



Proposed changes to Rule 30(b)(6)

17-CV-BBBBB

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08/01/2017 10:51 PM

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To whom it may concern:

I write to address potential changes to Rule 30(b)(6) of the Federal Rules of Civil Procedure. My general impression of the proposed changes is that they were drafted in order to strengthen the position of corporate defendants, and to make it harder for the average person to win against them in court. Therefore I urge you to reject these proposed changes.

Rule 30(b)(6) provides a powerful tool to an individual who is litigating against a corporation, especially where the litigation focuses on the corporation's conduct. In such cases, the corporation frequently possesses much—if not nearly all—of the salient information needed to prove the claim. Rule 30(b)(6) was written to stop abusive discovery tactics by corporate parties. Committee Note to 1970 Amendment to Rule 30. Prior to the adoption of Rule 30(b)(6), a corporation could play a shell game with information: Corporate Witness A denied knowing Fact X and testified that Corporate Witness B knew that fact; when Corporate Witness B was deposed, he again denied knowledge of Fact X and pointed to Corporate Witness C. This shell game could continue indefinitely. *See* 8A Fed. Prac. & Proc. Civ. § 2103 (3d ed.). Rule 30(b)(6) stopped this abuse by requiring a corporate party to prepare a witness with all information reasonably available to the corporation on a given issue in dispute.

The rule has functioned to provide for quicker discovery of the facts at issue and to cut down on discovery disputes needing to be decided by our federal judges.

Here is an analysis of each of the proposed changes.

Elimination of contention questions

It makes no sense to eliminate questions designed to help a party learn the factual bases of

a corporation's affirmative defenses. There is no consensus under the law that a defendant is required to plead facts to support its affirmative defenses. *See, e.g., Tardif v. City of New York*, 302 F.R.D. 31 (S.D.N.Y. 2014). Thus a plaintiff can face a raft of affirmative defenses and still be utterly in the dark as to the factual basis of these defenses. Rule 30 allows a plaintiff to question the defendant as to the factual basis of its affirmative defenses. The proposed change to Rule 30(b)(6) would prevent a plaintiff from learning the factual basis of a corporate defendant's affirmative defenses. Such questions are vital to efficient discovery and trial preparation. The current rule allows plaintiff's counsel to discover whether an affirmative defense is frivolous or not and promotes judicial economy.

Requirement of addressing 30(b)(6) depositions in the initial discovery conference

While promoting cooperation during discovery is a laudable goal, adding a requirement that the discovery plan address Rule 30(b)(6) testimony substantially disadvantages parties who litigate against corporations. The discovery conference is just too early a time for the party wishing to take such depositions to know everything that they should look for or what avenues they should pursue.

Normally, counsel on both sides engage in substantial communication prior to 30(b)(6) depositions under current practice. The corporation nearly always objects to one or more topics, and we frequently attempt to modify topics to make them mutually agreeable. However, this discussion usually occurs after initial written discovery, including document production, has been completed. At that parameters of a Rule 30(b)(6) deposition, instead of one side having information while the other side has to guess.

Allowing objections to Rule 30(b)(6) deposition notices

The Invitation suggests adding a procedure to allow a 30(b)(6) deponent to serve objections which would effectively prevent the deposition until the court acts on the objections. This would represent the greatest step backward in civil discovery in my career.

Scheduling 30(b)(6) depositions is frequently an exercise in futility already. In the past, I have provided a draft notice along with a request for dates. Almost universally, my request goes unanswered. When I follow up on that request, I typically get a promise to inquire with the client. Once again, weeks of silence follow. Finally, I serve a notice for a date, time, and place

certain, at which point communication about the deposition finally begins in earnest. After that exact set of events happened in a number of different cases, I now begin by serving the actual notice of deposition. I enclose a letter offering to work with opposing counsel as to the date, time, and place of the deposition, but I advise that, if we cannot agree, the deposition will go forward as noticed. Even following this procedure, it can take weeks to get a deposition scheduled. At that point, the deponent corporation must move for a protective order and at least seek a hearing in order to prevent the deposition.

Under the suggested change, discovery would slow even further. A deponent could halt the 30(b)(6) deposition by merely serving an objection. **Notably, only corporations would have this privilege: individual deponents would still be required to move for a protective order.** Further, allowing service of objections would substantially increase the amount of litigation over depositions. The mere fact that the discovering party would have to make a motion in order to move forward would mean that nearly every 30(b)(6) deposition would be preceded by a motion to compel. (In my experience, very few corporate deponents actually seek a protective order for a 30(b)(6) deposition.) Moreover, requiring the discovering party to make the motion *de facto* places the burden of persuasion on the discovering party. That flies in the face of the notion of broad discovery aimed at narrowing issues for trial.

To be sure, some discovering parties abuse Rule 30(b)(6). However, courts are fully empowered to stop—and punish—any abuses via protective orders. Further, where a discovering party is truly abusing the Rule, no defendant will shy away from seeking the court's protection.

Supplementation of 30(b)(6) testimony

Addition of an option, or even a requirement, to supplement Rule 30(b)(6) testimony will gut the preparation requirement of the Rule. If corporations are not bound by the testimony given by the witness, they will skimp on preparing their witness(es), if they prepare them at all, safe in the knowledge that their counsel can supplement the answers after hearing the specific questions.

Limitations on number and length of depositions

This proposed change, if implemented is an open invitation to discovery abuses by corporations. As it stands now, the deposing party gets one day of deposition time for each person designated under Rule 30(b)(6) and the 30(b)(6) deposition counts as a single deposition, irrespective of how many individuals are designated. To change this rule would invite corporations to engage in discovery gamesmanship for purposes of obfuscating the facts. For example, if each day counted as a separate deposition, corporations could use up their opponent's deposition days by designating several individuals unnecessarily, requiring the deposing counsel to spend time

exploring the background of many different witnesses. Similarly, if the 30(b)(6) deposition were limited to a single day, irrespective of the number of designees, the deponent corporation could eat up the time by designating multiple witnesses to be deposed.

Thank you very much for reading these comments.

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