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17-CV-WWW

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Submitted via e-mail:
Rules_Comments@ao.uscourts.gov

Re: *Invitation for Comment on Possible Changes to Rule 30(b)(6)*

Dear Committee Members:

I write in response to the Advisory Committee on Civil Rules, Rule 30(b)(6) Subcommittee's Invitation for Comment on Possible Issues Regarding Rule 30(b)(6). As a practitioner who makes substantial use of Rule 30(b)(6) depositions in every case I litigate, I have a significant interest in how this rule is handled. I believe the rule has been working effectively as it is, and that no changes are needed. I have particular concern about a few of the suggested changes which I address below.

Permitting supplementation of Rule 30(b)(6) testimony: A rule change providing for supplementation of Rule 30(b)(6) testimony would substantially undermine the usefulness of the rule, as there would then be little incentive for the corporation to properly select or prepare a witness, as questions could simply be answered "I don't know," and then a strategically crafted response provided in writing. As courts have famously said, "[a] deposition is not a take home examination." *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992). The opportunity to re-open the deposition to inquire about the supplementation would not be sufficient to offset the harm done by permitting the party to re-write its testimony, and it would add substantial inefficiency to the process. It would also be grossly one-sided, as individuals deposed personally, not as corporate representatives would not have the same opportunity to supplement, and effectively re-write, their testimony.

Forbidding contention questions: It is quite common that defendants ask plaintiffs to state all the reasons they believe an employment decision was motivated by discrimination, or all the facts that support their claim to have been mis-classified as exempt under the FLSA. Thus, it once again seems quite unfair to protect only corporations testifying under Rule 30(b)(6) from such contention questions. I have found 30(b)(6) depositions addressing the bases for a defendant's claim to have acted in "good faith" or to identify what defendant contends was a legitimate, non-discriminatory reason for an employment decision to be the most effective means of discovery on these issues, and no defendant has seriously objected to such topics. This seems another proposed change that would only lessen the effectiveness of the rule.

Providing for objections: This is another area where there is really no problem with the current rule, and the suggested changes would significantly undermine the usefulness of the rule. In particular, providing that an objection would excuse compliance with the rule, absent court order, would increase the number of disputes requiring judicial intervention. Currently, it is not uncommon for a producing party to raise objections in advance of a Rule 30(b)(6) deposition, but those objections do not block the deposition from going forward. Nearly always, by the time the deposition is completed, there are no disputes remaining for a court to address. In the circumstances where there are disputes, the testimony provided in the deposition gives context which provides a sounder basis for resolving those disputes. The proposed change would inevitably lead to protracted disputes requiring court intervention, and piecemeal depositions or greater delay, as the deposition is postponed until the dispute is resolved.

The current rule is working effectively, as described by this court:

> Although there is some authority for the proposition that a 30(b)(6) notice should be stricken in part based upon the specific topics included in the notice, ***the proper operation of the Rule does not require, and indeed does not justify, a process of objection and Court intervention prior to the schedule deposition. That would provide a corporate deponent a procedural benefit that no other deponent has***. …
>
> Instead, the better procedure to follow for the proper operation of the Rule is for a corporate deponent to object to the designation topics that are believed to be improper and give notice to the requesting party of those objections, so that they can either be resolved in advance or otherwise. The requesting party has the obligation to reconsider its position, narrow the scope of the topic, or otherwise stand on its position and seek to compel additional answers if necessary, following the deposition. ***The reason that is a better procedure is that the deponent's answers to relevant questions at the deposition will have a great deal of impact upon the strength of the arguments in support of or against a motion to compel.*** The answers provided will give the Court a factual record with which to judge whether a particular topic or question asked should be compelled or not. And that forces a responding party to ensure that the witness provides as much relevant or possibly relevant information as possible given the liberal scope of discovery provided by Rule 26 to forestall the necessity for a motion to compel.

New World Network Ltd. v. M/V NORWEGIAN SEA, No. 05-22916 CIV, 2007 WL 1068124, at

*4 (S.D. Fla. Apr. 6, 2007) (emphasis added). This procedure, outlined by the court under the existing rule, is essentially what I have seen in practice in courts throughout the country. It has resulted in informal resolution of any concerns about the scope of the 30(b)(6) notice in virtually every instance. No modification of the rule would improve upon the current practice.

Modifying the application of limits on the number and duration of depositions: As noted in the invitation for comments, the Advisory Committee notes establish that each Rule 30(b)(6) deposition notice counts as one deposition, regardless of the number of witnesses the producing party chooses to designate. Any change in this rule would permit a corporate party to game the system by designating a large number of separate witnesses, leaving the opposing party no opportunity to depose other witnesses without obtaining an enlargement of the presumptive limitation. Operating in a plaintiff-side contingency practice, I have zero interest in taking unnecessary depositions, or making depositions last longer than needed. Often I do not need to use all of my side's allotted depositions, given the utility of Rule 30(b)(6). And where a defendant designates a large number of separate witnesses in response to a Rule 30(b)(6) notice, then witnesses with fewer or shorter topics may only be deposed for an hour or two. But where witnesses are designated to cover more, or more significant topics, a full day is necessary and appropriate. I have not found these issues difficult to resolve with opposing counsel, and rarely, if ever, do they require court intervention. However, if a change were made, then court intervention to adjust the number of depositions permitted, or the allocation of time among 30(b)(6) designees could be required.

In short, Rule 30(b)(6) is not broken; please do not try to fix it. It functions effectively as it currently stands.

Sincerely,

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