17-CV-OOOOO

August 8, 2017

Submitted via email to: Rules_Comments@ao.uscourts.gov

Hon. Joan N. Ericksen
Chair, Rule 30(b)(6) Subcommittee
U.S. District Court, District of Minnesota
12W U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Re: NELA Comments To Advisory Committee on Civil Rules Rule 30(b)(6) Subcommittee's Invitation for Comment on Possible Issues Regarding Rule 30(b)(6)

Dear Judge Ericksen:

The National Employment Lawyers Association (NELA) submits the following comments in response the Advisory Committee on Civil Rules Rule 30(b)(6) Subcommittee's Invitation for Comment on Possible Issues Regarding Rule 30(b)(6) ("Subcommittee Invitation"). We appreciate the opportunity to offer our perspectives regarding the issues identified by the Subcommittee. Our general view is that Rule 30(b)(6) has remained essentially unchanged for as long as it has because it is a balanced rule that serves its intended purposes. A number of the proposals included in the Subcommittee Invitation would serve primarily to upset that balance and, as we discuss in greater detail below, should not be pursued further.

NELA is well qualified to comment on the issues identified in the Subcommittee Invitation because it is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA's members litigate daily in every federal circuit, which provides NELA with a unique perspective on how these issues actually will play out on the ground.

A number of the proposed changes would introduce costly and time-consuming motion practice to address issues that the parties in a case 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. Each incorporates a perspective that is too solicitous of the interests of organizational litigants at the expense of both individual litigants and broader judicial economy.

Rule 1 provides that the Civil 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 proceeding." Indeed, over the past decade, the Civil Rules Advisory Committee has devoted a great deal of effort to making changes to the Rules with the explicit goal of speeding up litigation and making it less expensive for both the parties and the courts. As outlined in more detail below, we believe the proposed modifications to Rule 30(b)(6) largely would have the opposite effect. For the most part, they would detract from the efficiencies envisioned by the original rule, slowing down discovery, and burdening the district courts with unnecessary motion practice. Proceeding with the proposed amendments outlined in the Subcommittee Invitation would represent a serious and troubling departure for the Civil Rules Advisory Committee, which has worked to issue carefully-calibrated rule changes that do not favor one set of litigants over another.

I. Maintaining the Incentives to Adequately Prepare Rule 30(b)(6) Deponents is Preferable to Permitting Supplementation

NELA opposes permitting supplementation of 30(b)(6) testimony.

As the Subcommittee points out in its Invitation for Comment, allowing supplementation would encourage wasteful forms of gamesmanship,[1] such as intentionally failing to prepare witnesses or introducing sham testimony. Courts routinely strike sham affidavits, but allowing supplementation would permit 30(b)(6) deponents to provide "I don't know, I will need to review our records" answers, thereby transforming the 30(b)(6) deposition into an unproductive, expensive, and largely empty exercise.

Further, such evasions can benefit only organizational defendants, and therefore would create serious inequities without any cognizable 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 plaintiff 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 should 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.

There is an additional, practical constraint that counsels against introducing a new provision regarding supplementation: the discovery process can differ substantially from case to case. A 30(b)(6) deposition often is taken at or near the outset of discovery, but that is not necessarily so. 30(b)(6) depositions may occur closer to the end of the period for taking discovery under the applicable Case Management Order. In the latter cases, any "supplementary"

[1] Part of the impetus for the adoption of Rule 30(b)(6) as part of the 1970 amendments to the Federal Rules of Civil Procedure was to remedy precisely this type of unproductive behavior. Prior to that time, organizations sometimes engaged in a tactic called "bandying," in which each employee who was deposed would disclaim knowledge of the facts in question, explaining that a different employee would be the better person to ask. *See, e.g.*, 8A Charles Alan Wright, et al., Federal Practice and Procedure § 2110 (3d ed. 2014).

testimony would come too late in the discovery proceedings to be addressed by the party receiving it, thereby causing prejudice to that party. Crafting a new, generally applicable provision that accounts for the myriad different ways in which supplementary testimony could be offered—and ensuring that it would not result in prejudice to the other party—likely would be futile. It is better to maintain the rule as it is, which encourages 30(b)(6) deponents to be adequately prepared and discourages deceptive discovery practices.

II. 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. 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 truly is 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.

More broadly, this proposal runs contrary to the mandate of Rule 1, as well as the overall direction the Advisory Committee on Civil Rules has taken in recent years, seeking to reduce expense and to improve efficiency. 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, and because rulings on such objections would be linked so closely to the particular circumstances of a given case, they would not provide useful guidance in other cases. This would be particularly true if the 30(b)(6) deposition at issue was the first one in the case. Neither the court nor the litigants would have a clear conception of how the case may develop, yet the court would be required to make substantive decisions that could be highly consequential to the proceedings.

III. Explicitly Addressing the Binding Effect of 30(b)(6) Depositions

NELA recognizes that under current law, deposition testimony offered under Rule 30(b)(6) is not treated as a judicial admission *per se*, but NELA opposes amending the rule to address this issue specifically. Adding this sort of language to the rule may have the unintended consequence of creating confusion about the circumstances under which Rule 30(b)(6) testimony may "bind" an organizational litigant to an extent greater than deposition testimony ordinarily does, because not doing so would reward and encourage deceptive discovery practices.

While courts generally treat Rule 30(b)(6) testimony as binding on an organization only to the extent analogous to traditional deposition testimony,[2] there are circumstances in which

[2] If the testimony is later altered or contradicted, it may be challenged through cross-examination, impeachment, and other means. *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001); *Dow Corning Corp. v. Weather Shield Mfg., Inc.*, 2011 WL 4506167, at *5 (E.D. Mich. Sept. 29, 2011); *Johnson v. Big Lots Stores, Inc.*, 2008 WL

litigants have been (and should be) prevented from offering subsequent evidence contradicting prior 30(b)(6) testimony. For example, in some cases, courts have rejected subsequent declarations contradicting prior Rule 30(b)(6) testimony using reasoning analogous to the "sham affidavit" rule. *See, e.g., Orthoarm, Inc. v. Forestadent USA, Inc.*, 2007 WL 4457409, at *2-3 (E.D. Mo. Dec. 14, 2007) (rejecting declaration as a "sham affidavit" at summary judgment because it "directly contradict[ed]" prior Rule 30(b)(6) deposition testimony); *Casas v. Conseco Fin. Corp.*, 2002 WL 507059, at *10-11 (D. Minn. Mar. 31, 2002) (granting summary judgment based on Rule 30(b)(6) testimony and refusing to consider contradictory affidavits); *see also Rainey v. Am. Forest and Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) ("[Rule 30(b)(6)] binds the corporate party to the positions taken by its 30(b)(6) witnesses so that opponents are, by and large, insulated from trial by ambush.").

Because of the information asymmetry that almost always exists at the outset of an employment case, individual litigants must be able to rely on the answers provided by organizational representatives in 30(b)(6) depositions. If 30(b)(6) testimony does not bind the organization to any meaningful extent, this would remove the incentives for 30(b)(6) deponents to prepare adequately, while creating huge incentives to offer incomplete or inaccurate responses during a 30(b)(6) deposition. This would force the other litigants to waste substantial amounts of time and other resources pursuing ultimately fruitless avenues of inquiry, and allow organizational parties to hide key facts until it is too late for their disclosure to provide any benefit, causing unacceptable prejudice to the other party.

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

In potentially addressing the issue of contention questions, NELA respectfully suggests that the Subcommittee should (1) be wary of attempting to define complex terms like "contention question," which could create more confusion than clarity for litigants, and (2) avoid introducing discovery restrictions on individual litigants that do not apply to organizational parties. Existing rules and practices deal adequately with the issue of litigants inappropriately asking certain deponents to offer legal conclusions or state legal contentions, i.e., the party objecting to the question may do so, and seek judicial resolution of their objection if necessary. Therefore, the Subcommittee should refrain from (1) attempting to define what qualifies as a "contention question" and (2) placing restrictions on the asking of such questions only to Rule 30(b)(6) deponents.

Corporate defendants often ask plaintiffs in employment cases what reasonably could be described as "contention questions" during their deposition (e.g., "What support do you have for your claim that you suffered discrimination?"), and plaintiffs do the same in deposing certain corporate representatives (e.g., "Which individuals were involved in the decision to fire the plaintiff?"). From the perspective of the plaintiff, for example, identifying the relevant decision-makers at the earliest point possible in a case is essential in deciding which individuals potentially should be deposed, as well as focusing subsequent discovery requests. As such, these types of questions address the problem of information asymmetry that almost always exists at the outset of an employment case, while promoting efficiency in the discovery process.

6928161, at *3 (E.D. La. May 2, 2008); *A&E Prods. Grp., L.P. v. Mainetti USA Inc.*, 2004 WL 345841, at *7 (S.D.N.Y. Feb. 25, 2004).

Allowing such questions to be asked of individual plaintiffs, but not of the designated representatives of organizational defendants, would unfairly tilt the scales in favor of one party to the litigation, without any principled justification. Further, in light of the limitations on other discovery devices that could be used to narrow factual issues, the value of 30(b)(6) depositions in identifying an organizational litigant's position on the facts in a case is higher than ever.

Current law recognizes that whether a particular issue should be raised during a 30(b)(6) deposition or through a contention interrogatory depends on the particular circumstances of a given case, and NELA respectfully urges the Subcommittee to consider carefully whether rulemaking on this issue would be productive. *See U.S. v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996) ("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.") It is not at all clear that what constitutes a "contention question" may be reduced to a generally-applicable definition that could be included in a rule amendment.

V. 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 entirely 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 tend to create disputes that otherwise would not exist, undermining much of what makes the rule useful.

NELA members represent employees in litigation against their current or former employers, which often are large companies. Because such entities generally have custody or control of all or most of the potential evidence at the outset of a case, NELA members' clients tend to be at a considerable disadvantage when it comes to identifying key documents and witnesses. Accordingly, our members 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 risk grinding the discovery process to a halt by encouraging unnecessary disputes on a host of items— e.g., (a) the precise topics that will be covered, (b) the timeframe(s) at issue, or (c) how many 30(b)(6) depositions can be taken. In most cases, our members would not be in a position to adequately address these disputes at the case planning stage. Under existing practice, these types of issues have been typically been resolved by the parties as they arise in the course of the

litigation, without the need for court involvement and the costly and time-consuming motion practice that comes with it.

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. 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.

Thank you for the opportunity to present NELA's views on this important matter. Please do not hesitate to contact NELA should you have any questions.

Respectfully Submitted,

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