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Submitted via e-mail:
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We submit the following comments in response to the Advisory Committee on Civil Rules Rule 30(b)(6) Subcommittee's Invitation for Comment on Possible Issues Regarding Rule 30(b)(6). We appreciate the opportunity to offer our perspectives regarding the issues identified by the Subcommittee.

In our view, none of the six (6) possible changes suggested by the Subcommittee would improve current practice under Rule 30(b)(6). The proposed changes would introduce costly and time-consuming procedures and motion practice to address issues that the parties typically can and do resolve without court intervention, thereby increasing the burdens on an already overworked judiciary. Others would encourage gamesmanship and similarly unproductive litigation behavior. The proposed changes are too solicitous of the interests of corporations at the expense of individual litigants.

I. Inclusion of 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

We oppose including a specific reference to Rule 30(b)(6), either (1) among the topics to be discussed during the Rule 26(f) conference or (2) as part of the Rule 16 report to the court.

The Subcommittee suggests in the Invitation for Comment that discussing Rule 30(b)(6) depositions during the Rule 26(f) conference and including them in the Rule 16(f) report "might be a catalyst for early attention and judicial oversight that could iron out difficulties that have emerged in practice." This statement assumes (a) that disputes are arising regarding Rule 30(b)(6) depositions that cannot be resolved without court intervention, and (b) that such disputes, if they do arise, do so early enough in a case to be addressed effectively at the Rule 26(f) conference. We respectfully submit that neither assumption is accurate. In our experience, inclusion of Rule 30(b)(6) depositions as an item to be addressed at the parties' Rule 26(f) conference would undermine much of what makes the rule useful and threaten to create disputes that otherwise would not exist.

We represent classes of consumers, employees, and other individual persons in litigation against large corporations and other organizational defendants. Because such entities generally have custody or control of all or most of the potential evidence at the outset of a case, we tend to be at a considerable disadvantage when it comes to identifying key documents and witnesses. Accordingly, we often use 30(b)(6) depositions early in discovery as an efficient means of identifying the categories of documents and other evidence that may be available for discovery, how they are maintained, and how they may be obtained. Acquiring this information early in a case creates additional efficiencies through its value in helping to identify disputed issues and keep subsequent discovery requests as narrowly-tailored as possible.

Inclusion of Rule 30(b)(6) depositions in the initial case planning discussions would threaten these efficiencies and risk grinding the discovery process to a halt, by providing the opportunity to create unnecessary disputes on a host of items— e.g., (a) when and where the deposition will take place, (b) the topics that will be covered, (c) the timeframe(s) at issue, or (d) whether follow-up depositions can be obtained. Under existing practice, these types of issues have been resolved by the parties themselves, without the need for court involvement and the costly and time-consuming motion practice that comes with it. Further, requiring discussion of Rule 30(b)(6) depositions in initial case planning discussions, but not requiring such discussion for other depositions, gives corporations an unfair opportunity to raise objections ahead of time, whereas individual litigants would not have such opportunity for early objection. Treating Rule 30(b)(6) depositions differently than other depositions in this manner unfairly favors corporate litigants.

II. Potential Treatment of Statements Made During 30(b)(6) Depositions as Judicial Admissions

Our position is that it is unnecessary to clarify through the Rules of Civil Procedure when Rule 30(b)(6) testimony is treated a judicial admission, such that an organization then would be forbidden from offering evidence inconsistent with that testimony. We believe that this is best left to be decided by courts on a case-by-case basis.

Most courts generally view Rule 30(b)(6) testimony as binding only in the sense of traditional deposition testimony. This general rule makes sense, since a Rule 30(b)(6) deposition is simply a means of deposing the corporate “person,” who should be treated as similarly to an individual litigant as possible. However, there are instances where a different result is appropriate, and courts should be permitted to decide the issue on a case-by-case basis.

Alternatively, we suggest that because this issue concerns the interplay between Rule 30(b)(6) and certain provisions of the Federal Rules of Evidence, perhaps it would be appropriate to refer it to the Advisory Committee on Rules of Evidence for its review and analysis before proceeding further.

III. Requiring and Permitting Supplementation of Rule 30(b)(6) Testimony

We oppose requiring or permitting supplementation of 30(b)(6) testimony. Allowing supplementation would encourage wasteful forms of gamesmanship, such as intentionally failing to prepare witnesses or introducing sham testimony. Such a rule would permit 30(b)(6) deponents to provide "I don't know, I will need to review our records" type of answers, then allow the corporation to supplement with written testimony. This would transform the 30(b)(6) deposition into an unproductive, expensive, and largely empty exercise.

Such a rule would benefit only organizational defendants, and therefore would create serious inequities without any recognizable benefit. As the Subcommittee recognizes in the Invitation for Comment, existing Rule 26(e) does not require or permit supplementation of deposition testimony. Indeed, supplementary testimony from an individual litigant that changes her prior testimony would be subject to a motion to strike and/or impeachment at trial. It is therefore difficult to understand why organizational parties would be allowed or required to freely supplement, while leaving individual plaintiffs subject to the existing, harsher rule. A corporate defendant already has the advantage of choosing the witness (or witnesses) who are most knowledgeable, so it would be doubly unfair then to allow these witnesses to decline to provide responsive, complete testimony, secure in the knowledge that inadequate or inconvenient testimony could be supplemented later. Individual deponents are not permitted to do so, and there is no principled reason to allow it in the context of 30(b)(6) depositions.

IV. Forbidding Contention Questions in Rule 30(b)(6) Depositions

As with the preceding item regarding supplementation, forbidding contention questions in Rule 30(b)(6) depositions would unfairly allow organizational parties to avoid answering contention questions while requiring individual parties to respond to them. While the Subcommittee is correct that parties have much more time to respond to contention interrogatories, corporate defendants often ask plaintiffs numerous contention questions during their deposition (e.g., "What support do you have for your claim that you suffered discrimination?"). Allowing these types of questions to be asked of plaintiffs, but not corporate defendants, again would unfairly tilt the scales in favor of one party to the litigation, without any principled justification. Whether a Rule 30(b)(6) witness may be asked to express an opinion or contention depends on the circumstances and should not be the subject of rulemaking. Further, such a rule would result in frequent disputes over what constitutes a

"contention question." Such disputes would inevitably end up requiring courts to decide whether a question is or is not proper under this rule, creating additional expense and inefficiency.

V. Adding a Provision for Objections to Rule 30(b)(6)

Injecting a formal objection process into Rule 30(b)(6) is problematic for a number of reasons. As we have already indicated, the 30(b)(6) deposition is often the first deposition taken in the case. Encouraging formal objections would create more motion practice at the start of the discovery process, causing long delays that will prevent any productive discovery from being conducted. Further, the additional suggestion of requiring the objecting party to specify what information they will provide despite their objection (similar to Rule 34) would do little to resolve this issue. Indeed, this would require that a party sit for multiple depositions—one on the topics they have agreed to, and a second after the court rules on an inevitable motion to compel regarding the topics to which they object. This change would greatly increase motion practice, as it will be very easy and inexpensive for corporate defendants to object to Rule 30(b)(6) notices. If this provision were enacted, it is highly probable that a majority of noticed Rule 30(b)(6) depositions would face objection. It would increase the workload of already overburdened district court judges, clerks, and staff.

These types of inefficiencies can be avoided by leaving the rule as it stands, and allowing the organization to move for a protective order if the proposed notice is truly objectionable. There has been no showing that the few motions for protective orders that may have been filed have been incorrectly decided, and there is no reason to assume that motions for protective orders are not an adequate remedy for a truly abusive notice. Further, the current rule treats corporate litigants like individual litigants. Just as individual deponents must appear for a noticed deposition unless they seek a protective order, the rule should require a corporate deponent to file a motion for protective order to avoid providing testimony.

VI. Amending the Rule to Address the Application of Limits on the Duration and Number of Depositions as Applied to Rule 30(b)(6) Depositions

In our experience, it is the current practice in most jurisdictions to allow one full-day deposition for each witness that an organization designates in response to a Rule 30(b)(6) notice. It is rare for disputes to arise in this area that cannot be worked out by counsel without court intervention. It is also significant that the party receiving the notice is in control of how many witnesses are produced. For instance, in some cases multiple witnesses are designated to cover different time periods or different deposition topics. This is done, presumably, for the convenience of the organization. The noticing party should not be required to use an extra deposition due to the needs (strategic or otherwise) of the other side. Further, limiting the

amount of time that a party can spend with each Rule 30(b)(6) witness may prevent certain topics from being explored as thoroughly as needed, requiring additional fact witness depositions that could otherwise be avoided. This area is not currently a source of disputes that cannot be resolved by the parties, and a rule change would be more likely to increase unnecessary conflict.

Respectfully,

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