The Gittes Law Group

Frederick M. Gittes
FGittes@GittesLaw.com

Jeffrey P. Vardaro
JVardaro@GittesLaw.com

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BY E-MAIL ONLY
Rules_Comments@ao.uscourts.gov

Dear Members of the Rule 30(b)(6) Subcommittee:

We are writing in response to the subcommittee's recent Invitation for Comment on Possible Issues Regarding Rule 30(b)(6). Our small firm focuses primarily on two areas of practice: representing individuals in employment litigation, as well as in civil rights cases involving misconduct by law enforcement and other government officials. In the work we do, we believe the changes suggested thus far in the process would risk transforming Rule 30(b)(6) from a discovery tool that provides an efficient and effective means of obtaining vital information from a corporate party into a burdensome source of needless motions practice.

In this regard, we are particularly (though not solely) concerned with the ideas of including Rule 30(b)(6) depositions as a topic in Rule 26(f) reports, permitting routine supplementation of Rule 30(b)(6) testimony, and allowing formal objections during Rule 30(b)(6) depositions. Each of these proposals would move Rule 30(b)(6) depositions further from the framework of ordinary depositions, and from the rule's current role in streamlining the otherwise difficult process of obtaining clear, informed testimony from corporate parties.

I. Inclusion in the Rule 26(f) Process

It is often helpful for parties to get their initial disputes resolved in advance, and the Rule 26(f) process can be a good way to do that. We often use that process to bring preliminary problems to the attention of the court and establish the ground rules for the case right off the bat. But it is important to reserve that process for only the most common and problematic issues the parties anticipate facing. Otherwise, the report itself will become burdensome and can be used against parties in problematic ways. For instance, although a Rule 30(b)(6) deposition can often be the first deposition requested in a case, that is not always true. Sometimes we use these depositions as a way to clarify other witnesses' testimony or a party's interrogatory responses, or because some unfamiliar policy or procedure requires clarification in the midst of discovery.

Unfortunately, though it is not the intent of the rule, we have seen Rule 26(f) reports used against a party who has failed to anticipate future developments in discovery—such as when an expert is needed and none was anticipated at the outset of the case, or when a party needs to conduct discovery about a topic area that was not listed at the time. Including more subject matter in the Rule 26(f) report will present more opportunities for this unintended "estoppel" effect. We have no desire to include, in every report, the possibility of conducting one or more Rule 30(b)(6) depositions on specific topics just to "cover our bases" in case that need arises later in the case (as we often do when it comes to anticipating possible expert testimony, for fear of somehow waiving the opportunity by omitting reference to an expert).

It would be a different story if Rule 30(b)(6) depositions actually posed concerns that were amenable to early resolution. But we rarely, if ever, see such concerns. Under the current rule, a Rule 30(b)(6) deposition is a matter of right, not a judge's discretion. We request the deposition, and the other party must provide one or more witnesses capable of addressing the identified topic. The disputes that follow are usually "one-offs": whether the witness is actually knowledgeable, whether they were sufficiently prepared, whether the topics were identified clearly enough, and whether more than one witness will be needed to address the topic—and then, as discussed by the subcommittee, whether the corporation can somehow disclaim its own designee's testimony when it does not support its theory of the case. None of these issues is capable of resolution until the deposition is noticed and often, until after it occurs. What, then, is the point of previewing the issues in a Rule 26(f) discussion? We can hardly imagine a case where we would have been able to tell the other side anything beyond "we think we may need a Rule 30(b)(6) deposition," and perhaps adding, "on topics such as _____ and _____." What issue would this possibly pose that the court could resolve in advance?

Requiring this topic to be covered at the outset of the case will, in our view, only add to the already lengthy list of issues the court must address in these conferences. Sometimes, it will be completely pointless (since we would only be airing the possibility of a 30(b)(6) deposition because there is a blank on the form to do so and we do not want to be accused of sandbagging later). Other times, it will only be *mostly* pointless (because the issues will not be sufficiently ripe for the court's review until after the deposition). Either way, it is difficult to see any benefits that outweigh the risks inherent in highlighting the rule as a potential area of dispute in every single civil case.

II. Supplementation and Formal Objections

Rule 30(b)(6), as it currently exists, should be a way to *simplify* the discovery process. When used as intended, it reduces the number of corporate deponents, eliminates uncertainty about who must be deposed, and commits the corporate defendant to a single, consistent description or explanation of a particular topic. The proposals aired in the invitation to comment would undermine all of those purposes and turn something that should look an awful lot like an ordinary deposition into an area of ancillary litigation, rife with unnecessary motions practice and gamesmanship.

As attorneys who represent individuals, almost exclusively, we understand that the people we represent must be prepared, must testify completely and truthfully, and when they "mess up" in a way that cannot be handled through reviewing and correcting a transcript, they had better have a convincing explanation. Otherwise, any contrary testimony they give will be subject to the "sham affidavit" rules and will risk exclusion from evidence or at the very least, damaging impeachment at trial. Rule 30(b)(6) deponents should stand in the same position. We understand the case law about whether their admissions are "binding" on the corporation generally avoids treating them as fully binding judicial admissions, but there are many other instances in which courts have treated them as very close to that level. The idea of allowing automatic supplementation and correction of 30(b)(6) testimony after a transcript has already

been reviewed and signed would mean a designated corporate employee would be *less* bound by the corporation's official testimony than an individual plaintiff is by his or her testimony.

This makes no sense. Individual plaintiffs are often in the dark about some aspects of the case at the time of their depositions. They learn new facts through the information-balancing process of discovery, and will often know much more at the time of trial than they did during their depositions. Yet they are held to their deposition testimony, absent a compelling reason to diverge from their prior testimony. Rule 30(b)(6) corporate designees are individuals whom the corporation has specifically identified and vouched for as knowledgeable—to the point that efforts to depose others on the same topic will be seen by the court as wasteful and abusive. Yet the subcommittee is considering allowing such designees to turn their testimony into a moving target, subject to "maybe/I don't know" answers that can later be "supplemented" by substitute testimony the corporation deems helpful to its cause? This would give corporations an unfair, unjustified strategic advantage over individual parties. If something changes that requires correcting a Rule 30(b)(6) deponent's answer, there is no reason the corporation should not follow the same process of providing a compelling explanation that any other deponent would need to follow under the same circumstances.

Similarly, there is no reason to provide corporations' counsel a greater opportunity to issue formal objections in a 30(b)(6) deposition than individual party deponents' counsel have. Unlike individual parties, who are deposed on a broad array of subjects—and particularly in certain types of employment cases, are asked extremely intrusive questions about their personal and medical histories, sometimes with only a minimal connection to the facts of the case—30(b)(6) deponents are provided notice in advance of the exact topics they will be asked about. If a sexual harassment victim's counsel cannot issue formal speaking objections and withhold an actual response pending a court's ruling when she is asked an out-of-left-field question about her dating history or her divorce filings, why should a corporate designee be permitted the special privilege of a formal objection when asked a question about a topic noticed in advance (as to which the corporation's counsel could have sought a protective order)?

Beyond the unfair strategic advantage, this rule would inevitably result in time-consuming and burdensome motions practice that would not apply to any other type of deposition. There is no reason a corporate designee cannot answer questions subject to an ordinary objection like any other witness, rather than triggering a formal discovery dispute that would needlessly delay and dilate the proceedings.

We urge the subcommittee to avoid changing the rule in any way that undercuts its current utility as a tool for efficient information gathering from corporate parties. Rule 30(b)(6) should be a method of reducing disputes, not an invitation to complicate the discovery process.

Very truly yours,

Frederick M. Gittes &
Jeffrey P. Vardaro