ATRA American Tort Reform Association

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18-CV-O

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Comment on Proposed Amendment to Federal Rule of Civil Procedure 30(b)(6)

Dear Committee Members:

As President of the American Tort Reform Association (ATRA), which represents a broad-based coalition of businesses and other entities concerned about abuse of the civil justice system, I write to respectfully urge you to reconsider the proposed amendment to Federal Rule of Civil Procedure 30(b)(6) put forth by the Civil Rules Advisory Committee (Advisory Committee). Although well-intentioned, the portion of the proposed amendment requiring parties to confer in good faith about the "identity of each person who will testify" has the potential to impose unsound, costly, and impractical burdens on civil defendants.

To be clear, the basic idea of requiring parties to meet and confer in "good faith" when a party seeks to depose a corporation or other organization is a good one. As the Advisory Committee stated in its draft note supporting the amendment, requiring the parties to discuss early on the matters for examination has the potential to "avoid unnecessary burdens" and "reduce the difficulty of identifying the right person to testify and the materials needed to prepare that person." These objectives can be accomplished, though, by the amended language stating that the parties "must confer in good faith about the number and description of the matters for examination."

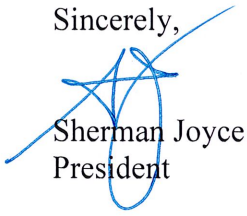
The second part of the proposed amendment, which requires the parties to confer in good faith about "the identity of each person who will testify," is what raises concern to ATRA and its members. This requirement creates a serious potential problem because it could be interpreted to require a corporation or other organization to identify each person who will testify on each matter in which information is sought at the initial conference between the parties when these issues are first raised and discussed. As the Committee can appreciate, such a requirement would impose an impractical burden on organizations subject to a 30(b)(6) deposition, particularly larger corporate entities, to make "on the spot" judgment calls about which individual within the organization would be the most appropriate person to testify about a given issue. The selection of witnesses is a matter that needs to wait until a case is fully understood; that does not occur at an initial pre-discovery meet-and-confer.

ATRA believes this provision has the potential to deprive civil defendants of their right to fairly evaluate plaintiffs' information requests and make a considered determination of whom within the defendant's organization will testify on specified matters for examination. Based on ATRA's experience identifying and documenting abuses in the civil justice system, it would come as little surprise if some plaintiffs' counsel sought to interpret the proposed Rule 30(b)(6) amendment as imposing an affirmative discovery obligation on corporations or other organizations to identify each witness at the proposed good faith conference and be bound by that decision throughout the course of the litigation.

ATRA also believes the proposed amendment could create confusion among courts by suggesting that the party seeking a 30(b)(6) deposition has some measure of input, by virtue of participating in the good faith conference, as to which individual within an organization should be designated to sit for the deposition. Although the Advisory Committee correctly recognizes in its draft supporting note that "the named organization ultimately has the right to select its designee," the experience of ATRA members is that some plaintiffs' counsel will work to urge courts to interpret the amended Rule 30(b)(6) language as requiring the organization to consider the plaintiff's proffered deponent within the organization as part of the parties' "good faith" requirement. Such an interpretation would significantly change existing law, augment litigation dynamics, and create costly and unnecessary litigation in a manner that does not appear intended by the Advisory Committee.

Fortunately, there exists a straightforward solution to achieving the basic goal of the Advisory Committee's proposed FRCP 30(b)(6) amendment while avoiding potential unintended consequences: delete the phrase "and the identity of each person who will testify" from the proposed rule change. The remaining language requiring the parties to "confer in good faith about the number and description of the matters for examination" is sufficient to meet the objective of the proposed amendment to help streamline litigation and reduce unnecessary burdens. Accordingly, I respectfully urge the Committee to remove the problematic provision from its proposed FRCP 30(b)(6) amendment.

Sincerely,



Sherman Joyce
President