17-CV-DDD

July 21, 2017

Honorable John D. Bates
Senior United States District Judge
Chair, Advisory Committee on Civil Rules
United States District Court for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Avenue N.W.
Washington, DC 20001

Honorable Joan N. Ericksen
United States District Judge
Chair, Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
12W U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Re: Invitation for Comment on Possible Issues Regarding Rule 30(b)(6)

Dear Judges Bates and Ericksen:

I am writing on behalf of the American College of Trial Lawyers (the "College") as Chair of the College's Federal Civil Procedure Committee with respect to the Invitation for Comment on possible issues regarding Rule 30(b)(6) published by the Advisory Committee's Rule 30(b)(6) Subcommittee on May 1, 2017.

By letter to Judge Bates dated March 23, 2017, with an enclosed report, the College was pleased to have the opportunity to express its views to the Advisory Committee on proposed amendments to Rule 30(b)(6) then being discussed. It was the College's view that no amendments to the Rule were warranted.

As a result of the discussion of Rule 30(b)(6) at the Advisory Committee's meeting in Austin, Texas on April 25, 2017, and the ensuing Invitation for Comment, the College's Federal Civil Procedure Committee revisited one topic for possible amendment of the Rule that has been addressed at some length: should the Rule contain a provision specifying whether Rule 30(b)(6) testimony is or is not to be treated as a binding judicial admission? After further deliberation, it remains the view of the Committee and the College that no such amendment is desirable. I am enclosing a copy of the Committee's report addressing this issue.

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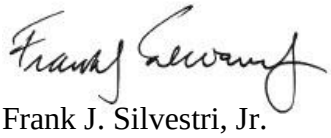
The College greatly appreciates the consideration of its view by the Rule 30(b)(6) Subcommittee and the Advisory Committee.

Respectfully,



Frank J. Silvestri, Jr.
Federal Civil Procedure Committee Chair

Enclosure

Copy: Executive Committee

**MEMORANDUM**

To: Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules

From: American College of Trial Lawyers,
Federal Civil Procedure Committee

Date: July 6, 2017

Re: Whether Rule 30(b)(6) requires an amendment regarding judicial admissions

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Upon review, Rule 30(b)(6) of the Federal Rules of Civil Procedure should not be amended to address the question of judicial admission due to the following findings:

Majority Position

In 1996 the Middle District of North Carolina was the first federal court to determine "answers given at a Rule 30(b)(6) deposition are not judicial admissions." *U.S. v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996). Five years later, in *A.I. Credit Corp. v. Legion Insurance Co.*, the Seventh Circuit ruled that Rule 30(b)(6) does not bind a corporate party to its designee's recollection. 265 F.3d 630 (7th Cir. 2001). Since 2013, the Eighth, Second, and, recently, Tenth Circuits have referenced *A.I. Credit Corp*'s essential holding in declining to treat Rule 30(b)(6) deposition testimony as a judicial admission. *See Southern Wine and Spirits of America, Inc. v. Division of Alcohol and Tobacco Control*, 731 F.3d 799 (8th Cir. 2013); *Keepers, Inc. v. City of Milford*, 807 F.3d 24 (2d Cir. 2015); *Vehicle Mkt. Research, Inc. v. Mitchell Int'l, Inc.*, 839 F.3d 1251 (10th Cir. 2016).

The *Keepers* court observed that "nothing in the text of the Rule or in the Advisory Committee notes indicate that the Rule is meant to bind a corporate party irrevocably to whatever its designee happens to recollect during her testimony." 807 F.3d 24, 34-35 (2d Cir. 2015). Therefore, the majority position on the judicial admissions issue declines to adopt such a bright-line rule.

"Minority" Position

In *Rainey v. American Forest & Paper Ass'n, Inc.*, the court bound the plaintiff corporation to its Rule 30(b)(6) testimony, effectively penalizing the party for failing to properly prepare the witness as the Rule requires. 26 F. Supp. 2d 82, 94 (D.D.C. 1998). The court refused to permit an "eleventh hour" supplemental affidavit introduced to avoid summary judgment. In *Hyde v. Stanley Tools*, the court also bound the non-moving party to its Rule 30(b)(6) testimony to prevent another 'sham-affidavit' from belatedly creating a material issue of fact. 107 F. Supp. 2d 992, 993 (E.D. La. 2000).

In a memorandum to this subcommittee dated March 30, 2017, at page 13, the Rules Committee Support Office emphasizes that, even though *Rainey* and *Hyde* bound parties opposing summary judgment to their Rule 30(b)(6) testimony, there are no cases (not even those barring supplemental, contradictory, or explanatory testimony like *Rainey*) expressly holding that a Rule 30(b)(6) witness's statements are judicial admissions. The Federal Practice & Procedure guideline notes, "[a Rule] 30(b)(6) deposition being 'binding' on the corporation should not be interpreted as being tantamount to a judicial admission." 8A Charles Alan Wright, et al., Federal Practice and Procedure §2103 (Supp. 2007); *U.S. v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996). Even in *Vehicle Market Research*, the Tenth Circuit recognized that Rule 30(b)(6) testimony may be contradicted in an affidavit opposing summary judgment if there is "good reason." 839 F.3d at 1259-60. With no precedents establishing Rule 30(b)(6) depositions as judicial admissions, the "minority" rule within *Rainey* and *Hyde* are merely punitive measures used to avoid deception and exhaustive discovery proceedings.

## Analysis

As written, Rule 30(b)(6) provides judicial discretion in the determination of whether or not to bind a deposed business to its testimony. This gives rise to two questions: first, should Rule 30(b)(6) definitively treat the testimony either as a judicial or as an evidentiary admission, and second, is there sufficient confusion as to require such a clarification.

To answer the first question, definitively making a decision one way or the other impinges upon the flexibility of the court. A judicial admission establishes a bright-line rule too strict for Rule 30(b)(6) deponents. Often times, evidence is unclear and courts require the greater flexibility present within the current rule. "[A]n organization's deposition testimony is binding in the sense that whatever its deponent says can be used against the organization;" however, "Rule 30(b)(6) testimony is not binding in the sense that it precludes the deponent from correcting, explaining, or supplementing its statements." *See Keepers, Inc.*, 807 F.3d at 34.

If the Rule were to definitively characterize the testimony as evidentiary admissions, punitive rulings akin to those in *Rainey* and *Hyde*, and even the *Vehicle Market Research* exception, might be precluded. It is true that there are already remedies in place to punish bad actors and deter misleading or incomplete statements from Rule 30(b)(6) witnesses. For example, if testimony is later altered, it may be attacked through cross examination or impeachment, or simply utilized to demonstrate a lack of trustworthiness throughout the party's case in chief. If the altered testimony is flagrant, the court may impose sanctions under Rule 37(d).

In addressing the second question, even though these remedies are in place, the issue of how to treat Rule 30(b)(6) testimony is not sufficiently unsettled to justify an amendment to the current rule. Since no court has declared Rule 30(b)(6) testimony a judicial admission, there is no widespread confusion that requires action from the Advisory Committee.

In its letter to the Honorable John D. Bates dated March 20, 2017, the National Employment Lawyers Association recommends maintaining the Rule as is because "allowing courts to analyze these issues on a case-by-case basis is the better approach." NELA cites to the *Hyde* approach then stresses that other instances require evidentiary admissions to clear up ambiguous statements. The flexibility inherent in the Rule allows better analysis by the courts.

In sum, judicial discretion is an important factor in Rule 30(b)(6) evidentiary determinations that should not be undermined without sufficient disagreement on the issue. Too many bright-line rules can disrupt the court's ability to issue appropriate rulings on a case-by-case basis. While the vast majority of courts treat Rule 30(b)(6) testimony as an evidentiary admission, no court has imposed across-the-board treatment as a judicial admission. Because the "minority" position on this issue does not create blanket judicial admission treatment, both the majority and "minority" rules can operate in tandem without intervention from the Advisory Committee. Currently, the majority and "minority" positions are not so unsettled or contradictory to one another as to warrant an amendment.