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Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
Rules_Comments@ao.uscourts.gov

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

Huie, Fernambucq & Stewart, LLP[1] ("Huie") respectfully submits this Comment to the Advisory Committee on Civil Rules ("Advisory Committee") and its Rule 30(b)(6) Subcommittee ("Advisory Subcommittee") in support of much needed amendment to Federal Rule of Civil Procedure 30(b)(6).

I. Introduction

For 65 years, our firm proudly represented and currently represents a wide range of businesses and individuals from Fortune 500 companies to "Mom and Pop" establishments. We believe the collective experience of our attorneys makes us uniquely situated to comment on the need for amendment so that Rule 30(b)(6) can operate more efficiently and meet the strident requirements of Rule 1's "just, speedy, and inexpensive" mandate.

Specifically, Huie believes that three amendments will alleviate many of the issues faced by practitioners in modern day application of Rule 30(b)(6): (1) Include Rule 30(b)(6) in Rule 16 pretrial conferences and scheduling orders and Rule 26(f) meetings of the parties; (2) Add a provision that objection to a topic or part of a topic excuses performance absent a court order; and, (3) Add a provision that provides work-product protection for documents and information chosen by a party's attorney from a larger subset of production to assist in preparation for the deposition and that communications related to same are attorney-client privileged communications.

II. Rule 30(b)(6) Should Be Included In Rules 16 And 26(f) To Facilitate Early Identification And Resolution Of Potential Discovery Disputes

As part of the 2015 Amendments to the Federal Rules, eight (8) words were added to Rule 1, which now reads, "[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and

[1] Huie, Fernambucq & Stewart, LLP was founded in 1952 by three World War II veterans who harnessed their sense of honor, duty and fairness to protect hard-working businesses and individuals in civil litigation.

proceeding." Speaking of the Rule 1 amendments in his year-end report on the federal judiciary, Chief Justice John Roberts explained:

> The underscored words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow. The new passage highlights the point that lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes.

To further these objectives, Rule 16 provides that its purpose is, in part, to "[establish] early and continuing control so that the case will not be protracted because of lack of management;" and, "[discourage] wasteful pretrial activities." Unfortunately, Rule 26(f), the primary vehicle for establishing the early plan to meet Rule 16's purpose, is silent as to Rule 30(b)(6) depositions. This often leads to a failure or refusal by a party or parties to address this discovery method. Our experience shows that, in turn, the failure to address Rule 30(b)(6) leads to depositions noticed late in or on the eve of the discovery period in the form of a notice that is lengthy in number of topics and that lacks the specificity to allow a party to properly prepare.

In addition to large topic numbers and a lack of specificity, Rule 30(b)(6) notices often seek testimony on information already provided during written discovery. In other words, more times than not, the requesting party asks for a witness to basically provide testimony about information that is already easily discernible from Interrogatory answers or documents produced in response to Requests for Production. As but one example, a topic may ask for a witness to discuss "testing" of a product during design and development. However, if a party already produced the actual test reports that make up the body of testing to which the product at issue was subjected, *why is it necessary for the same party to expend the time, energy, resources, and money to prepare a witness to read from the test reports already in the requesting party's possession?*

As a result of late filed notices that contain large numbers of topics; lack specificity; or, seek discovery on information already in the requesting party's possession, a responding party has no choice but to file a motion to quash or for protective order with the Court. The filing of a motion in turn jeopardizes the court's Rule 16 scheduling order, and, equally important, burdens an already hefty docket with a dispute that could have, and should have, been addressed at the outset of the case.

Including Rule 30(b)(6) in the early conference discussions is well aligned with the Chief Justice's comments about the roles that both attorneys and judges play in discovery. As to judges, he said they "must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation." As for attorneys, his words are equally clear saying, "[T]he test for plaintiffs' and defendants' counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results."

We are certainly mindful of the fact that sometimes issues arise during discovery that could not be anticipated during the Rule 26(f) meeting of the parties or the Rule 16 scheduling conference. However, we believe, without hesitation, that many of these issues can be resolved with more robust conference between the parties early in a case and a more active role by the judiciary to set reasonable expectations for discovery. Both of which will promote greater efficiency, reduce costs, and further the tenets of amended Rule 1's mandate.

III. Rule 30(b)(6) Should Contain A Provision That Objections Excuse Performance Absent Court Order

There are four (40 primary methods outlined in the Federal Rules for a party to obtain discovery: (1) Interrogatories; (2) Requests for Production; (3) Requests for Admission; and, (4) Depositions. All of these discovery methods contain a provision for objections to be lodged *prior to the discovery being had,* except Rule 30. In particular, Rule 30(b)(6) does not provide any meaningful method to object to individual topics for testimony. Even during the testimony, absent a prior court order, a party may object but the deposition must proceed and testimony can only be refused if it will disclose information protected by the attorney-client privilege or work product doctrine. The failure of Rule 30(b)(6) to contain a reasonable method for lodging objections is thus inconsistent with other means of discovery and promotes oftentimes burdensome and last minute motion practice within an already full court docket.

Because Rule 30(b)(6) fails to include a method for objecting, we unfortunately see it used as often as a sword as it is a legitimate discovery tool. For example, it is not uncommon for a requesting party to unilaterally schedule a deposition on a date and time that either is not available to the responding party or does not allow sufficient time for the responding party to properly prepare and present a witness. In many circumstances, this occurs when the responding party is unable to provide a witness precisely when the requesting party wants the deposition to be set. In this situation, because Rule 30(b)(6) lacks a reasonable objection procedure, the requesting party takes the position that the responding party must either present a witness or file a motion and have it heard prior to the unilateral date set by the requesting party. Thus, instead of promoting the efficiency and cooperation between parties envisioned by the 2015 Rules Amendments, the current Rule 30(b)(6) actually promotes adversarial motion practice that leads to greater burden on oftentimes already overburdened court dockets.

We believe that Rule 45 is a good example of how to amend Rule 30(b)(6). Under Rule 45, the responding party initially must serve a written objection on the requesting party prior to the time set forth for compliance or fourteen (14) days, whichever is earlier. Once the responding party serves the written objection, the burden shifts to the requesting party to move for an order compelling production. If a motion to compel is not filed, then compliance is made as to the non-objectionable requests. This objection procedure is similar to other discovery methods as well.

Taking the Rule 45 approach is reasonable in several respects. *First*, it will lead to greater care being taken by the requesting party to narrowly tailor Rule 30(b)(6) topics prior to serving the notice. *Second*, it will incentivize more robust meet and confer prior to a Rule 30(b)(6) notice being issued because the requesting party will want to avoid the time and expense of having to prepare a motion to compel and also potentially having to take two or more depositions at different times depending on the ultimate ruling from the court. *Third*, it will reduce motion practice before the court by allowing parties to complete discovery in a way that is more proportional to the actual needs of the case as opposed to the whims of a requesting party.

IV. Rule 30(b)(6) Should Contain A Provision That Protects Attorney Work-Product And Attorney-Client Communications

Perhaps the most troubling issue we face in Rule 30(b)(6) depositions is the requesting party's insistence that materials relied upon by a witness to prepare for a deposition or chosen by an attorney to prepare a witness are subject to disclosure. Despite Rule 26(b)(3)(A)'s admonition

that a party may not discover "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative," attorneys requesting or taking a Rule 30(b)(6) deposition almost universally ask a party's representative to disclose the materials the witness relied upon to prepare for the deposition. The lack of any discernible protection of these type materials is a glaring hole that must be filled in Rule 30(b)(6).

A great deal of time and effort is often expended to prepare a witness or group of witnesses to testify pursuant to Rule 30(b)(6). Proper preparation requires a responding party's attorney(s) to select documents from the larger production already made in a case in order to focus the preparation and concentrate on the areas pertinent to the issues to be addressed. The selection of these documents are strategic mental impressions of both the responding party and its attorney and the selection should absolutely be protected from disclosure. Although this concept is not uniformly accepted in all courts or across all jurisdictions, many courts do correctly recognize that work product includes the selection and compilation of documents by counsel.

A good example is the Florida state court case of *Proskauer Rose LLP v. Boca Airport, Inc.*, 987 So. 2d 116 (Fla. 4th DCA 2008). *Proskauer* was a legal malpractice case. *Id.* at 117. During the deposition of one of the Proskauer partners, the deponent indicated that he met with Proskauer's attorney and "reviewed certain documents counsel selected to prepare him for the deposition." *Id.* The deponent also reviewed summaries prepared by the firm's attorney and also highlighting and notations on portions of some of the documents. *Id.* Although the witness agreed that review of these documents assisted his preparation for the deposition, he did not view any of them during the deposition. *Id.*

Defendant Boca Airport moved to compel production of the documents reviewed by the witness prior to deposition and the trial court granted the motion. *Id.* Boca's motion and the trial court's order were based on a specific Florida Statute that requires disclosure of documents if a witness uses the document(s) *during his/her testimony. Id.* Florida's 4th District Court of Appeals disagreed and granted a writ of cert to Proskauer that quashed the trial court order requiring production. *Id.* at 118. In its holding, the 4th DCA found there is no common law right in Florida to discovery of documents used to prepare to testify. *Id.* Further, the Court of Appeals found that the trial court's order would "disclose to the opponent which documents petitioner's counsel thought were most relevant, which, along with the summaries it prepared ... were clearly work product and privileged attorney-client communications." *Id.*

Like Florida, there is no general common law right to discovery of documents used by a corporate representative to prepare to testify. We therefore urge the Advisory Subcommittee to recommend, and the Advisory Committee to adopt, a provision in Rule 30(b)(6) that is in line with the reasoning from *Proskauer Rose, supra,* and other similarly situated courts. By providing that attorney-client privilege and work-product materials are not proper subjects for disclosure or questioning before or during a Rule 30(b)(6) deposition, this amendment will create greater uniformity in federal courts across the country; protect the privileged and protected materials of attorneys and their clients; and, decrease the amount of time and resources necessary to prepare for a Rule 30(b)(6) deposition. As it stands, when faced with the prospect of disclosing privileged and protected materials and communications, most attorneys and Rule 30(b)(6) witnesses will simply review every document produced in a case, which of course increases exponentially the time and cost it takes to prepare. We respectfully submit this is out of line with Rule 1 and the 2015 Rules amendments.

V. Conclusion

Rule 30(b)(6) is clearly an important tool in the Federal Rules to obtain needed discovery. However, it is too often used as a weapon by opposing parties to do what all other discovery devices will not allow. The proposed amendments discussed herein are certainly not all that we would consider if given a blank slate but will definitely go a long way to providing a more efficient rule that more exactly promotes the vision of cooperation, efficiency and reduced cost set forth by Chief Justice Roberts in 2015. We appreciate the opportunity to comment on these important amendments and urge the Advisory Committee and Subcommittee to seriously consider these much needed improvements.

Respectfully submitted,

Huie, Fernambucq & Stewart, LLP

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