17-CV-SSSSS

August 10, 2017

Honorable John D. Bates
Senior United States District Judge
Chair, Advisory Committee on Civil Rules
United States District Court for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Avenue N.W.
Washington, DC 20001

Honorable Joan N. Ericksen
United States District Judge
Chair, Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
12W U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

RE: Invitation for Comment on Possible Issues Regarding Rule 30(b)(6)

Dear Judges Bates and Ericksen:

The American Association for Justice ("AAJ"), formerly known as the Association of Trial Lawyers of America ("ATLA"), hereby submits these comments in response to Invitation for Comment on Possible Issues Regarding Rule 30(b)(6) (hereinafter "Invitation for Comment") posted by the 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules (hereinafter "Subcommittee"). AAJ, with members in the United States, Canada and abroad, works to preserve the constitutional right to trial by jury and access to justice when people are injured by the negligence or misconduct of others. AAJ advocates to ensure that all plaintiffs, including employees, consumers, patients, families, shareholders and businesses injured by corporations, receive proper access to the courts under fair, just, and reasonable rules of procedure.

AAJ wishes to thank the Honorable Joan Erickson and Professor Richard Marcus for attending AAJ's Annual Convention in Boston to allow for a dialogue with some of our members regarding their professional experience with and use of Rule 30(b)(6).

In summary, AAJ stresses the importance of Rule 30(b)(6) as invaluable to plaintiffs litigating against corporate defendants. Without a Rule 30(b)(6), injured plaintiffs face the all-too frequent practices by many corporate defendants and their counsel, including "bandying", delaying, and sometimes denying, their right to seek legitimate discovery that is often within the exclusive control of that corporate defendant. Rule 30(b)(6) has worked well over time, streamlining discovery and ensuring that corporations, organizations, and other entities provide an educated, prepared witness. AAJ expresses opposition generally to specific amendment ideas listed in the Subcommittee's Invitation for Comment as they would resurrect the practice of bandying under which an entity's officers or managers deny knowledge of facts clearly known to people in the organization, thus providing special advantages to corporate litigants and adding delay and expense to the discovery process.

AAJ members who have reviewed the Invitation for Comment universally have a negative reaction to the proposal. AAJ did not distribute this proposal to its membership, but rather selected members with varied practices to review the proposal and provide feedback at the July 21 meeting. As word of the Invitation for Comment has started to circulate on various plaintiff list serves, there is a general sense that the Invitation for Comment aims to serve the interests of corporate defendants such that it is one-sided, failing to recognize the benefits and efficiencies regularly achieved by proper use of the 30(b)(6) deposition. In fact, the original submission that apparently prompted the Subcommittee's focus on this rule was drafted by defense lawyers and is not representative of the ABA or the ABA-process for establishing formal committee policy.[1]

I. The Importance of Rule 30(b)(6) to Effective, Reasonable, and Efficient Discovery.

As it exists today, Rule 30(b)(6) is invaluable to the plaintiff, as it frequently serves as the most efficient means to the discovery of relevant facts and evidence within a corporation's exclusive control.[2] In its previous meetings, the Subcommittee has already thoroughly noted the past problem of bandying and the history of the purpose of Rule 30(b)(6), and AAJ finds little need to recite the history and burdens of bandying in these comments.

However, with the history and purpose of Rule 30(b)(6) in mind, AAJ cautions the Subcommittee against considering any proposal that could revive the practice of bandying. Furthermore, AAJ would urge the Subcommittee to refrain from conferring special rights to corporations. Plaintiffs rely on even-handed discovery rules to ensure fair, speedy, and just resolution of their cases. Special discovery advantages exclusive to corporate litigants would unfairly tilt the balance of justice against individual plaintiffs who, when compared to the corporations they litigate against, already have

[1] Defense lawyers have initiated this possible rulemaking on Rule 30(b)(6) by writing of the "potential abuses" of the Rule and commenting about the cost to prepare a witness adequately for a 30(b)(6) deposition. *See*, Letter by 31 members, in their individual capacity, of the Council and Federal Practice Taskforce American Bar Association Section of Litigation (Jan. 26, 2016).

[2] While AAJ frequently uses "corporations" or "corporate defendants" in this comment, AAJ acknowledges that these concerns equally apply to any legal entity subject to a Rule 30(b)(6) deposition, such as a partnership or LLC, and any reference to corporate entities in these comments should be considered to apply to all other business entities and government entities.

significantly less resources. The proposed changes would exacerbate problems with asymmetrical information, as previously discussed by the Advisory Committee on Civil Rules during the public comment period that led to the 2015 discovery amendments.

In many product liability cases, the defendant has most of, if not all of, the information regarding where relevant documents are located, who has custody or knowledge of the documents, and who developed or designed a particular product, when it was placed in the stream of commerce, and where it was manufactured. In employment discrimination cases, the defendant has custody of all relevant employment records, including the salary and employment history of the plaintiff and other employees. The same is true of police misconduct and civil rights cases, water and other contamination cases, nursing home negligence cases, inadequate security and premises liability litigation, and a plethora of other cases represented by AAJ members. Early initial information often needs to be disclosed to the plaintiff before additional questions relevant to the litigation can be answered. Rule 30(b)(6) enables litigants to identify key sources of information as well as information about corporate policies and practices—a far more effective means than some of the other available discovery tools such as document requests and interrogatories, which often are mired by responses and objections that can take months to resolve.

Meanwhile, Rule 30(b)(6) could be made more potent. As effective as Rule 30(b)(6) is in preventing bandying and allowing for discovery of facts and evidence, designated Rule 30(b)(6) witnesses frequently arrive unprepared to answer questions, wasting the limited discovery resources of plaintiffs and their attorneys, who tend to be compensated on a contingent basis, and as such have no incentive to waste resources (unlike lawyers who bill by the hour). Since the corporate defendant frequently controls all or most of the discovery in the case, an unprepared corporate witness results in the need for more discovery (and often travel) and creates unnecessary disputes between the parties, sometimes requiring judicial involvement to resolve.

These complaints and suggestions are not new to the Advisory Committee. The Subcommittee has already noted the Advisory Committee has twice before been asked to review amendments to Rule 30(b)(6) and has twice declined to do so after it "concluded that any problems were attributable to behavior that could not be effectively addressed by rule." The current complaints and suggestions presented to the Subcommittee are eerily reminiscent of the Advisory Committee's prior assessment of Rule 30(b)(6). As stated by the Rule 30(b)(6) Subcommittee ten years ago:

> Responses indicate that lawyers who represent plaintiffs complain that named witnesses often are unprepared. Lawyers who represent defendants complain that notices are unclear and that questioning regularly extends beyond matters identified in the notice. "That's how adversaries are." We cannot hope to accomplish much by rules changes.[3]

This criticism rings as true today as it did a decade ago. Indeed, the fact that Rule 30(b)(6) has remained unchanged over several reviews may evidence its effectiveness and efficiency as a proper discovery tool and that Rule 30(b)(6), as written, strikes the correct balance of the competing interests of the parties. Nevertheless, if the Subcommittee is steadfast in the effort to amend Rule 30(b)(6), then AAJ would suggest incremental changes, particularly in light of the Subcommittee's historical rejection of these same purported concerns. In this regard, these comments include

[3] Subcommittee Report: Rule 30(b)(6), Agenda Book of the Civil Rules Advisory Committee, May 22-23, 2006, page 88, available at: http://www.uscourts.gov/sites/default/files/fr_import/CV2006-09.pdf

suggestions for improvement, as outlined in Section III, to ensure that designated witnesses are properly prepared and that 30(b)(6) depositions are properly used as part of phased discovery.

II. Opposition to Specific Suggested Amendments to Rule 30(b)(6).

AAJ is opposed to the proposed amendment suggestions as listed in the Advisory's Committee's Invitation for Comment. At a minimum, the suggested amendments will delay or complicate discovery, lead to unnecessary disputes between litigants, and require more involvement of the trial judge in pre-trial motion practice. Even more troubling, these suggested amendments would provide special advantages to corporate litigants seeking to avoid or delay legitimate discovery and will resurrect the practice of bandying. Notably, none of these suggested amendments would be incremental, and all represent a significant change to current practice.

In particular, the proposed suggestions on supplementation, contention, and objections are extremely objectionable to AAJ members because they would delay litigation, establish rules for corporate depositions that do not exist for other depositions (thereby placing corporate defendants on different footing than individuals), create further lack of clarity rather than closure of issues, and increase the likelihood of acrimony and discord in litigation. Although AAJ does not believe that any amendment to Rule 30(b)(6) is warranted, discussing the potential need for a 30(b)(6) deposition early in the litigation without discussing the specifics of the deposition, as AAJ now understands that provision based on the July 21 meeting, is a proposed amendment that AAJ could potentially support subject to wording and clarity in the corresponding comment.

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

This suggested amendment would be devastating to plaintiffs and would eliminate the purpose of Rule 30(b)(6). By allowing or requiring supplementation, this suggested amendment would extinguish the duty of corporate defendants to properly prepare a witness, ultimately reviving the practice of bandying and corporate deponents whose only answer is "I don't know." If supplementation is allowed, the "I'll get back to you" response may become the norm. Written, legalistic supplementation is not subject to the probing that an oral deposition is subjected to and will be a poor substitute for such testimony.

The utility of all depositions is based on its binding effect, and without that, there is very little reason to conduct a deposition at all. Allowing corporate defendants to alter deposition testimony inherently makes depositions non-binding and denies plaintiff's counsel practical use of the deposition, such as using deposition testimony to impeach a corporate witness at trial or using deposition testimony in a summary judgment motion. This is true not only for asymmetrical litigation but also for symmetrical litigation where Rule 30(b)(6) is also a useful tool.

Further, if they have a special right to supplement their deposition testimony, corporations would have no incentive to properly prepare their chosen witness. Instead, corporations would have every incentive to provide an unprepared and deliberately uninformed witness for a Rule 30(b)(6) deposition and merely wait until the end of discovery, after learning of all the discoverable evidence, before fully disclosing its knowledge of relevant facts or forming positions. Worse, it would facilitate altering a record upon which parties have relied throughout the course of litigation. Surely

this flies in the face of Rule 1 which aims to "secure the just, speedy, and inexpensive determination of every matter and proceeding."

Deponents already have a right under 30(e)(1)(B) to make changes in form or substance to a recording or transcript of a deposition and the reasons for making them within the 30-day time period provided in the rule. This rule permits timely changes without leaving the deposition open indefinitely, thereby rendering it useless. The proposed amendment is tantamount to inviting mischief on the part of corporate defendants and would only serve to exacerbate the problems faced by plaintiffs in obtaining meaningful information when properly using Rule 30(b)(6).

Furthermore, this suggested amendment would make the rule inherently one-sided, favoring corporate defendants. It would give corporate and other organizational litigants, at the expenses of plaintiffs, an unfair advantage in court—the ability to change their testimony without consequence, essentially a "do-over" not afforded to individual litigants. While arguments have been made that the entity deponent needs this more than the individual deponent, the opposite is more likely true. Organizational deponents are often professional testifiers whereas individuals such as plaintiffs are typically one-time litigants who are unfamiliar and uncomfortable with the deposition process. If anyone needs an opportunity for a do-over, it is the amateur, not the pro. It is probably best, however, to give no deponent a chance to re-write testimony. *Indeed, no other rule permits a party to a lawsuit to change or rewrite their prior testimony without consequence*.

The comparison of this suggested amendment to Rule 26(e)(2) is misplaced. Rule 26(e)(2) applies to the obligation of parties to supplement the material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition. This limited exception is to recognize that rare and special event when an expert witness has changed his or her opinion on a material matter.[4] This exception supports the interest of the court to recognize material facts that could be dispositive of a case and is recognized as an obligation of the parties to correct the testimony of an expert, not a right of parties to alter testimony. On the other hand, allowing corporations, as litigants, the ability to change their testimony without consequence is inequitable, serves no legitimate interest, and hinders the process of just and speedy discovery.

B. Adding a provision authorizing pre-deposition objections.

The suggestion envisions a process by which corporate litigants could raise objections upon being noticed of a Rule 30(b)(6) deposition and thereby either delay the deposition until the court rules on the objections or allow the deposition to go forward only subject to the limitations included in the objections. This would be a dramatic departure from current practice and without question will stall discovery. Undoubtedly, it will create more pre-trial motions practice and create more disputes between parties that require judicial involvement. As such, if adopted, trial judges can expect to

[4] As stated in the Advisory Committee notes to 1993 Notes to Rule 26, "to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1)."

decide many more motions to compel during discovery, and judges will be at a disadvantage because they will have to make these decisions prematurely without proper context.

This suggested amendment is also ripe for abuse, and there will be many baseless objections made merely to stall discovery. One does not need a crystal ball to predict that every 30(b)(6) deposition notice will be answered with a litany of objections, many of them boilerplate. To the extent that a court does not rule promptly, it will further stall discovery, which in most cases is managed efficiently and effectively by counsel without the need for court intervention.

Rule 30(b)(6) as written contains a more flexible streamlined approach. For example, a 30(b)(6) deposition taken at the beginning of the litigation can help the plaintiff identify which files of current and past employees contain relevant information. By identifying early in discovery which employee files or other repositories contain relevant information discovery requests can be more targeted. Allowing pre-deposition objections to this early deposition would unnecessarily stall all other discovery. As another example, in class actions, 30(b)(6) depositions are sometimes the only depositions relied upon in support of plaintiffs' motion for class certification because the discovery mechanism allows plaintiffs' counsel to identify the relevant policy documents, establish how those policies are applied, and determines whether they are applied in a uniform manner. Employment cases provide another example where early 30(b)(6) depositions can identify key issues and guide more efficient discovery, as the corporate deposition can explain the corporate structure and chain of command and identify the decision-makers responsible for the adverse employment action.

Moreover, this suggested amendment is based on a flawed assumption that the current practice of using protective orders is not appropriate to address truly abusive Rule 30(b)(6) requests. Such abuses are rare. Indeed, protective orders from Rule 30(b)(6) depositions are rarely sought. In those rare cases where a protective order is sought, there is no evidence that protective orders did not appropriately forbid or limit an abusive Rule 30(b)(6) deposition and in a timely manner.

The comparison of this suggested amendment to Rule 45 is misplaced. Rule 45 places restrictions on subpoenas of non-parties. Rule 45(d)(2)(B) allows a non-party to make objections to a subpoena and creates a procedure for deciding that objection in a timely manner. However, the purpose of this allowance for objections to a subpoena is to "avoid imposing undue burden or expense on a person subject to the subpoena." The interest in protecting a non-party from an overly burdensome subpoena is not comparable to the interest of a corporate defendant to properly prepare a witness for a 30(b)(6) deposition. Note that Rule 45 already provides this protection to non-party organizations. Extending this procedure to party organizations is unwarranted. Indeed, it encumbers the interests of the court and the requesting party in allowing for legitimate discovery, including deposition, of a corporate defendant, which may likely have exclusive control of all or most of the relevant discovery.

Remarkably, this right to raise pre-deposition objections, and thus stall discovery, will be a special, i.e. uniquely, corporate right—a discovery advantage that is not conferred to any other type of litigant. There is no justification to single out and increase the burdens of plaintiffs who litigate against corporations. In fact, it would run contrary to the purpose of the Rule 1 to "secure the just, speedy, and inexpensive determination of every action and proceeding."

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

The appropriateness of a contention question can only be decided on a case-by-case basis, and when appropriate, contention questions lower costs and result in speedy discovery. Their prohibition in 30(b)(6) will result in more pre-trial motions practice and unnecessary involvement of the trial judge whose time and resources are already limited.

A 30(b)(6) deposition is frequently the only means of discovery for a plaintiff to determine whether a corporate defendant has a factual basis for its affirmative defenses. Depending on the case and the facts, it can be fair and efficient for both parties and the court to allow requesting counsel to ask for such factual basis during a Rule 30(b)(6) deposition. Indeed, it is not uncommon for counsel to ask contention questions in depositions generally, whether from individuals or corporations, and there is no legitimate purpose to treating corporations differently from other litigants. Such questions focus the evidence and narrow the issue as well as provide a means of understanding the corporation's or organization's position on key issues. Or course, if the entity has no position, or if the question is so case-specific that the answer can only come from the litigation experts, the deponent can simply say so. But in many instances, contention questions are important and fairly assist in the development of evidence.

For example, 30(b)(6) depositions can be crucial to resolving major issues efficiently in product liability litigation because such deposition can confirm what technical documents are relevant to the alleged defect, whether those technical documents are open to multiple interpretation or changed over time, and what the company knew about the defect and when it knew. In a product case, the deponent might be asked whether the company ascribes to the engineering principle that a design danger must be designed out if that is feasible and that a warning only suffices if it is not feasible to design out danger. It is important to know the company's approach, which best comes from the company and not from its lawyers. It is also often important to probe a company's knowledge of its regulatory responsibility. For instance, in a product safety case against a van conversion company, the company may be asked whether it must crash test a converted van if it replaces the seat belt mounts. It is important to get this information from the company itself—to see whether the company understands its obligations under law—rather than from the company's lawyers, which would happen if the question is asked in interrogatory.

Certainly, this suggested prohibition will lead to more pre-trial motions practice. No definition has been proposed for what is a "contention question," and it is hard to imagine a proper definition that would not encourage years of satellite litigation. Giving corporate defendants the right to refuse any contention questions will cause disputes between the parties regarding whether or not a question was actually a contention question or not. These disputes will ultimately need to ultimately be decided by the court, once again unnecessarily involving the trial judge in discovery.

Additionally, there are evidentiary protections already in place to protect against an objectionable contention question at deposition. The attorney representing the corporate designee at a deposition can object to contention question, but the question must be answered. The corporation can then move the court to allow amendment to the answer or exclude the answer if the question was inappropriate, and the trial judge will be in the best position to make that determination. And often, the best remedy is an honest answer. If the question is whether the company contends the light was

green at the time of the accident, a legitimate answer may be that the company has hired lawyers who have investigated and hired experts to make that determination, and that the company has no position other than what those investigations and experts determine.

As with the other suggestions, this suggested amendment would create a special corporate advantage. It would forbid asking contention questions but only for corporate designated witnesses while permitting such questions for other witnesses. There is no justification for deeming contention questions unfair to corporations, but fair game for all other litigants, including most notably those with far fewer resources or access to information.

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

30(b)(6) depositions can be some of the most important, productive, and efficient ways of making relevant information available to the parties. Creating strict limits on duration and number of Rule 30(b)(6) depositions would be highly problematic to certain cases. Parties frequently agree on limits without involvement of the court, and where there is a dispute, a trial judge, familiar with the specific facts of the case, is in the best position to determine what those limits should be.

Some who have made this suggestion have wrongfully assumed that 30(b)(6) depositions are always requested towards the end of discovery. While Rule 30(b)(6) is often used by plaintiffs towards the end of discovery, it is not uncommon for plaintiff to request a 30(b)(6) deposition early in discovery to determine who specifically has control of certain information and where that information might be.[5] For instance, parties are often benefited from an early 30(b)(6) deposition on ESI to locate relevant documents with a later 30(b)(6) deposition, if needed, after document production. Preliminary 30(b)(6) deposition can be used to identify: 1) data; 2) how an organization, entity or corporation creates data; 3) how data is stored; 4) organizational policies that govern ESI; 5) the organization's retention policy; 6) the management of ESI; and 7) the most efficient method of retrieving data.[6]

The suggestion by some defense counsel to provide only one 30(b)(6) deposition is particularly troublesome. In all but the simplest litigation, more than one such deposition is required. For example, in a car defect case, an early 30(b)(6) deposition may help the parties limit and refine the scope of litigation by determining which make(s) and model year(s) are potentially involved. After the relevant documents are collected and reviewed, a later 30(b)(6) deposition can be used to explore more substantive issues of defect or negligence. Such phased discovery is generally beneficial to the parties and supported by the Advisory Committee.

Indeed, arbitrary limits would add expense and delay to discovery. If the parties believe they may be limited to only one 30(b)(6) deposition, they are forced to try to imagine, at the very beginning of the case, what all of the relevant topics for corporate testimony may be and include a laundry list of everything they believe they may need for the duration of the case at the outset. This is highly inefficient and prevents the parties from using their early discovery to instruct and focus subsequent discovery in the case. Moreover, it puts the plaintiffs in a position where they may have to take

[5] AAJ opposes any amendment that would provide for one 30(b)(6) deposition in the rule itself.
[6] Kosieradski, *30(B)(6) Deposing Corporation, Organization & the Government,* (2016) p. 219.

deposition testimony on a topic that would otherwise benefit from further documentary discovery, or that could even be rendered unnecessary in light of further discovery.

Further, a 30(b)(6) deposition is separate and distinct from a deposition of an individual. AAJ opposes the suggestion made by Lawyers for Civil Justice and others that a person can be deposed only once. A deponent representing an entity at a 30(b)(6) deposition represents the knowledge of the entity, not the knowledge of the deponent. It may be necessary to take the deposition of that person separately solely for that person's individual knowledge. Due to the total overall limit on the number of depositions as well as the expense involved, plaintiff attorneys have no incentive to waste resources on unnecessary depositions. Attorneys who work on a contingency fee basis are generally more cognizant of the need to control costs and streamline discovery than attorneys who work on an hourly rate or under a retainer agreement.

No two cases are alike, and hard and fast rules do not take into account litigation that involves two individual parties and a discreet fact set and complex litigation involving multiple organizational parties. In some cases, multiple 30(b)(6) depositions are necessary and appropriate. In many cases, no 30(b)(6) deposition is required. Setting arbitrary limits applicable to all cases, and perhaps against what may be the better judgment of the trial judge, will blindly inhibit discovery in cases where broader Rule 30(b)(6) depositions are needed to fully develop discovery of relevant facts.[7] In short, limits, if needed, are far better left to the discretion of the trial judge.

E. Judicial admissions.

AAJ has concerns that any proposed rule change regarding the effect of 30(b)(6) testimony would interfere with the development of the case law, which is developing without problems, and would be subject to interpretations that would be counterproductive and lead to extensive motions practice. In particular, no change should be made that could be used to undermine the consensus of the case law that 30(b)(6) testimony is binding on the corporation or organization. Without such binding effect, 30(b)(6) depositions could become essentially useless, and would decrease the incentive for witnesses to prepare for the deposition by locating facts within the organization. This would be a huge step in the wrong direction, cutting the legs off a one of the most important discovery provisions in the Civil Rules.

First and foremost, no district courts expressly hold that a Rule 30(b)(6) witness's statements are judicial admissions.[8] Second, AAJ disputes any assertion suggesting that this issue is "extensively litigated." AAJ has identified 114 cases since 1991 that expressly address whether a statement in a 30(b)(6) deposition is a judicial admission. In other words, of all the cases that cite Rule 30(b)(6)[9], only 1.4 percent even address the issue of whether a statement is a judicial admission. The overwhelming, vast majority of those 1.4 percent of cases recognize the general rule that 30(b)(6)

[7] Notably, in the most recent round of discovery rule amendments, the Rules Advisory Committee determined that no further limitations on number and duration of depositions were warranted.

[8] AAJ's research is consistent with the conclusion of the Memorandum from Lauren Gailey, Rules Law Clerk, to the Subcommittee (March 30, 2017) (hereinafter "Memo") ("Critically, no cases—even those barring supplemental, contradictory, or explanatory testimony, like Rainey—expressly hold that a Rule 30(b)(6) witness's statements are judicial admissions.")

[9] The authors of the Memo found that Rule 30(b)(6) has been cited in 8,300 decisions since 1991. 114 cases of the 8,300 represents roughly 1.4 percent.

witness testimony, although binding, does not amount to a judicial admission. There are a few, rare cases[10] where statements are treated like judicial admissions, while not expressly being judicial admissions.[11] In those handful of cases, trial judges only allowed such treatment for punitive reasons where a defendant engaged in extreme and unusual evasive behavior.[12]

The Invitation for Comment may be focused on the distinction between judicial as opposed to evidentiary admissions. The courts do not seem to be confused on this point, and most conclude that such testimony is an evidentiary admission (not a judicial admission) but is nonetheless "binding" as a statement of the entity. Helpful cases[13] explain that contradiction of this testimony will not always be permitted – just as the "sham affidavit" rule prevents contradiction of all sorts of testimony in some circumstances. The case law provides a common-sense, case-by-case approach that works. AAJ believes that changing the rules will be argued to mean – and found to mean by some courts – that such testimony is less "binding" to a corporation than it would be to an individual. This would unfairly favor organizational parties over individuals, would lead to more depositions of officers and employees rather than 30(b)(6) depositions, and would generally eviscerate the 30(b)(6) deposition as a tool for efficiently developing the facts.

F. 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.

As the suggestion is written, AAJ has concerns that this suggested amendment would slow-down the discovery process and lead to unnecessary disputes between the parties early in litigation. A plaintiff's attorney may know at the outset of some cases that the 30(b)(6) deposition will be necessary, often times it is not clear until later in the litigation. Even where the 30(b)(6) deposition is anticipated at the outset of the litigation, it is often not evident what the areas of inquiry will be until substantial discovery has already been completed—such as document production and answers to interrogatories.

However, during the discussion at AAJ's Annual Convention, Judge Ericksen clarified that the suggestion would be to identify Rule 30(b)(6) depositions as a topic to be raised during a Rule 26(f) conference or in a Rule 16 report to the court, insofar as they might potentially be used in the litigation, but that specifics as to topics and scope would not need to be identified at this juncture. A general discussion, without setting strict limits or requiring identification of topics, is a type of proposal that AAJ could potentially support.

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[10] *Rainey v. American Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82 (D.D.C. 1998); *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992 (E.D. La. 2000).

[11] The Memo states, "[h]owever, a closer inspection of decisions barring parties from contradicting their 30(b)(6) deponents' statements reveals that it is imprecise to characterize them as approving of the 'judicial admissions' approach. In these cases, which tend to involve unusually evasive behavior or extreme lack of preparation on the part of the corporate party, barring contradictory evidence has been used as a sanction rather than a true judicial admission."

[12] The Memo states: "Another aspect of Rainey that limits its reach is that the court strongly suggested its true purpose in barring the affidavit was punitive. See 26 F. Supp. 2d at 95 (finding employer's conduct in either designating the wrong person or failing to prepare its witness 'clearly violated Rule 30(b)(6)')."

[13] *See, e.g.*, *Rainey v. American Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82 (D.D.C. 1998); *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992 (E.D. La. 2000).

III. AAJ's Suggestions to Improve Rule 30(b)(6) Depositions.

Plaintiffs frequently litigate against corporations who control most, if not all, of the relevant evidence, and who typically have significantly more resources than an injured plaintiff. A 30(b)(6) deposition is instrumental in the legitimate discovery of relevant facts and information in exclusive control of the corporation, and it allows plaintiffs to obtain the information despite imbalance of resources. Yet, it is not uncommon for plaintiff's counsel to encounter a 30(b)(6) deponent that is unprepared or unresponsive. An unprepared witness is not just a burdensome encumbrance for the plaintiff, but also the result unnecessarily bogs-down litigation and thus impedes the expectations of the court and parties in achieving speedy discovery.

AAJ requests that the Subcommittee consider adding language to Rule 30(b)(6) to emphasize the obligation of the defendant to provide a witness who is properly prepared. To incentivize adherence to this obligation, AAJ further recommends specific sanctions be listed in the Rule language itself or in Notes, such as a specific sanction limiting the introduction of corporate witnesses at trial to only those corporate witnesses who have been deposed.

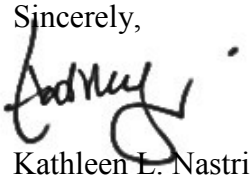
Furthermore, changes to other rules in Civil Rule 30 could enhance the proper use of a 30(b)(6) deposition as part of phased discovery. The current rules place two obstacles to such phased use of 30(b)(6) depositions. Rule 30(a)(2)(A)(ii) prohibits taking the deposition of a deponent who has already been deposed without agreement of the parties or an order of the Court. A party who wants to take an early corporate representative deposition to help narrow the issues and guide discovery thus is placed in a dilemma. If an early deposition is taken, the party may not know if a substantive deposition will be permitted later in the case once more of the facts and documents are available. The second obstacle is the one-size-fits-all deposition presumptive limit. In any case involving multiple plaintiffs or defendants, and in cases involving expert testimony, the ten-deposition limit is unworkable.

Therefore, AAJ recommends two changes to Civil Rule 30. First, AAJ recommends that Rule 30(a)(2)(A)(ii) be amended to state that it applies to deponents other than 30(b)(6) deponents. This actually may have the benefit of reducing the total number of depositions since a single 30(b)(6) deposition can obviate the need for multiple fact witness depositions, creating efficiencies for both the party taking the deposition and the organizational entity appearing for deposition. To allow 2 or 3 such depositions will often mean avoiding 5-10 individual employee or officer depositions.

Second, the ten-deposition limit found in Rule 30(a)(2)(A)(i) should be amended to allow for 10 depositions *exclusive of party and expert depositions*. This would make the rule self-scaling. The current rule is nonsensical when it makes attorneys choose between deposing parties and experts or deposing impartial fact witnesses. While these issues could be worked out in Rule 26(f) consultations between the parties, AAJ's proposed change would make the presumptive rule work in a far larger percentage of cases than under the current rule.

AAJ appreciates this opportunity to submit comments regarding Civil Rule 30(b)(6). If you have any questions or comments, please contact Sue Steinman, Senior Director of Policy and Senior Counsel, American Association for Justice, at (202) 944-2885.

Sincerely,



Kathleen L. Nastri
President
American Association for Justice