17-CV-PPP

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Submitted via e-mail to:
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I submit the following comments in response to the Advisory Committee on Civil Rules Rule 30 (b)(6) Subcommittee's invitation for comment.

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.

While this requirement would add to the preparation time for the initial pretrial conference, it is difficult to see any advantage to adding this requirement because the parties ordinarily discuss 30(b)(6)depositions separately and at varying stages of the liability discovery. For example, a lawsuit alleging an equal pay violation is vastly different than a lawsuit alleging discriminatory or wrongful termination. An equal pay lawsuit may only require two 30(b)(6) deponents – the decision maker who set the pay and the HR representative. A disability discrimination lawsuit may require four or more 30(b)(6) deponents – the HR representative, the disability accommodation staff member, the corporate medical or safety official, the disability policy author and/or enforcement official, and so forth.

Typically, an assessment of the topics and number of 30(b)(6) depositions is not determined until the initial written discovery has been accomplished. Therefore, 30(b)(6) depositions cannot be intelligently discussed at the Rule 26(f) conference.

While inclusion of rule 30(b)(6)at the rule 20 6F conference would not necessarily prejudice either party it would add to the preparation time for the initial pretrial conference, without gaining any discernible efficiencies.

II. Potential treatment of statements made during 30(b)(6)depositions as judicial admissions.

In my experience, I have never encountered this issue, nor, to the best of my knowledge, has this issue been raised by members of the Indiana bar. It is my experience that litigants merely treat 30(b)(6)statements as evidentiary statements, not judicial admissions. Moreover, the litigants treat the sworn statements as binding upon the deponent, and not necessarily the corporate organization, leaving it to the trier of fact with respect to inconsistent statements and/or evidence to determine the truth of the fact asserted.

III. Requiring and permitting supplementation of rule 30(b)(6) testimony.

I oppose this suggested change to the rule because it opens the door even further to gamesmanship. Recently, and a number of times in the past, defense counsel has "supplemented" the Defendant's response to plaintiff's request for production by

providing documents just a few days before a scheduled deposition even though those same documents had been in their possession all along. Defendant met its obligation to "supplement" but gamed the system by delaying production of the documents already in their possession so as to delay the deposition and out of fear that the deponent might reveal the existence of the documents Defendant possessed but had not yet produced. This is an example of the gamesmanship that some parties employ. The so-called "supplementation" resulted in postponement of the scheduled deposition. . I anticipate that if this rule were adopted, the parties would employ this type of gamesmanship and the court would have to intervene, thus adding to the court's burden of refereeing discovery issues.

IV. Forbidding contention questions in rule 30(b)(6) depositions.

I oppose this suggested mandate because it unfairly tilts the scales in favor of the corporate organization and against the plaintiff. Defendants routinely ask the plaintiff contention questions in a deposition, such as, "please tell me what evidence you have to support your claim that you were discriminated against,' or "please tell us what evidence you have to support your claim for emotional damages." To prohibit contention questions in a 30(b)(6)deposition would be a significant barrier to the truth-finding purpose of discovery. After all, you should remember that it is the corporation that possesses most, if not all, the information relevant to the litigation and can much more easily access its information to support its contentions/affirmative defenses.

V. Adding a provision for objections to rule 30(b)(6).

I oppose this suggested change. Corporate defendants typically have far more resources, including attorneys, at their disposal. Defense counsel, in keeping with their obligation to zealously defend their clients' interests, will routinely object to a 30(b)(6) deposition, much like they do in answering interrogatories, or producing documents. Allowing a pre-deposition objection to rule 30(b)(6) will only add to the discovery time and expense. For example, if the corporate organization designates six 30(b)(6) deponents and raises an injection to each of those, the requesting party will be forced to undergo the exhaustive process of responding to each of the objections even before filing a motion to compel. It is far easier to raise a spurious unfounded objection than to mount a response. It is analogous to having to explain to one who claims that the earth is flat why it is not.

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.

I oppose any separate limitation on the duration and number of depositions as applied to rule 30(b)(6)depositions. The current rule limiting the duration of depositions is adequate. Keep in mind that it is the organization that will designate the 30(b)(6) deponent for a particular topic. For example, if there are six different topics, the corporate organization can designate six different deponents, thus consuming six of the 10 depositions currently permitted under rule 26. Thus, it is the corporate organization

that will drive the number of depositions as opposed to the specific needs of the plaintiff. Also keep in mind that the plaintiff has a self-imposed limitation – costs. Plaintiffs are very cost sensitive; defendants know this and, in my experience, sometimes intentionally drive up the cost by designating several 30(b)(6) deponents, when only one or two would suffice. Moreover, given that 30(b)(6) deponents are quite often located in diverse geographical locations, it presents much more of a hardship on the plaintiff than corporate organizations in conducting 30(b)(6) depositions. This is another example of a self-limiting factor plaintiff's decision of whether or not to depose a particular 30(b)(6) deponent.

Some background on the undersigned. I am a solo practitioner, representing primarily individual plaintiffs in employment litigation. I also represent small business employer/defendants on occasion. I have served as the chair of the Indiana State Bar Employment and Labor Council. I am currently serving as the president of the Indiana chapter of the National Employment Lawyers Association (NELA). I have been commissioned twice, once by plaintiff and once by defendant, as an expert employment law lawyer in legal malpractice cases.

In my opinion, the suggested changes would hinder, not aid, the discovery process. The suggested changes presented for comment appear to me to be a solution looking for problem. As my wife frequently reminds me, “don’t mess with the recipe.”

Respectfully submitted,

/s/Tae Sture_____
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