Re: Proposed Changes to Rule30 (b) (6) 17-CV-JJJ
Jonathan Feigenbaum
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Re: Proposed Changes to Rule30 (b) (6)

Dear Members of the Committee:

For my entire career, I have heard Courts state that they do not dealing with discovery minutiae. The proposed rule change will force Courts to become micromanagers of discovery to a greater extent than exists under the current system. The proposed changes will elevate procedure over substance even more than what currently exists. The Federal Courts have turned into a litigation forum where procedure is paramount.

In its current form, Rule 30(b) (6) works. Whatever short-comings exist in the rule has been addressed through Court decisions. Making major changes will cause parties to waste more time on procedure and avoid the substance of their disputes.

I have been practicing law for more than 30 years. I concentrate in two areas: (1) representing individuals in ERISA claims and litigation; and (2) insurance policyholders, both individuals and corporations, in first-party actions against insurance companies. Most the litigation involves health, life and disability insurance.

I am the ERISA chair of the Massachusetts Employment Lawyers Association (MELA). MELA is a not-for-profit organization comprised of attorneys who devote a majority of their practice to representing employees, rather than employers. MELA has approximately 175 members. The mission is to enforce and to advance employee rights. NELA does this by working to increase awareness, improve advocacy, and monitor legislation and support members in their practices.

In addition to my volunteer work at MELA, I have served in other bar capacities focusing on ERISA, or ERISA related areas of the law. I have served as Chair of the Health and Disability Committee under the Torts Trial and Insurance Practices section of the American Bar Association; Chair of the Insurance Section with the American Association for Justice; Chair of the ERISA litigation group with the American Association for Justice; and I am a senior editor to *Employee Benefits Law*, Bloomberg/BNA, which is the leading treatise on employee benefits.

Discovery's purpose under the Federal Rules of Civil Procedure is to provide a mechanism for making relevant information available to litigants. See generally Richard A. Posner, Economic Analysis of Law 571 (6th ed. 2003). In the end, most civil litigation is over money. So making solid economic choices is what litigants strive for most.

Lawyers and litigants must believe that the Federal Rules of Civil Procedure are a neutral governing procedure and not favoring one party or another regarding the substance of the litigation. The proposed changes are one-sided; the changes favor defendants.

Information asymmetry is the core reason that plaintiffs are materially disadvantaged when litigating in the Federal Courts. When given the chance every defendant removes litigation from a state forum to a

Federal Court. The reason is that the Federal Courts enhance information asymmetry to the advantage to the defendant and at the cost to the plaintiff. Each of the proposed changes to Rule 30(b)(6) can only be seen as efforts to corporate defendant. Individuals do not have the same proposed advantages when deposed.

Discovery helps parties make good decisions. Discovery assists in preparing for trial. Discovery brings about settlements. Not every case needs to be tried, or should be tried. That is a fact that litigants on both sides of the "V" can agree on. If discovery becomes too limited, why settle? Trying to make a rational economic decision regarding settling or proceeding to trial becomes too much of a guess.

The Proposed Changes

The proposed changes will lead to more discovery fighting.

-The imposition of a minimum number of days that a Rule 30(b) (6) deposition must be noticed before the date it is scheduled to take place (subpart A). The current law requires reasonable notice which works. I don't know any lawyers who abuse the notice procedure.

-A numerical limit on list of topics will prove to be arbitrary. One-size fits all will not work. Some lawyers will fight over sub-parts, or parts of sub-parts to allege that the limit has been reached.

-A formal objection process will lead to more and more delays. Plus, this will require Judges to expend their time to resolve disputes over more and more procedural matters rather than on the substance of the dispute. The current system allows for the filing of protective order when really needed.

-Requiring advance disclosure of proposed exhibits will cause parties, out of caution, to list excessive numbers of exhibits, "just to be safe." This will lead to time wasting by the deponent and its lawyers in preparing for the deposition.

- There is no need for an explicit statement that a witness may be questioned only about matters on which they were designated to testify. Minor disputes sometimes arise in the course of a Rule 30(b) (6) deposition as to whether certain questions fall within the scope of the topics in the notice. The case law has established a manner of dealing with this issue. The method for addressing this is set-out in *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995). This case is widely cited.

-Banning so-called contention questions is not needed. A blanket ban is overkill. *See U.S. v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C.) ("Whether a Rule 30(b)(6) deposition or a Rule 33(c) contention interrogatory is more appropriate will be a case by case factual determination."). Depositions are the only way to get to the material facts in support of affirmative defenses as interrogatory answers are too often not complete.

-The proposal attempting to clarify whether and when testimony constitutes a formal "judicial admission" will lead to confusion over the weight that such testimony should receive in a particular instance. Time will be wasting fighting over so-called mixed issues of law and fact.

-The proposal to allow supplementation of Rule 30(b)(6) testimony will create "do-overs" and a one-sided chance to entities to avoid binding statements when the testimony does not come-out at first, as hoped for. Individuals really don't have this opportunity.

I urge the Committee not to adopt the changes.

Thank you for your consideration.

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