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Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
Email: rules_comments@ao.uscourts.gov

To Whom It May Concern:

We write in response to the request for comments on potential amendments to Federal Rule of Civil Procedure 30(b)(6). We are concerned that many of the proposed revisions would effectuate a retreat from the Rule's long-standing goals of efficiency and corporate accountability. The current Rule works well. If it is to change, the changes should promote those goals.

Our firm, Hagens Berman Sobol Shapiro LLP, represents consumers, whistleblowers, government entities, and other groups in consumer fraud, antitrust, investment fraud, securities, employment, environmental, product liability, and personal injury cases. For years, our Boston office has aggressively pursued pharmaceutical pricing litigation, helping lead the fight for more affordable prescription drugs and a more responsible pharmaceutical and medical device industry. In our pharmaceutical litigation, HBSS works with consumers, for-profit and not-for-profit health insurers, consumer organizations, state Attorneys General, third-party payors, drug wholesalers and retailers, and other purchasers. As a result, we both defend and take Rule 30(b)(6) depositions regularly.

The American civil justice system makes equals of organizations and individuals. In line with this philosophy, Rule 30(b)(6) makes no distinction between the obligation to attend and tell the truth for an organizational witness, on the one hand, and an individual deponent, on the other.

The Rule also promotes efficiency: it is an invaluable tool in discovery of business entities when no one individual holds all the facts. The Advisory Committee's Notes to the 1970 Amendment Rule 30 (which added subsection (b)(6)) reflect this interest in efficiency: the new Rule "will curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it."

We support the Subcommittee's proposal to include 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. Due to the size of the cases we litigate, we often discuss the scope of Rule 30(b)(6)

depositions with opposing counsel at an early stage. Such discussions are helpful. We propose that the Rule be amended to require the parties to confer on the number and sequencing for Rule 30(b)(6) depositions during the Rule 26(f) conference. Such conversations could include whether multiple witnesses may be designated in response to a single Rule 30(b)(6) notice with multiple topics and whether those depositions will count as one deposition or multiple. In our experience, when the parties sharpen their pencils on these issues early in the case, they save time and resources down the line. Calling for discussion of these topics at the Rule 26(f) conference will promote efficiency by teeing up any potential disagreements between the parties early.

At least four of the proposals under consideration, though, depart from one or both of the principles of equality and efficiency described above.

We believe amending the Rule to require or permit supplementation of testimony is an invitation to mischief, granting organizational witnesses license to hide the truth during the deposition and reveal it only when it is too late to be fair. Just as individual witnesses may not change their testimony without being subject to another deposition, organizational witnesses should not be permitted to walk away from unfavorable testimony by supplementing: to change the Rule to provide otherwise invites precisely the "bandying" the Rule was designed to prevent. We do not mean to suggest that an organization can never supplement its designee's testimony. But the Rule should prohibit the party from doing so unless (1) at the time of the deposition, the organization did not know, or could not have known, the information prompting its testimony's supplementation or amendment, (2) fact discovery has not yet closed, and (3) the witness may be re-called if appropriate. If a Rule 30(b)(6) notice includes financial topics, an organization's failure to speak to Steve in accounting before the deposition should not provide a basis for the organization to walk away from its testimony.

By that same token, we are wary of any changes that would reduce the effect of admissions made in Rule 30(b)(6) testimony. Under the Rule, an organization is bound to a position it takes during a Rule 30(b)(6) deposition.[1] Although Rule 30(b)(6) statements may not always be tantamount to "judicial admissions," organizations may not their disavow Rule 30(b)(6) testimony. If dissatisfied with their prior statements, organizations can only explain and

[1] *See Sabre v. First Dominion Capital, LLC*, 2001 WL 1590544, at *1 (S.D.N.Y. Dec. 12, 2001) ("A 30(b)(6) witness testifies as a representative of the entity, his answers bind the entity and he is responsible for providing all the relevant information known or reasonably available to the entity."); *Rainey v. Am. Forest and Paper Ass'n*, 26 F. Supp. 2d 82, 95 (D.D.C. 1998) (court found it proper to "to prevent consideration of the Kurtz affidavit at the summary judgment stage because it states legal and factual positions that vary materially with those taken by the corporate representatives" at their 30(b)(6) depositions); *Caraustar Indus. v. N. Ga. Converting, Inc.*, 2006 U.S. Dist. LEXIS 91829, at *20-21 (W.D.N.C. Dec. 19, 2006) ("it is well settled in the Fourth Circuit that, as a general proposition, a party may not submit an affidavit or declaration at the summary judgment stage contradicting its earlier deposition testimony," and applying the general proposition to strike a declaration offered to retract an admission made by corporate designee at 30(b)(6) deposition).

explore such admissions through cross-examination,[2] or the timely introduction of evidence that may contradict or expand its testimony. This works well. Amendments to the Rule that go farther, enabling deponents to disclaim prior admissions, would confound the purpose of Rule 30(b)(6). Again, if organizations know that they can wriggle free from Rule 30(b)(6) testimony, there will be more (not less) "bandying."

Forbidding contention questions in a Rule 30(b)(6) deposition would grant privileges to organizational witnesses that individuals have never been permitted. Jane Doe has to answer contention questions in her deposition: on what basis should Jane Doe, Inc. be relieved of that responsibility? Interrogatory answers may be carefully drafted – admittedly, even over-lawyered – but a properly-prepared witness's answer in a deposition will never be "spontaneous." If it is, the organization has failed to meet its preparation obligations. As courts have recognized, "[T]he purpose behind Rule 30(b)(6) undoubtedly is frustrated in the situation in which a corporate party produces a witness who is unable and/or unwilling to provide the necessary factual information on the entity's behalf. . . . For courts to permit litigants to disregard the responsibilities that attend the conduct of litigation would be tantamount to 'encouraging dilatory tactics.'"[3] Indeed, the Committee should strengthen and make more explicit the requirement to prepare the Rule 30(b)(6) witness, providing a remedy against a witness who answers "I don't know" in response to topics well within the scope of the Rule 30(b)(6) notice.

Finally, we strongly oppose any amendment that would, absent a court order, excuse a party's attendance from a deposition when that party lodges an objection to a Rule 30(b)(6) notice. Such a change would invite an organization to derail the entire case simply by lodging an objection to the notice. Under the Subcommittee's proposal, the change would lay the burden of obtaining a court order compelling attendance on the noticing party – the party most prejudiced by the delay. When HBSS represents organizations, we often lodge written objections to Rule 30(b)(6) notices notwithstanding the absence of an explicit provision for them in the Rules. And we defend against such objections when lodged against us. In both instances, we find advance objections are helpful: they put the opposing party on notice as to the topics on which the defending party will prepare their corporate designee and facilitate structured dialogue between the parties in advance of the deposition. But absent extraordinary circumstances, we would not use our objections as an excuse not to present our designee for examination.

* * *

[2] *See, e.g., United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996); *see also* Lisa C. Wood, Matthew E. Miller, *Serving as the Company's Voice-the 30(b)(6) Deposition*, Antitrust 92, 95 (Spring 2010).

[3] *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000) (quoting *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 611 F.2d 32, 35 (3d Cir. 1979)).

We thank the Subcommittee for the opportunity to provide these comments.

Very truly yours,

/s/ Thomas Sobol
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