17-CV-AA

Comment regarding the changes to Fed. R. Civ. P. 30(b)(6) proposed by the Rule 30(b)(6) Subcommittee Advisory Committee on Civil Rules

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This comment is in opposition to most, if not all, of the changes to Fed. R. Civ. P. 30(b)(6) proposed by the Rule 30(b)(6) Subcommittee Advisory Committee on Civil Rules. As attorneys who use Rule 30(b)(6) and our state's version of the rule as efficient tools to gather information from organizations on behalf of injured people, we urge the Subcommittee to keep in mind the purpose of Rule 30(b)(6), which is to prevent an organizational party to gain an unfair advantage in litigation by virtue of the fact that it consists of multiple individuals. If a corporation or similar organization is to be afforded the privileges of personhood, it should also, to the extent possible, be subject to the same responsibilities and rules that apply to individuals.

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When a person or group of people form a legal entity like a corporation, the entity takes a life of its own and gains rights and privileges that are distinct from the individuals who own, operate, manage, or work for the entity. As Mitt Romney famously asserted on the campaign trail in 2011, "Corporations are people, my friend." Corporations and other entities are legally treated as "people," distinct from their owners or members, with liability generally limited to the assets of the entity. In litigation, a legal entity has the privilege of acting as a distinct person: it can retain its own counsel, maintain its own defenses, present its own evidence, and select the witnesses it wants to testify based on an accumulation of institutional knowledge and documents.

The accumulation of knowledge and resources gives a legal entity a great advantage over the mere humans who are injured by the acts of the entity or who seek information from the entity in litigation. When the lawyers for a corporation depose an individual plaintiff, they generally can ask any question they want: what did the plaintiff see and when? Who are all the people the plaintiff spoke to about the incident? Who does the plaintiff blame for her injuries and why? Why did the plaintiff make the allegation in Count I of the complaint? Does the plaintiff intend to say at trial that she believed the physician was an employee of the hospital corporation based on some representation by the hospital? What were all the things the hospital did to make her believe the physician was an employee?

When the tables are turned, a plaintiff, without Rule 30(b)(6), would be forced to sift through a maze of individuals within the entity and try to connect the dots through multiple witnesses to learn what the entity "knows," what the entity "believes" happened in the case, and what the entity will "say" at trial through the agents and employees it selects to testify. Rule 30(b)(6) is the only tool that empowers a plaintiff to treat a legal entity just as it is treated in every other aspect of the law: as a person.

Many of the proposed changes to Rule 30(b)(6) would undermine the purposes of the rule, which include preventing a corporation from "bandying" or offering multiple witnesses who disclaim knowledge of facts that are available to the organization as an institution and that the organization may later present through the witnesses it selects.[1] The changes would also severely prejudice individual and corporate plaintiffs alike, increase the cost of litigation, and make discovery drastically less effective in accomplishing its purpose of making trial "less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958).

The proposed changes would undermine the purpose of the rule in the following ways:

1. <u>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</u>

An amendment to Rule 26(f) referring specifically to 30(b)(6) depositions would be the only specific reference in the rule to any discovery mechanism. For example, the rule does not require parties to provide a discovery plan that sets out which specific topics the parties will inquire about through interrogatories, requests for production, or other types of depositions. Requiring a party, in the earliest stage of a case, to commit to which depositions are needed would serve no purpose other than to unfairly restrict the party's ability to obtain deposition testimony at a time when the need for that testimony becomes apparent and to provide a basis for the organization to prevent the deposition from taking place even though there is a need for it. The usefulness of this amendment would be minimal because parties seeking 30(b)(6) depositions would be unable to provide anything more than very broad and general descriptions of the types of topics those depositions would explore. Inevitably, any dispute about a specific deposition would still have to be resolved later in the case when the parties are aware of the specific matters being noticed. If any amendment is to be made to refer specifically to 30(b)(6) depositions, it should simply be an addition to Rule 26(f)(3)(B), as follows: "the subjects on which discovery may be needed, when discovery should be completed, **whether the parties anticipate the need for any depositions noticed pursuant to Rule 30(b)(6),** and whether discovery should be conducted in phases or be limited to or focused on particular issues…."

As for an amendment to Rule 16, it is unclear what the Subcommittee has in mind for inclusion of a discussion about 30(b)(6) depositions in a report to the court under Rule 16. The rule already requires a scheduling order to limit the time to complete discovery. Placing further restrictions on the timing of Rule 30(b)(6) depositions, especially if the rule is also changed to permit supplementation of 30(b)(6) deposition testimony, would completely defeat the purpose of the rule, as an organization could supplement after a deadline for 30(b)(6) depositions and the deposing party would no longer have the option of re-opening the deposition.

2. <u>Judicial admissions</u>

In theory, an amendment that simply provides that 30(b)(6) testimony is not a judicial admission – i.e., one that cannot be changed at trial – would be acceptable. However, there is a danger that the rule would be interpreted to permit the type of sandbagging that Rule 30(b)(6) is

[1] *See* Fed. R. Civ. P. 30(b)(6) advisory committee's notes, subdivision (b) (1970).

intended to eliminate. The term "binding" means that the witness is speaking not as an individual but as the organization and that the testimony should have the same consequences when used against the organization as testimony would have against an individual. For example, the deposing party should be permitted to use the testimony in a summary judgment motion and the organization should not be permitted to respond with an affidavit contradicting that testimony, unless there is some change in circumstances that justifies the change in position.

The binding effect of 30(b)(6) deposition serves to motivate an organization to fully prepare its witness and deters sandbagging. The rule should not suggest that these depositions no longer have such a binding effect. If an amendment to this effect is to be made, it should also include a statement that if the organization seeks to change its position or make a new allegation that differs from the deposition testimony, the organization has the burden to prove the information forming the basis of the allegation or position was not known or reasonably available at the time of the deposition. *See Rainey v. American Forest and Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) (adopting this burden-shifting approach).

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

Allowing an organization to supplement 30(b)(6) testimony would potentially defeat the purpose of the rule by giving the organization the ability to wait until the end of discovery to disclose the full extent of its positions and knowledge while offering an inadequately prepared witness at the deposition. If an amendment allowing supplementation is made, supplementation should only be allowed under the same type of burden-shifting process discussed above regarding judicial admissions.

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

This proposed change would confer special rights on corporations and other organizational defendants, who already have the benefit of knowing in advance what topics will be explored during a deposition. There is no prohibition in Rule 30 against asking an individual witness about their contentions or opinions, and ordinary witnesses, particularly plaintiffs, are routinely asked those types of questions in depositions. The Subcommittee's concern that a "spontaneous answer in a deposition seems quite different" from an interrogatory answer that the answering party has 30 days to prepare has no merit. A typical 30(b)(6) deposition involves the same 30-day period because of requests for documents. Prohibiting "contention" questions would only serve to allow a corporate defendant to polish its testimony through its attorneys and to save its contentions for trial, where the opposing party would have no prior testimony with which to impeach—one of the main purposes of a deposition. Individual deponents are not afforded this luxury, and organizational deponents should not be afforded it either.

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

This provision would slow down litigation, drive up costs for all parties, and clog the courts with more motions. Most importantly, it would permit an organizational party to obstruct the discovery process in a way that individual parties cannot. An individual party does not have the benefit of being notified in advance what topics will be explored at a deposition and cannot

object to questioning in advance. The purpose of providing a notice specifying the matters for examination is to permit the organizational party to prepare a witness to testify on behalf of the organization, putting the organization on equal footing with a witness testifying based on personal knowledge. Allowing the organizational deponent to receive special treatment by using the noticed topics as a basis for objections would give those organizations an unfair advantage. The most efficient way for parties to address questioning that exceeds the boundaries of relevance is through objections to deposition designations at the time of trial, just like with any other witness. Pre-deposition objections would inevitably result in delays and motion practice over the permissible scope of 30(b)(6) deposition testimony. There is no justification for this proposed revision to the rule.

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

If an amendment on this subject is to be made, it should codify the Committee Notes providing that one day should be allowed for each person designated, and that the 30(b)(6) deposition counts as one of the 10 for the limit on number of depositions, no matter how many people are designated to testify. If the rule provided otherwise, an organization might simply designate 10 witnesses in response to a 30(b)(6) notice and successfully argue that the deposing party is prohibited from taking any more depositions, which would unfairly prejudice the deposing party.

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Thank you for your consideration of this comment and for your hard work.

Sincerely,

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