COMMENT REGARDING THE CHANGES TO FED. R. CIV. P. 30(b)(6) PROPOSED BY THE RULE 30(b)(6) SUBCOMMITTEE ADVISORY COMMITTEE ON CIVIL RULES

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This comment is in opposition to many of the proposed changes to Fed. R. Civ. P. 30(b)(6) as set forth by the Rule 30(b)(6) Subcommittee Advisory Committee on Civil Rules. As attorneys who use Rule 30(b)(6) in federal court, the State of Arkansas (whose Rule is very similar to the federal rule) as well as other state's versions of the rule as well. We have learned the hard way that these are efficient tools to gather information from organizations on behalf of injured people and even in corporate litigation. Based upon this, we urge the Subcommittee to keep in mind the original purpose of Rule 30(b)(6), which still prevails today. As you well know, this purpose is to prevent an organizational party from gaining an unfair advantage in litigation by virtue of the fact that it consists of multiple individuals. If a corporation or similar organization is to be afforded the privileges of personhood (which it is in every state, to our knowledge), it should also, to the extent possible, be bound by the rules, obligations and responsibilities that apply to individuals.

When a person or group of people form a legal entity like a corporation, limited liability company or other entity, this entity becomes a separate person and has a life of its own and gains rights and privileges that are distinct from the individuals who own, operate, manage, or work for the entity. All of these entities are legally treated as "people", distinct from their owners or members, with liability generally limited to the assets of the entity. In litigation, a legal entity has the privilege of acting as a distinct person who can and often should does retain its own counsel, maintain its own defenses, present its own evidence, and select the witnesses it wants to testify. All of which may be completely different from the individuals who might also be parties to the litigation besides the entity.

The accumulation of knowledge, employees, wealth and other resources often give a legal entity a great advantage over the human beings who are sometimes injured by the acts of the entity or who seek information from an entity to properly prepare for litigation where the purpose is not to be surprised, but to be prepared so that a case can be presented fairly for both sides. When the lawyers for a corporation depose an individual plaintiff, they generally can ask any question they want that does not violate a privilege, e.g. What did the plaintiff see and when? What did the plaintiff do to avoid the injury? Who did the plaintiff speak to about the incident? Who does the plaintiff blame for her injuries and why? What does the plaintiff intend to say at trial?

However, without Rule 30(b)(6), the Plaintiff would be forced to sift through a maze of individuals within the entity and try to connect the dots through multiple witnesses to learn the totality of what the entity knows, believes, and what the entity will say at trial through its witnesses that are selected to testify. Rule 30(b)(6) is the only tool that empowers a plaintiff to

treat a legal entity just as it is treated in every other aspect of the law: as a person.

Many of the proposed changes to Rule 30(b)(6) would undermine the real purpose of the rule, which include preventing a corporation from "bandying" or offering multiple witnesses who disclaim knowledge of facts that are available to the organization as an institution and that the organization may later present through the witnesses it selects.[1] The changes would also severely prejudice individual and corporate plaintiffs alike, increase the cost of litigation, and make discovery drastically less effective in accomplishing its purpose of making trial "less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958). This statement by the United States Supreme Court is of critical import. To provide for full, fair litigation, this purpose should not be obscured by changes to Rule 30(b)(6).

The Rule as it exists allows the individual or the entity seeking the information to avoid excuses such as "I don't know, you will have to talk to someone else." Then, when asked, "Who should I consult?" The corporation cannot simply say "I don't know, someone other than me." The purpose of discovery is to assure that we do not return to the dark ages of litigation where everyone can have a trial by ambush with the length of trials being extended, discovery taking much longer and being more costly and wasting our limited judicial resources. Such a return to these times and these methods of trying cases is simply not in the interest of justice.

The proposed changes would undermine the purpose of the rule in the following ways:

1. <u>Inclusion of specific reference to 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</u>

An amendment to Rule 26(f) referring specifically to 30(b)(6) depositions would be the only specific reference in the rule to any discovery mechanism. For example, the rule does not require parties to provide a discovery plan that sets out which specific topics the parties will inquire about through interrogatories, requests for production, or other types of depositions. Requiring a party, in the earliest stage of a case, to commit to which depositions are needed would serve no purpose other than to unfairly restrict the party's ability to obtain deposition testimony at a time when the need for that testimony becomes apparent and to provide a basis for the organization to prevent the deposition from taking place even though there is a need for it. The usefulness of this amendment would be minimal because parties seeking 30(b)(6) depositions would be unable to provide anything more than very broad and general descriptions of the types of topics those depositions would explore. Inevitably, any dispute about a specific deposition would still have to be resolved later in the case when the parties are aware of the specific matters being noticed.

If a similar amendment is made, then the entity should be required to do exactly the same

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[1] *See* Fed. R. Civ. P. 30(b)(6) advisory committee's notes, subdivision (b) (1970).

thing and limit its topics of inquiry so as to level the playing field. As you are aware, litigation often takes an unexpected turn and requires additional discovery which as long as it is conducted according to the rules and within the times based on scheduling orders should not be unduly restricted for either side. To require one side to limit its topics or to require both sides to do so, very early in the litigation will simply cause laundry lists to be developed which create busy work for attorneys to be sure that every conceivable topic is named and will accomplish nothing.

We are unsure what the Subcommittee has in mind for inclusion of a discussion about 30(b)(6) depositions in a report to the court under Rule 16. The rule already requires a scheduling order to limit the time to complete discovery. Placing further restrictions on the timing of Rule 30(b)(6) depositions, especially if the rule is also changed to permit supplementation of 30(b)(6) deposition testimony, would defeat the purpose of the rule, as an organization could supplement a 30(b)(6) deposition after the deadline for conducting Rule 30(b)(6) depositions and the deposing party would no longer have the option of re-opening the deposition unless by supplementing, it reopens this for both sides. If this occurs, then discovery deadlines will constantly need to be extended which will wreak havoc on court calendars.

2. Judicial admissions

In theory, an amendment that simply provides that 30(b)(6) testimony is not a judicial admission – i.e., one that cannot be changed at trial – may exist in some jurisdictions depending upon the case law in that Circuit, but, usually, in limited circumstances. However, to add this language would simply encourage playing "hide the ball" that Rule 30(b)(6) is intended to eliminate in every jurisdiction. The term "binding" means that the witness is speaking not as an individual but as the organization and that the testimony should have the same consequences when used against the organization as testimony would have against an individual. For example, the deposing party should be permitted to use the testimony in a summary judgment motion and the organization should not be permitted to respond with an affidavit contradicting that testimony, unless there is some change in circumstances that justifies the change in position. Obviously, people can change their testimony, but it is fraught with danger as they can be cross examined on it and unless there is a valid basis, it can be very destructive to their credibility. There should be no difference for the corporate "person".

The effect of a 30(b)(6) deposition serves to motivate an organization to fully prepare its witness and deters sandbagging. The rule should not suggest that these depositions no longer have such an effect. If an amendment to this effect is to be made, it should also include a statement that if the organization seeks to change its position or make a new allegation that differs from the deposition testimony, the organization has the burden to prove the information forming the basis of the allegation or position was not known or reasonably available at the time of the deposition. See *Rainey v. American Forest and Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) (adopting this burden-shifting approach).

3. Requiring and permitting supplementation of Rule 30(b)(6) testimony

Allowing an organization to supplement 30(b)(6) testimony would potentially defeat the purpose of the rule by giving the organization the ability to wait until the end of discovery to disclose the full extent of its positions and knowledge while offering an inadequately prepared witness at the deposition If an amendment allowing supplementation is made, supplementation should only be allowed under the same type of burden-shifting process discussed above regarding judicial admissions or, once again, do so, but with the discovery process being reopened. This is not a good idea in our opinion as it will, once again, work completely against judicial calendars, judicial economy, the desire to complete litigation and the purpose of finality and closure for all.

4. Forbidding contention questions in Rule 30(b)(6) depositions

This proposed change would confer special rights on corporations and other entities, who already have the benefit of knowing in advance what topics will be explored during a deposition. There is no prohibition in Rule 30 against asking an individual witness about their opinions, positions or contentions, and ordinary witnesses, particularly plaintiffs, are routinely asked those types of questions in depositions. The Subcommittee's concern that a "spontaneous answer in a deposition seems quite different" from an interrogatory answer that the answering party has 30 days to prepare has no merit. Most 30(b)(6) depositions that experienced attorneys use involve, at least, the same 30-day period because of Requests for Production of Documents that usually accompany the notice. Prohibiting contention, position or opinion questions would only serve to allow a corporate defendant to polish its testimony through its attorneys and to save those items for trial, where the opposing party would have no prior testimony with which to impeach which has been stated is the method by which the truth is obtained, i.e. one of the main purposes of a deposition. If entities are going to be afforded this luxury, then individual deponents must be given the same rights (or Constitutional issues may be raised). None of the parties to litigation, regardless of their status should be allowed to dodge, avoid and refrain from answering questions that will, ultimately, result in a resolution or a fair result for both sides.

5. Adding objections to Rule 30(b)(6)

This provision would do nothing, but slow down litigation, drive up costs for all parties, and clog the courts with more discovery motions, which through my experience most judges do not want to waste their time on. This would simply permit an entity to obstruct the discovery process in a way that individuals cannot. An individual does not have the benefit of being notified in advance what topics will be explored at a deposition and cannot object to questioning in advance. The purpose of providing a notice specifying the matters for examination is to permit the organizational party to prepare a witness to testify on behalf of the organization, putting the organization on equal footing with a witness testifying based on personal knowledge. Allowing the organizational deponent to receive special treatment by using the noticed topics as a basis for objections would give those organizations an unfair advantage. The most efficient way for parties to address questioning that exceeds the boundaries of relevance is through objections to deposition designations at the time of trial, just like with any other witness. Pre-deposition objections would inevitably result in delays and motion practice over the permissible scope of

30(b)(6) deposition testimony. There is no logical justification to increase trial delays, hearings on motions and the accompanying waste of judicial resources.

6. <u>Amending the rule to address the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions</u>

If an amendment on this subject is to be made, it should codify the Committee Notes providing that one day should be allowed for each person designated, and that all of the 30(b)(6) depositions only count as one of the ten for the limit on number of depositions, no matter how many people are designated to testify for all of the topics sent in one notice. If the rule provided otherwise, an organization can simply designate ten witnesses in response to a 30(b)(6) notice and successfully argue that the deposing party is prohibited from taking any more depositions, which would unfairly prejudice the deposing party.

We oppose any changes in the existing Rule 30(b)(6) and ask that the Subcommittee consider the full effect of any changes. Thank you for your consideration of this comment and for your hard work.

Sincerely,

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