but allowing supplementation would permit 30(b)(6) deponents to provide "I don't know, I will need to review our records" type of answers, thereby transforming the 30(b)(6) deposition into an unproductive, expensive, and largely empty exercise at a huge expense for plaintiffs and their lawyers. Evasive answers only benefit organizational defendants, and therefore would create serious inequities without any recognizable benefit.

As the Subcommittee recognizes in the Invitation for Comment, existing Rule 26(e) does not require or permit supplementation of deposition testimony. Indeed, supplementary testimony from a plaintiff that changes her prior testimony would be subject to a motion to strike and/or impeachment at trial. It is therefore difficult to understand why organizational parties would be allowed or required to freely supplement, while leaving individual plaintiffs subject to the existing, harsher rule. A corporate defendant already has the advantage of choosing the witness (or witnesses) who are most knowledgeable, so it would be doubly unfair then to allow these witnesses to decline to provide responsive, complete testimony, secure in the knowledge that inadequate or inconvenient testimony could be supplemented later. Individual deponents are not permitted to do so, and there is no principled reason to allow it in the context of 30(b)(6) depositions.

This part of any rule should be limited to discovering new facts not reasonably within the party's possession at the time of the deposition. If not, it will be used as an excuse for the witness to say: "I will get back to you on that" and might result in needless continuances and delays in the litigation process, which the rules are supposed to prevent.

FORBIDDING CONTENTION QUESTIONS IN RULE 30(B)(6) DEPOSITIONS

Defendants typically ask contention questions during depositions: (e.g., "What support do you have for your claim that you suffered discrimination?"). Allowing these types of questions to be asked of plaintiffs, but not defendants unfairly tilts the scales in favor of one party to the litigation, without any principled justification. Whether a Rule 30(b)(6) witness may be asked to express an opinion or contention depends on the circumstances and should not be the subject of rulemaking. See U.S. v. Taylor, 166 F.R.D. 356, 363 (M.D.N.C. 1996) ("Whether a Rule 30(b)(6) deposition or a Rule 33(c) contention interrogatory is more appropriate will be a case by case factual determination.").

ADDING A PROVISION FOR OBJECTIONS TO RULE 30(B)(6)

Corporate defendants typically have far more resources, including attorneys, at their disposal. Defense counsel, in keeping with their obligation to zealously defend their clients' interests, will routinely object to a 30(b)(6) deposition, much like they do in answering interrogatories, or producing documents. Allowing a pre-deposition objection to rule 30(b)(6) will only add to the discovery time and expense. If this change is made, courts are going to be faced with handling even more discovery disputes. This proposed change is just not warranted.

AMENDING THE RULE TO ADDRESS THE APPLICATION OF LIMITS ON THE DURATION AND NUMBER OF DEPOSITIONS AS APPLIED TO RULE 30(B)(6) DEPOSITIONS

I am opposed to any separate limitation on the duration and number of depositions as applied to rule 30(b)(6) depositions. The current rule limiting the duration of depositions is adequate. Keep in mind that it is the organization that will designate the 30(b)(6) deponent for a particular topic. For example, if there are six different topics, the corporate organization can designate six different deponents, thus consuming six of the 10 depositions currently permitted under rule 26. Thus, it is the corporate organization that will drive the number of depositions as opposed to the specific needs of the plaintiff. Please remember that the plaintiff has a self-imposed limitation – costs. Plaintiffs must be very cost sensitive; defendants know this and, in my experience, sometimes intentionally drive up the cost by designating several 30(b)(6) deponents, when only one or two would suffice. Moreover, given that 30(b)(6) deponents are quite often located in diverse geographical locations, it presents much more of a hardship on the plaintiff than corporate organizations in conducting 30(b)(6) depositions. This is another example of a self-limiting factor plaintiff's decision of whether or not to depose a particular 30(b)(6) deponent.

I ask that my comments be given due weight during the review process. The proposed changes are not warranted. While there is a need to change some of the federal rules, 30(b)(6) is not one of them. I respectfully request that the proposed changes be rejected.

Sincerely,

David A. Sims

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