LAWYERS FOR CIVIL JUSTICE

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July 27, 2006

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Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of U.S. Courts
Suite 4-170
1 Columbus Circle, NE
Washington, DC 20544

Dear Mr. McCabe:

Lawyers for Civil Justice respectfully submits the enclosed Comments in response to the invitation to comment on FRCP 30(b)(6). As a nationwide coalition of corporate and defense counsel supporting improvements in the civil justice system, our members are hands on litigators and litigation managers who deal with the civil rules on a regular basis.

We appreciate the action taken by the Civil Rules Advisory Committee to address FRCP 30(b) 6 and we encourage you to call upon us if we can provide you with additional information. Thank you for allowing us this opportunity to express our views.

Sincerely,

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Encl: LCJ Comment Re: FRCP 30(b)(6)

Cc: Honorable Lee H. Rosenthal
Honorable David G. Campbell
Professor Edward H. Cooper
Professor Richard L. Marcus
Mr. Peter G. McCabe

July 25, 2006

Lawyers for Civil Justice

Supplemental Comments
to the
Civil Rules Advisory Committee

Improving Federal Rule of Civil Procedure 30(b)(6) to Address the Realities of Modern Litigation

I. Introduction

Lawyers for Civil Justice ("LCJ")[1] respectfully submits these supplemental comments regarding the Committee's consideration of amendments to Rule 30(b)(6) of the Federal Rules of Civil Procedure.

Since introduced in 1970, Federal Rule of Civil Procedure 30(b)(6) has proved to be a useful tool in obtaining the testimony of corporate witnesses. The enactment of the Rule effectively addressed the difficulty of obtaining corporate testimony on matters relevant to the litigation. Prior to Rule 30(b)(6), corporate testimony was typically available only from an officer, director, or managing agent. These individuals often lacked sufficient knowledge on topics relevant to litigation. Quite often, several depositions would be necessary in an attempt to locate an individual with sufficient information.

Rule 30(b)(6) sought to remedy this situation by requiring the deposing party to describe the topics of a corporate deposition with "reasonable particularity," so as to allow the corporate entity to properly

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporate counsel and civil defense trial lawyers, including DRI, IADC, FDCC, supporting improvements in the civil justice system.

designate an individual with knowledge "as to matters known or reasonably available to the organization." In enacting this provision, it was hoped that these requirements would "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it." Committee Note to Federal Rule of Civil Procedure 30(b)(6). It was also hoped that the provision "would assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge." *Id.*

To a substantial extent, the implementation of Rule 30(b)(6) has forwarded these goals. However, this provision has also led to a number of unintended consequences.

First, depositions of a corporate witness under Rule 30(b)(6) are often used as a tool to solicit the legal contentions and positions of the corporation from unsuspecting corporate witnesses. Deposing parties often seek to have the responses to these so-called "contention questions" deemed as legal admissions at time of trial.

Second, the "contentions" problem is exacerbated by the limits frequently placed upon the introduction of evidence explaining or, in appropriate circumstances, contradicting a corporate representative's deposition testimony.

Third, deponents themselves are often precluded from supplementing deposition testimony.

Fourth, deposing parties often seek disclosure of the sources of information utilized in preparation for the deposition. As described below, such information may be protected by the attorney-client and/or work-product privileges.

Fifth, the requirement that the topics of a Rule 30(b)(6) deposition be described with "reasonable particularity" has not prevented deposing parties from asking questions with regard to topics that were not identified in the deposition notice. This may result in the deposing party seeking to sanction the corporate litigant for presenting an unprepared witness, or the witness attempting to answer questions as to which he had no knowledge.

This Comment seeks to explain these concerns and offers suggestions as to how Rule 30(b)(6) could be revised to address them. The adoption of these suggested revisions will help ensure that a corporate deposition serves its purpose of providing litigants with a source of corporate discovery pertaining to relevant topics, while curbing the potential for abuse that has unfortunately become common in recent years. Therefore, we respectfully suggest the following revised Rule 30(b)(6), with new material underscored and in bold:

> A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which each person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization, **within the scope of the topics identified in the deposition notice or subpoena, subject to deponent's right to assert attorney client**

privilege or work product objections to inquiries pertaining to the sources of information used in preparation for the deposition and to object to questions calling for legal contentions. Deponent's testimony should not constitute a judicial admission and the organization may in good faith supplement deponent's testimony in further proceedings as appropriate. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

II. Rule 30(b)(6) Should be Amended in the following ways to Address the Demands of Modern Litigation.

1. A Deposing Party Should be Precluded from Seeking Legal Contentions From Corporate Representatives in a 30(b)(6) Deposition.

A number of courts have held that corporate witnesses designated under Rule 30(b)(6) have the authority to speak for the corporation "not only [as] to facts, but also to subjective beliefs and opinions." *Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 21 (E.D. Pa. 1986); *see also Media Services, Inc. v. Lesso*, 45 F. Supp. 2d 1237, 1253 (D. Kan. 1999); *U.S. v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996).

This viewpoint has encouraged many deposing parties to utilize Rule 30(b)(6) depositions as a means of eliciting legal contentions from the corporation. A number of courts have rejected this approach, often on the grounds that such issues are more properly examined through contention interrogatories. *See, e.g., SmithKline Beecham Corp. v. Apotex Corp.*, No. 99-CV-4303, 2004 WL 739959, at *2-*4 (E.D.Pa. Mar. 23, 2004); *In re Independent Service Organization Antitrust Litig.*, 168 F.R.D. 651, 654 (D.

Kan. 1996); *McCormick-Morgan, Inc. v. Teledyne Indus., Inc.*, 134 F.R.D. 275, 285-88 (N.D. Cal. 1991). In so doing, courts have frequently recognized that permitting contention depositions would "in effect require [the corporate entity] to marshal all of its factual proof and then provide it to [the corporate representative] so that she could respond to what are essentially a form of contention interrogatories." *United States v. District Council of New York City*, No. 90 CIV. 5722, 1992 WL 208284, at *15 (S.D.N.Y. Aug. 18, 1992). Contention depositions have been appropriately condemned as "highly inefficient and burdensome, rather than the most direct manner of securing relevant information ... " *Id.*

Nevertheless, a number of courts have authorized deposing parties to seek testimony as to the contentions of a corporation by Rule 30(b)(6) corporate deposition. *See, e.g., U.S. v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996); *Protective Nat. Ins. Co. of Omaha v. Commonwealth Ins.*, 137 F.R.D. 267, 282-83 (D. Neb. 1989). In so doing, these courts "commit[] the fallacy of assuming that each discovery device must perform every function a well-designed litigation system must provide." Kent Sinclair and Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(B)(6) and Alternate Mechanisms*, 50 ALA. L. REV. 651, 710 (1999). Specifically, these courts have reached the erroneous conclusion that "because the discovering party is entitled to obtain some definition about the adversary's actual contentions and expected trial position, the Rule 30(b)(6) deposition must be set up to provide that defining moment." *Id.*

Permitting "contention depositions" overlooks the fact that "depositions, including 30(b)(6) depositions, are designed to discover facts, not contentions or legal theories, which, to the extent discoverable at trial, must be discovered by other means." *JP Morgan Chase Bank v. Liberty Mut.*

Ins. Co., 209 F.R.D. 361, 362 (S.D.N.Y. 2002). When discovery of the legal contentions and theories of parties are available through methods such as contention interrogatories and requests for admission, there is simply no need to seek such information in the course of a deposition. Rather than providing corporate litigants with the time to develop accurate and complete responses to questions pertaining to legal contentions and theories, discovery of legal contentions through a Rule 30(b)(6) deposition often results in the "burdens and unfairness of eliciting the information in a fluid, live format from one (or a few) persons who must master a complex situation with which they have no personal knowledge and about which in the heat (or tedium) of a deposition they speak inaccurately, vaguely, ambiguously, or imprecisely." Sinclair and Fendrich, 50 ALA. L. REV. at 710.

In this sense, permitting litigants to inquire as to legal contentions during the course of Rule 30(b)(6) depositions accomplishes little more than the potential that the corporate representative will inadvertently misstate the corporate position as to these contentions. Even courts that have authorized the questioning of a Rule 30(b)(6) corporate representative with regard to legal contentions have recognized that "[s]ome inquiries are better answered through contention interrogatories wherein the client can have the assistance of the attorney in answering complicated questions involving legal issues." *Taylor*, 166 F.R.D. at 362 n.7. It is difficult to envision a situation in which the converse would be true. It is simply unrealistic to expect a single individual to perform the "super-human feat" of effectively synthesizing complex legal and factual issues in order to accurately reflect a corporation's contentions during the course of a deposition. *See* Sinclair and Fendrich, 50 ALA. L. REV. at 702. Given the inherent complexity of this task, both the deposing party and the corporation would be far better served by a rule that

limits discovery of legal contentions to requests for admissions and/or interrogatories, in which the full resources of the corporation and the advice of counsel may be utilized to ensure complete and accurate answers.

Therefore, Lawyers for Civil Justice recommends that Federal Rule of Civil Procedure 30(b)(6) be revised to preclude elicitation of the legal contentions and/or positions of the organization the designated corporate representative has been designated to represent.

2. Corporations Should be Permitted to Explain or in Appropriate Circumstances, Contradict Rule 30(b)(6) Deposition Testimony.

The problem of legal contention inquiries during the course of a corporate representative deposition is magnified by the potential that responses to these inquiries may be deemed judicial admissions that may not be explained or otherwise supplemented by the corporation at trial. At minimum, the testimony of corporate representatives during a Rule 30(b)(6) deposition is typically deemed "binding" upon the corporation. *See, e.g., Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253, 268 (2d Cir. 1999); *Taylor*, 166 F.R.D. at 360. Therefore, the testimony of a corporate representative may be used for impeachment purposes at trial. *See, e.g., A & E Products Group, L.P. v. Mainetti USA Inc.*, No. 01 Civ. 10820 (RPP), 2004 WL 345841, at *7 (S.D.N.Y. Feb. 25, 2004); *Industrial Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000). However, the question of whether a corporation can take any steps to explain or contradict the erroneous deposition testimony of a corporate representative presents a different issue. Many courts have recognized that the testimony of a

corporate representative does not constitute a judicial admission that conclusively decides an issue. *A & E Products*, 2004 WL 345841, at *7; *A.I. Credit Corp. v. Legion Ins. Corp.*, 265 F.3d 630, 637 (7th Cir. 2001); *Industrial Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000); *Taylor*, 166 F.R.D. at 363 n. 6. Other courts have held that given the corporate representative's role as the "voice of the corporation" for purposes of a deposition, the corporation may not introduce evidence or allow testimony that contradicts or explains the testimony of the corporate representative. *See, e.g., Int'l Gateway Exch. v. Western Union Fin. Services, Inc.*, 333 F. Supp. 2d 131, 144-45 (S.D.N.Y. 2004) (precluding a corporation from submitting an affidavit contradicting testimony of corporate representative for the purpose of opposing a motion for summary judgment); *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 993 (E.D. La. 2000) (same); *Rainey v. American Forest and Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) (same).

"Deposition testimony ... is simply evidence, nothing more." Sinclair and Fendrich, 50 ALA. L. REV. at 730. Any departure from this rule would unjustly penalize corporations for honest mistakes made by corporate representatives during the course of a Rule 30(b)(6) deposition. Of course, corporations must ensure that corporate representatives are well-prepared for a 30(b)(6) deposition. However, the number and complexity of issues typically addressed during the course of a deposition increases the potential that some inaccurate statements will be made, even when the representative and the corporation have acted in the utmost good faith to ensure that the representative is properly prepared. When inaccurate statements are made, corporations should be given the opportunity to introduce evidence explaining or supplementing the statements. If corporations are denied such

an opportunity, entire cases could be lost on nothing more than the slip of a corporate representative's tongue.

Indeed, the prospect that a corporation may be "locked into" the testimony of a corporate representative may encourage deposing parties to increase the complexity and scope of the deposition in the hope that the deponent will be caught off guard and make inaccurate statements that can be used against the corporation. In particular, it may encourage deposing parties to ask more questions pertaining to legal contentions, in the hope that a corporate witness may inadvertently commit the corporate entity to an untenable position.

All of this threatens to convert the Rule 30(b)(6) deposition of a corporate representative into a contest of legal gamesmanship, rather than the fact-finding purpose for which it is intended. To avoid this result, it is our recommendation that Rule 30(b)(6) be revised to permit an organization to explain or, in appropriate circumstances, to contradict deponent's testimony and to clarify that such testimony does not constitute an admission binding on the organization.

Adopting this revision would not treat corporate witnesses more favorably than other witnesses, but would rather restore balance to the rules. A corporation is "bound" by its 30(b)(6) testimony the same way any natural-person witness is bound by his or her testimony. That is, the witness's testimony is evidence that, in most cases, can be explained away or modified at trial. *See, e.g., W.R. Grace & Co. v. Viskase Corp.*, No. 90 C 5383, 1991 WL 211647, *2 (N.D. Ill. 1991) ("a corporation is 'bound' by its Rule 30(b)(6) testimony, in the same sense that any individual deposed under Rule 30(b)(1) would be 'bound' by his or her testimony. All this means is that the witness has committed to a position at a particular point in

time. It does not mean that the witness has made a judicial admission that formally and finally decides an issue.") The same rule should apply to those witnesses being deposed pursuant to Federal Rule of Civil Procedure 30(b)(6).

3. Corporations Should be Permitted to Supplement the Testimony of a Corporate Representative.

Many of the problems set forth above could also be ameliorated by allowing corporate representatives to supplement their testimony. The reasons for permitting supplementation of the Rule 30(b)(6) deposition testimony of a corporate representative are similar to the reasons underlying the duty to supplement the deposition testimony of an expert witness under Federal Rule of Civil Procedure 26(e)(1). In recommending the enactment of this 1993 amendment, the Advisory Committee implicitly recognized that the testimony of such a witness assumes a heightened importance in civil litigation, and therefore should be supplemented to ensure its accuracy.

The deposition of a corporate representative frequently assumes a similar importance in litigation against a corporation. Accordingly, there is a need to ensure that the deposition testimony of a corporate representative is as accurate and complete as possible. Such a purpose would be well-served by allowing corporate representatives the opportunity to supplement such testimony.

There may be many cases in which supplementation of deposition testimony is unnecessary. However, as set forth above, the broad scope of many Rule 30(b)(6) depositions often makes it impossible to ensure that

corporate representatives will be able to provide accurate and complete testimony, regardless of the length and breadth of preparation sessions. Permitting supplementation in such circumstances would permit corporate representatives to correct or explain inaccurate statements, and may also provide corporate representatives with the opportunity to provide more complete responses to inquiries made during the deposition.

Such a rule would benefit all parties to the litigation. By providing a corporate representative with the opportunity to clarify deposition testimony, the deposing party will have the benefit of the most accurate and complete responses possible. In many cases, this will lessen the need of the deposing party to take further discovery, and may make additional Rule 30(b)(6) depositions unnecessary.

Federal Rule of Civil Procedure 30(b)(6) "is not designed to be a memory contest." *Bank of New York v. Meridian BIAO Bank Tanzania*, 171 F.R.D. 135, 150 (S.D.N.Y. 1997) (citations and internal quotation marks omitted). Nevertheless, too many deposing attorneys treat it as such. These attorneys unreasonably expect a Rule 30(b)(6) deposition to provide access to "a single, omniscient witness, or teams of witnesses, who can manage to hold in his head all facts, actions, opinions, statements and documents of perhaps dozens of individuals stretching perhaps over many years ... ." Sinclair and Fendrich, 50 ALA. L. REV. at 713. Corporations that engage in the good faith preparation of corporate representatives should not be penalized for failing to satisfy such lofty and unrealistic goals. By providing corporations with the ability to ensure that deposition testimony is as accurate and complete as possible, the right to supplement Rule 30(b)(6) deposition testimony will forward the central purpose of discovery: which is

nothing more than to "ascertain the truth." *In re Certain Asbestos Cases*, 112 F.R.D. 427, 432 n. 8 (N.D. Tex. 1986).

Therefore, it is our recommendation that Federal Rule of Civil Procedure 30(b)(6) be revised to permit a corporate representative to supplement his or her testimony in appropriate circumstances.

4. Corporate Representatives Should be Permitted to Assert Attorney-Client and Work Product Privileges as to Questions Regarding the Source of Material Used in Preparation for the 30(b)(6) Deposition.

Deposing parties often utilize Rule 30(b)(6) depositions as an opportunity not only to obtain the relevant facts known by the corporation, but to also get a sense of the thought processes of the corporate attorney. One common approach is to ask corporate representatives to identify the precise sources of the information relied upon in preparation for the deposition.

These requests are rarely made with the purpose of simply acquiring documents of relevance to the underlying litigation. Indeed, the documents requested by deposing parties have typically (unless otherwise privileged) already been produced to the deposing parties through responses to routine discovery requests. Rather, questions to 30(b)(6) witnesses as to preparation materials are often made with the knowledge that a corporate representative is almost always prepared for his or her deposition by the corporation's retained counsel. In seeking identification of the particular documents utilized in the preparation sessions, deposing parties hope to discover other wise privileged information and get a sense of the relative importance that

the corporate attorneys have placed upon these documents, and to thereby obtain insight into the attorneys' litigation strategy.

Such a line of questioning is clearly precluded by the attorney-client privilege, which typically protects communications between an attorney and a client made for the purpose of obtaining "assistance in [a] legal proceeding." *E.g., Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994). Even more significantly, "[d]iscovery which provides a roadmap to the disclosing party's selection, organization and assessment of a welter of facts and documents raises fundamental work product concerns." Sinclair and Fendrich, 50 ALA. L. REV. at 723. As codified in Federal Rule of Civil Procedure 26(b)(3), the "discovery of documents and other tangible things" that have been "prepared in anticipation of litigation or for trial by or for another party or by and for that other party's representative" is contingent upon "a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." However, the "disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation" is always precluded.

The purpose of a Rule 30(b)(6) deposition is to obtain the relevant facts — not to determine how they were learned by the deponent. Courts have held that the work product privilege precludes parties from asking questions that are "intended to ascertain how [the corporate defendant] intends to marshall the facts, documents and testimony in its possession, and to discover the inferences that plaintiff believes properly can be drawn from the evidence it has accumulated." *S.E.C. v. Morelli*, 143 F.R.D. 42, 47

(S.D.N.Y. 1992). Questions pertaining to the preparation of a Rule 30(b)(6) corporate representative are inevitably intended to determine such information. Indeed, courts have long recognized that "it is the selection and compilation of relevant facts that is at the heart of the work product doctrine." *E.E.O.C. v. HBE Corp.*, 157 F.R.D. 465, 466 (E.D. Mo. 1994); *see also Sprock v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985) ("the selection and compilation of documents by counsel in this case ... falls within the highly-protected category of opinion work product"). Therefore, "when disclosure of facts would effectively reveal the mental impressions or questions of an attorney, these facts have been protected from disclosure pursuant to the attorney work product doctrine." *In re Bilzerian*, 258 B.R. 846, 849 (Bkrptcy. M.D. Fla. 2001).

Accordingly, both the attorney-client and work product privileges would be reinforced by a rule precluding parties from obtaining discovery of the sources of information relied upon by a corporate representative in preparing for a Rule 30(b)(6) deposition. It should be emphasized that such a rule will not preclude parties from obtaining non-privileged documents used as the source of a corporate representative's deposition testimony. As set forth above, such documents will almost always be requested by and produced to the deposing party during the course of discovery.

Therefore, the only benefit of inquiring as to the source material for the corporate representative's testimony is to determine which documents were deemed so significant by the corporate attorney as to warrant discussion with the corporate representative. An attempt to delve into the mental impressions of corporate counsel is clearly violative of the attorney-client and work product privileges, and should not be countenanced by Rule 30(b)(6). Accordingly, Rule 30(b)(6) should permit objection to the sources

of information used in the preparation of the representative's deposition, if responses to such inquiries would disclose information protected by the attorney-client and/or work product privileges.

5. Deposing Parties Should be Precluded from Asking Questions Outside the Scope of Topics Identified in the Deposition Notice.

In order to obtain a deposition of a corporate representative pursuant to Rule 30(b)(6), the deposing party must "describe with reasonable particularity [in a deposition notice or subpoena] the matters on which examination is requested." A recognized purpose of this rule is "to avoid the problem which arose when a party noticed a particular officer of a corporation and the corporation had no way of knowing what matters were going to be the subject of the inquiry and whether the particular officer whose deposition had been noticed knew anything about these matters." *Paparelli v. Prudential Ins. Co. of America*, 108 F.R.D. 727, 730 (D. Mass. 1985).

It stands to reason that this purpose would be "thwarted if a party could ask a representative of a corporation produced pursuant to a Rule 30(b)(6) deposition notice to testify as to matters which are not specifically listed in the notice and upon which the representative is prepared to testify." *Id.* Unfortunately, this logical conclusion has not been followed by some courts. Indeed, some courts have held that "the description of the scope of deposition in the notice [is] the minimum about which the witness must be prepared to testify, not the maximum." *King v. Pratt & Whitney, a Div. of United Technologies Corp.*, 161 F.R.D. 475, 476 (S.D. Fla. 1995). A number

of courts have held that deposing parties are permitted to ask questions of corporate representatives outside the scope of the notice or subpoena by virtue of Rule 26(b)(1), which allows discovery of any matter that is relevant and not privileged. *See, e.g., Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000); *Overseas Private Investment Corp. v. Mandelbaum*, 185 F.R.D. 67, 68 (D.D.C. 1999); *King*, 161 F.R.D. at 476.

The fact that Rule 26(b)(1) establishes a generally broad scope of discovery does not prevent the enactment of rules placing limitations on the manner in which discovery may be carried out. This is demonstrated by provisions of the Federal Rules establishing limits upon the number [FED. R. CIV. P. 30(a)(2)] and length [FED. R. CIV. P. 30(d)(2)] of depositions, as well as provisions limiting the number of interrogatories that may be served [FED. R. CIV. P. 33(a)]. No court has criticized these provisions as inconsistent with the general principles of broad discovery set forth in Rule 26(b)(1). Yet, courts have not hesitated to interpret the policy underlying Rule 26(b)(1) as justification for permitting deposing parties to exceed the scope of the designated topics during the course of the deposition, thereby rendering the "reasonable particularity" requirement virtually worthless.

The inclination of some courts to permit questioning of a corporate representative on matters outside the scope of a deposition notice or subpoena is particularly puzzling given courts' strict enforcement of the "reasonable particularity" requirement with regard to the notice itself. For example, deposition notices which state that the deposition may cover topics "including but not limited to" the delineated topics have been rejected, on the grounds that "[a]n overbroad Rule 30(b)(6) notice subjects the noticed party to an impossible task." *Reed v. Bennett*, 193 F.R.D. 689, 691 (D. Kan. 2000). However, the case law above suggests that such concerns about an

"impossible task" somehow disappear when the deposing party does *not* disclose the possibility that other topics may be addressed.

In an attempt to place some significance upon the content of a deposition notice, courts have observed that the deposing party assumes the risk that the corporate representative will not "know the answer to questions outside the scope of the matters described in the notice." *King*, 161 F.R.D. at 476. However, this offers little comfort to a corporation or its representative. In the high-pressure atmosphere of a Rule 30(b)(6) deposition, a corporate representative may feel compelled to offer "educated guesses" with regard to topics for which he was not prepared and has no personal knowledge. At minimum, corporate depositions may needlessly be extended as deposing parties seek to probe the knowledge of the corporate representative on numerous issues: a process which inevitably culminates in the noticing of additional Rule 30(b)(6) depositions after it becomes clear that the representative has no knowledge of topics that were not identified in the original notice.

Such problems may be avoided by simply limiting Rule 30(b)(6) depositions to the topics set forth in the notice or subpoena. By requiring parties to identify all potential topics of a Rule 30(b)(6) deposition, a corporate litigant would be able to appropriately select the proper individuals to offer testimony on each topic. This would benefit both parties by ensuring that the process of deposing corporate representatives runs as smoothly and efficiently as possible.

Courts and commentators have criticized attempts to rely upon Rule 30(b)(6) "as a basis for requiring creation of a single, omniscient witness who can synthesize all of the preparations and knowledge of a party ... ." Sinclair and Fendrich, 50 ALA. L. REV. at 704. Allowing deposing parties to

ask questions outside the scope of the topics identified in a Rule 30(b)(6) deposition notice only reinforces this unrealistic expectation of many deposing parties. As with the other topics set forth above, the amendment of Rule 30(b)(6) to limit the scope of the deposition to the identified topics will help ensure that the deposition of a corporate representative is not used for the purpose of legal gamesmanship, but to provide the deposing party with a fair opportunity to ascertain relevant discovery.

Accordingly, Federal Rule of Civil Procedure 30(b)(6) should be revised to provide that "[t]he persons so designated shall testify as to matters known or reasonably available to the organization, **within the scope of the topics identified in the deposition notice or subpoena.**"

III. Conclusion

As legal commentators have observed, many deposing parties (and, in some cases, courts) have sought to convert Federal Rule of Civil Procedure 30(b)(6) from a simple method of "eas[ing] an adversary's disclosure of appropriate witnesses" to "a powerful sword that fundamentally transforms the nature of discovery in cases involving corporations or other organizations." Sinclair and Fendrich, 50 ALA. L. REV. at 749. The revisions to Rule 30(b)(6) set forth above will help ensure that the Rule is restored to its original purpose.

By precluding parties from seeking legal contentions from Rule 30(b)(6) corporate representatives (Section II. 1., above), permitting corporate litigants to introduce evidence explaining or otherwise

supplementing the testimony of corporate representatives (II. 2.), allowing corporate representatives to supplement deposition testimony (II. 3.), and foreclosing invasions of attorney client privilege and work product protection (II. 4.), a revised Rule 30(b)(6) would help ensure that the evidence obtained by the deposition of a corporate representative is treated *as* evidence, rather than an admission binding upon the corporation. In so doing, these revisions would simply establish that the deposition testimony of a corporate representative is to be treated as no different than the testimony of any other individual.

By expressly limiting the scope of a corporate representative deposition to the topics identified in a deposition notice (II. 5.), a revised Rule 30(b)(6) would reinforce the fundamental purpose of facilitating disclosure of witnesses knowledgeable as to all of the issues to be addressed at the deposition.

In recommending the adoption of Federal Rule of Civil Procedure 30(b)(6), the Advisory Committee intended to establish "an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process." Committee Note to Federal Rule of Civil Procedure 30(b)(6). By recommending the revisions set forth above, the Advisory Committee will reinforce these original stated goals of Rule 30(b)(6), and curb the abuses of the Rule which have unfortunately become prevalent over the past decades. For these reasons, we respectfully request that the Advisory Committee adopt the revisions described above.

Respectfully submitted,

Lawyers for Civil Justice