18-CV-K

COMMENT
to the

ADVISORY COMMITTEE ON CIVIL RULES
and its
RULE 30(b)(6) SUBCOMMITTEE

A STEP IN THE WRONG DIRECTION: INCLUDING "THE IDENTIFICATION OF EACH PERSON WHO WILL TESTIFY" IN THE PROPOSED 30(b)(6) CONFERENCE UNDERMINES THE PURPOSE OF THE AMENDMENT

April 6, 2018

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") and its Rule 30(b)(6) Subcommittee ("Subcommittee").

INTRODUCTION

The portion of the Subcommittee's draft amendment to Rule 30(b)(6)[2] requiring a good faith conference about "the number and description of the matters for examination" makes sense. It would help address the frequent lack of mutual understanding about a deposition's subject matters that often results in disputes about inadequately defined topics[3] and witnesses

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. Although LCJ's corporate members are often defendants, they are plaintiffs as well. They not only respond to many discovery requests, they also seek discovery. They receive many 30(b)(6) notices but also, on occasion, serve them and expect meaningful compliance. LCJ wants Rule 30(b)(6), like the rest of the FRCP, to be fair and efficient for everyone, regardless of their position in any particular lawsuit.

[2] Advisory Committee on Civil Rules, *Agenda Materials, Philadelphia, PA, April 10, 2018*, Report of the Rule 30(b)(6) Subcommittee, at 134, [hereinafter Agenda Materials] available at http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf.

[3] *See, e.g., New Jersey Mfrs. Ins. Grp. v. Electrolux Home Prod., Inc.*, No. CIV. 10-1597, 2013 WL 1750019, at *3 (D.N.J. Apr. 23, 2013) (duty to prepare a witness is "limited to information called for by the deposition notice"); *E.E.O.C. v. Freeman*, 288 F.R.D. 92, 99 (D. Md. 2012) (questions beyond scope do not bind the company at all); *State Farm Mut. Auto. Ins. Co. v. New HorizonT, Inc,*, 250 F.R.D. 203, 216 (E.D. Pa. 2008) ("[I]f a Rule 30(b)(6) witness is asked a question concerning a subject that was not noticed for deposition . . . the witness need not answer the question."); *King v. Pratt & Whitney, a Div. of United Techs. Corp.*, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (if the

insufficiently prepared to address those topics.[4] Unfortunately, however, including the "identification of each person who will testify" as a discussion topic in the required conference would undermine any potential benefit from the rule change by establishing a new and unrealistic discovery burden.

I. REQUIRING THE 30(b)(6) CONFERENCE TO INCLUDE THE IDENTITY OF WITNESSES WOULD CREATE A NEW AND IMPOSSIBLE DISCOVERY OBLIGATION.

The phrase "the identity of each person who will testify,"[5] would impose a *new* discovery obligation. Courts have not previously interpreted Rule 30(b)(6) to require disclosure of witness names in advance of the deposition.[6] The Subcommittee's draft directing the parties to confer about the identity of witnesses could be read to suggest that the noticing party would have standing to insist on giving input or even to resist the responding party's decision about who will testify. But Rule 30(b)(6) gives complete discretion and responsibility for determining the identity of organization representatives to the party who receives the notice.[7] A party who wants to depose a particular individual already has a mechanism for seeking such a deposition, but not

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examining party asks questions outside the scope of the matters described in the notice and if the deponent does not know the answer to questions outside the scope of the notice that is the examining party's problem).

[4] *See, e.g., Clapper v. Am. Realty Inv'rs, Inc.*, No. 3:14-CV-2970-D (N.D. Tex. Nov. 9, 2016) (requiring a second deposition, at the deponent company's expense, where the deponent was unfamiliar with several areas of inquiry); *Wausau Underwriters Ins. Co.* 310 F.R.D. 683, 687 (S.D. Fla. 2015) (barring a company from testifying at trial on any matters on which the company's selected deponent had been unable or unwilling to testify); *Martin Cty. Coal Corp. v. Universal Underwriters Ins. Servs., Inc.*, No. 08-93-ART, 2010 WL 4629761, at *12 (E.D. Ky. Nov. 8, 2010) (threatening sanctions where a deponent was "unprepared"); *State Farm*, 250 F.R.D. at 217 (compelling additional testimony and granting monetary sanctions where a company failed to adequately prepare its designated representative for deposition).

[5] Agenda Materials at 116-17.

[6] *See, e.g., Roca Labs, Inc. v. Consumer Opinion Corp.*, No. 8:14-CV-2096-T-33EAJ, 2015 WL 12844307, at *2 (M.D.Fla. May 29, 2015)(denying motion to compel identity of witnesses and stating "the identity of Defendants' corporate representatives is not relevant and Defendants are not required to identify their Rule 30(b)(6) witnesses prior to deposition."); *Klorczyk v. Sears, Roebuck & Co*., Civ. No. 3:13CV257 (JAM), 2015 WL 1600299, at *5 (D.Conn. Apr. 9, 2015)("the Court will not require Sears to disclose the name(s) or resume(s) of its 30(b)(6) witness."); *Cruz v. Durbin*, No. 2:11-CV-342-LDG-VCF, 2014 WL 5364068, at *8 (D.Nev. Oct. 20, 2014)("the Rule 30(b)(6) deponent's name is irrelevant. Rule 30(b)(6) deponent[s] testify on behalf of the organization. *See* FED.R.CIV.P. 30(b)(6). Therefore, the court denies Cruz's motion to compel with regard to the identify of Wabash's Rule 30(b)(6) deponent because it seeks irrelevant information.").

[7] *See, e.g., Quilez-Velar v. Ox Bodies, Inc*., Civ. No. 12-1780(GAG/SCC), 2014 WL 12725818, at *1 (D.P.R. Jan. 3, 2014)("the noticed corporation alone determines the individuals who will testify on those subjects. What the discovering party simply cannot do is require that a specific individual respond to a Rule 30(b)(6) notice."); *Colwell v. Rite Aid Corp*., No. 3:07cv502, 2008 WL 11336789, at *1 (M.D. Penn. Jan. 24, 2008)("Nothing in the rule indicates that the party seeking the deposition can determine the identity of the person to be deposed. "); *Booker v. Massachusetts Dept. of Public Health*, 246 F.R.D 387, 389 (D.Mass. 2007)("Plaintiff may not impose his belief on Defendants as to whom to designate as a 30(B)(6) witness."). Leading commentators agree that the party serving the Rule 30(b)(6) deposition notice has no basis for demanding any role in the selection of witnesses. *See* 8A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2103 (3d ed. 2013) ("[T]he party seeking discovery under [Rule 30(b)(6)] is not permitted to insist that it choose a specific person to testify[.]"); 7 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 30.25[3](3d ed.2013) ("It is ultimately up to the organization to choose the Rule 30(b)(6) deponent, and the party requesting the deposition generally has no right to assert a preference if the designee is sufficiently knowledgeable on the subject matter.").

via Rule 30(b)(6), which requires an organization to speak through its chosen representative. It is strictly the prerogative of the organization to select its representative. The identity of the representative is not germane to a Rule 30(b)(6) deposition so long as the witness tendered is prepared to answer questions regarding the topic at hand.[8]

Additionally, the mandatory conference language will almost certainly give rise to an expectation that recipients must disclose the witness name(s) *during the same meet-and-confer session* in which the "number and description of the matters for examination" are discussed. This timing would place responding parties in an impossible situation by mandating disclosure of witness names on the spot, without the opportunity for consideration before determining who will act as the entity's representative. It seems obvious that the notice recipient cannot provide witness names immediately upon hearing the description of the topics, so the language of Rule 30(b)(6) should not create that expectation. The Subcommittee seems to recognize this problem, which was discussed on the January 19, 2018, conference call:[9]

> True, the rule only says that the organization must "confer in good faith," but *parties issuing such notices will take the position that the rule commands the responding organization to identify the person or persons who will testify during the conference and also specify which person will address which matter. The reality is that may sometimes be asking too much*. "If it's just one person, that's easy. But what if I plan to designate three people to testify for my client. I may not be comfortable deciding which witness will address which topics until shortly before the deposition occurs." (Emphasis added.)

Accordingly, the phrase "and the identity of each person who will testify" should be deleted from the proposed amendment. It will not lead to better understanding, and it will almost certainly interfere with and distract from the important discussion about the parameters of the deposition topics.

II. THE COMMITTEE SHOULD INCLUDE THE POSSIBLE RULE 26(f) AMENDMENT IN THE PACKAGE FOR PUBLICATION AND PUBLIC COMMENT.

If the Committee recommends a proposed Rule 30(b)(6) amendment to the Standing Committee for publication and public comment, it should include the Subcommittee's draft Rule 26(f) approach with it. The Subcommittee is reportedly uncertain whether mentioning Rule 30(b)(6) in Rule 26(f) would be beneficial or harmful.[10] But the Rule 26(f) approach would be consistent with the spirit of the 2015 FRCP amendments because it would invite early judicial case management when appropriate. Although it is true that Rule 30(b)(6) depositions may occur at different points in different cases, or not at all, it is also beyond dispute that they are an important component of many discovery plans. Public comment on whether mentioning Rule 30(b)(6) depositions in Rule 26(f) would be helpful or harmful will clarify the issues and provide the Committee with flexibility as to whether to adopt that approach.

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[8] *See, e.g., Roca Labs*, 2015 WL 12844307, at *2 ("the identity of Defendants' corporate representatives is not relevant"); *Cruz*, 2014 WL 5364068, at *8 ("the Rule 30(b)(6) deponent's name is irrelevant.").

[9] Agenda Materials at 129-30.

[10] Agenda Materials at 118.

CONCLUSION

Rule 30(b)(6) badly needs reform.[11] Although the Subcommittee's proposal holds the promise of encouraging meaningful communication prior to depositions, the phrase "the identity of each person who will testify" would defeat that promise by establishing a new burden and creating unrealistic expectations. If that language is deleted, the Subcommittee proposal would be worthy of the Standing Committee's consideration, as would the draft amendment adding a reference to 30(b)(6) in Rule 26(f).

[11] For a discussion of ways to improve Rule 30(b)(6), *see* Lawyers for Civil Justice, "*Advantageous to Both Sides": Reforming the Rule 30(b)(6) Process to Improve Fairness and Efficiency for All Parties* (July 5, 2017), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_response_to_invitation_for_comment_on_rule_30_b__6__7-5-17.pdf; Lawyers for Civil Justice, *Not Up To the Task: Rule 30(b)(6) and the Need for Amendments that Facilitate Cooperation, Case Management and Proportionality* 6-8 (Dec. 21, 2016), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_30_b__6__12-21-2016.pdf, and Lawyers for Civil Justice, "*Give Them Something to Talk About: Drafting a Rule 30(b)(6) Consultation Requirement with Sufficient Parameters to Ensure Meaningful Results* 2-3 (December 15, 2017), http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_comment_on_30_b__6__consultation_requirement_final_12-15-17.pdf.