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

On behalf of Wright, Lindsey & Jennings LLP, I write to encourage the Subcommittee to continue its efforts to explore possible changes to Fed. R. Civ. P. 30(b)(6) in hopes of simplifying its requirements and easing what is often a burdensome process. We offer the following comments on the areas identified in the Subcommittee's May 1, 2017, invitation for comment, as well as one area not identified that we think is worthy of consideration.

Judicial admissions. As the Subcommittee noted in its invitation for comment, a clear majority of courts to consider this issue have held that an organization is not bound by a corporate designee's testimony. Under the majority view, testimony by a corporate designee is treated the same as would the testimony of any individual and can be contradicted at trial by other evidence. The majority view seems to align with the intent of the rule—the Seventh Circuit has concluded that "nothing in the advisory committee notes indicates that the Rule goes so far" as to deem corporate designee testimony as absolutely binding. *A.I. Credit v. Legion Ins. Co.*, 265 F .3d 630, 63 7 (7th Cir. 2001). We believe that the majority view is the better rule, and a change to the text of Rule 30(b)(6) that codifies that view should be considered to make clear that corporate designee testimony is not treated differently than any other deposition testimony.

Forbidding contention questions in Rule 30(b)(6) depositions. The practice of using Rule 30(b)(6) depositions to seek the views of a corporation or other entity regarding legal theories or legal opinions should be forbidden. The purpose of depositions under Rule 30(b)(6) is the discovery of factual matters known to the entity being deposed, and firing a host of questions seeking legal theories or contentions undermines that purpose. It also threatens to invade the attorney-client and work product privileges. As the Subcommittee stated in its invitation for comment, Rule 33 provides a vehicle for contention interrogatories that are answered by counsel after a substantial period of time is allotted to formulate those responses. Putting corporate designees—who are usually not lawyers—on the spot

with such questions that demand an immediate response is unfair and unnecessary, and consideration should be given to prohibiting the practice.

Adding a provision for objections to designated topics. The lack of a procedure for objecting to Rule 30(b)(6) deposition notices creates uncertainly, unnecessary expense, and a very real danger of sanctions against the entity being deposed. The Subcommittee should consider the adoption of a process that permits objections to the number of topics, the reasonable particularity of the topics, the relevance of the topics, the location of the deposition, and other issues that should be resolved prior to the deposition taking place. After objections are made, the parties should be required to meet and confer in the fashion required for other discovery disputes, and the party seeking the deposition should have the burden of demonstrating the appropriateness of their notice and designated topics through a motion to compel pursuant to Rule 37. The procedure should also establish minimum times for noticing Rule 30(b)(6) depositions and making objections, as well as specifying that the deposition may not proceed until the objections have been resolved. While such a procedure might lead to motion practice on the front end if the parties cannot reach agreement, it would likely avoid motion practice after the deposition, at a time where the only remedy might be a second deposition or even sanctions.

Reasonable particularity. Though the Subcommittee did not address the issue in its invitation, we believe that consideration should be given to clarifying the meaning of "reasonable particularity" as it is used in Rule 30(b)(6) to govern the designation of topics. In our experience, parties seeking the deposition of corporate deponents often designate topics that are so broad as to defy any reasonable effort to prepare a witness on them. As a Kansas federal district court has stated, "to allow the Rule to effectively function, the requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute." *Sprint Communications Co., L.P. v. Theglobe.com, Inc.*, 236 F.R.D. 524, 528 (D. Kan. 2006). More detailed topics make the process of preparing a witness simpler and more contained, while also increasing the likelihood that the party taking the deposition will get the answers to the questions it poses. We therefore suggest that the Subcommittee consider a change in the rule providing more guidance as to the specificity required of the designated topics.

We appreciate the opportunity to provide the Subcommittee with our firm's input on these issues, and we hope that the Subcommittee's efforts will result in a better procedure for the taking of depositions under Rule 30(b)(6).

Cordially yours,

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