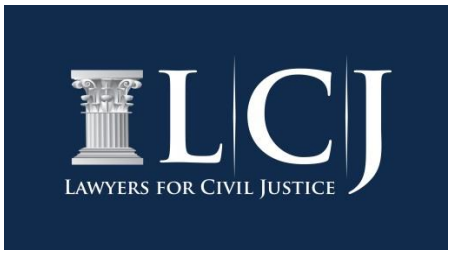

COMMENT
to the

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

THE PROPOSED RULE 30(b)(6) AMENDMENT SHOULD NOT BE PUBLISHED WITH THE RADICAL MANDATE THAT AN ORGANIZATION "MUST CONFER" ABOUT THE IDENTITY OF WITNESSES WHO WILL TESTIFY ON ITS BEHALF

May 18, 2018

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Committee on Rules of Practice and Procedure ("Standing Committee").

INTRODUCTION

The Civil Rules Advisory Committee ("Advisory Committee") proposes to amend Rule 30(b)(6) for the principal purpose of assisting counsel in resolving the frequent back-and-forth disputes[2]

[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] Such disputes frequently manifest themselves in motions in which the noticing party claims the witness was unprepared to address the topics set forth in the notice, while the responding party asserts that the questions raised during the deposition exceeded the scope of the announced topics. Such disputes suggest a lack of mutual understanding of the topics. For examples of cases addressing such disputes arising from the parties' inconsistent expectations about Rule 30(b)(6) topics, *compare New Jersey Mfrs. Insurance 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"); *State Farm*, 250 F.R.D. at 216 ("If 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 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) *with 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*

concerning "overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses."[3] After considering a number of ideas for reforming practice under the rule,[4] the Advisory Committee settled on a meet-and-confer approach that requires a good-faith conference about "the number and description of the matters for examination."[5] This approach holds some promise of promoting cooperation and helping lawyers gain a mutual understanding about a deposition's intended subject matters, and, therefore, the appropriate scope of witness preparation. Unfortunately, however, the Advisory Committee has also added a novel and problematic provision directing that organizations "must confer" regarding "the identity of each person who will testify."[6] Such a requirement would radically and inappropriately depart from the well-settled principle that it is the organization's sole prerogative to name the witness who will speak on its behalf. Even if it is not the Advisory Committee's intent to provide noticing parties input in selecting the witnesses, the proposal suggests otherwise and would result in more discovery disputes, not fewer.[7] Including this provision in the proposed amendment for public comment would elicit an overwhelming reaction from the bar, defeating the Advisory Committee's goal of obtaining useful input on the broader question of whether Rule 30(b)(6) should include a mandatory conference about "the number and description of the matters for examination." The Standing Committee should remove "the identity of each person who will testify" from the proposed amendment prior to any decision on publication.

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).

[3] Advisory Committee on Civil Rules, *Agenda Materials, Philadelphia, PA, April 10, 2018*, Report of the Rule 30(b)(6) Subcommittee, at 117, [hereinafter Agenda Materials] available at http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf.

[4] 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.

[5] Agenda Materials at 116-17.

[6] *Agenda Materials* at 117.

[7] An Advisory Committee member made a similar observation prior to the Advisory Committee's non-unanimous vote to recommend the proposal for consideration by the Standing Committee.

I. MANDATING THAT ORGANIZATIONS "MUST CONFER" ABOUT THEIR CHOICE OF RULE 30(b)(6) WITNESSES WOULD CREATE A NEW DISCOVERY REQUIREMENT THAT IS ANTETHETICAL TO EXISTING CASE LAW AND THE PRINCIPLE OF THE RULE.

Rule 30(b)(6) requires "the named organization" to designate one or more persons "to testify on its behalf."[8] Because the Rule 30(b)(6) deponent speaks for the organization, the organization has complete discretion and responsibility for determining the identity of its representatives.[9] The ABA Section of Litigation Federal Practice Task Force agrees: "Since the organization will be bound by the witness's testimony, it should retain maximum flexibility as to who it may choose to designate."[10] The party serving the Rule 30(b)(6) deposition notice has no basis for demanding any role in the selection of witnesses.[11] As one court put it, Rule 30(b)(6) "does not permit the plaintiff to designate a deponent to speak for the corporate defendants [and] the plaintiff's attempt to do so is not appropriate."[12] The organization's choice "will not be disturbed as long as the witness can testify competently."[13] In fact, courts have widely held that, because the witness is not speaking to his or her personal knowledge, the organization need not disclose the name of the witness in advance of a Rule 30(b)(6) deposition[14] because the identity

---

[8] FED. R. CIV. P. 30(b)(6); *Resolution Tr. Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993) ("[Rule 30(b)(6)] places the burden of identifying responsive witnesses for a corporation on the corporation").

[9] *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.").

[10] ABA Section of Litigation Federal Practice Task Force Report on Rule 30(b)(6) Depositions of Organizations 4 (Nov. 23, 2015) (*attached to* Letter from Koji Fukumura et al. to the Hon. Judge D. Bates (Oct. 13, 2017) available at http://www.uscourts.gov/sites/default/files/17-CV-DDDDDD-Suggestion_Koji_Fukumura_0.pdf).

[11] *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.").

[12] *Dillman v. Indiana Ins. Co.*, No. 3:04-CV-576-S, 2007 WL 437730, at *1 (W.D. Ky. Feb. 1, 2007). *See also Cleveland v. Palmby*, 75 F.R.D. 654, 657 (W.D. Okla. 1977) ("[Rule 30(b)(6)] does not provide that a party can specifically name an employee of an organization and then require the organization to designate such employee as a witness to testify on behalf of the organization").

[13] *See, e.g., Thermolife Int'l, LLC v. Vital Pharm., Inc.*, No. 14-61864-CIV-ZLOCH, 2015 WL 11197783, at *1 (S.D. Fla. Oct. 5, 2015); *see also Poseidon Oil Pipeline Co., v. Transocean Sedco Forex, Inc.*, No. 00-2154, 2002 WL 1919797, at *3 (E.D. La. Aug. 20, 2002) ("[organization] is correct that [noticing party] cannot compel it to name a specific person").

[14] *Id. See also 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.");

of the witness is "irrelevant."[15] A party who wants to depose a particular individual already has separate mechanisms for seeking such a deposition.[16]

The Advisory Committee's proposed amendment mandating conferral about "the identity of each person who will testify" [17] will upend these well-settled principles by seeming to provide noticing parties standing to participate in the decision about who will testify, and to resist the organization's decision if the noticing party would prefer a different witness. The language will exacerbate, not remedy, the contentious nature of many Rule 30(b)(6) depositions. Moreover, if not removed from the proposed amendment prior to publication, this provision is sure to draw such overwhelming attention from the bar that it will compromise the Advisory Committee's ability to get useful reaction to the more salient question of whether a good-faith conference about "the number and description of the matters for examination" would assist counsel in avoiding or resolving disputes about "overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses." The Standing Committee should remove this provision from the proposed amendment.

II. DEFINING THE CONFERENCE AS "CONTINUING IF NECESSARY" DOES NOT REMEDY THE COMPLICATIONS CAUSED BY CREATING AN OBLIGATION TO CONFER ABOUT THE IDENTITY OF WITNESSES.

During its April meeting, the Advisory Committee added timing language to the draft Rule 30(b)(6) amendment defining the obligation to confer as "continuing if necessary." This timing language was intended to facilitate the mandate to confer about witness identity because, without it, the proposal would give rise to an expectation that conferral about witness identity would occur during the same meet-and-confer session in which the "number and description of the matters for examination" are discussed. Obviously, the organization cannot provide witness names on the spot, immediately upon learning the description of the topics. A responding organization often needs time to determine appropriate and available witnesses, and identifying such witnesses well in advance of an upcoming deposition can be difficult or even impossible. To address this issue, the Advisory Committee entertained several ideas of language that would define the obligation to confer as ongoing, and quickly adopted to the "continuing if necessary" construction. But that language does not solve the many problems that would follow from a mandate to confer about "the identity of each person who will testify," as discussed above.

---

[15] *See, e.g., 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.").

[16] FED. R. CIV. P. 30(a) & 30(b)(1); *Lizana v. State Farm Fire & Cas. Co.*, No. CIV.A.108CV501LTSMTP, 2010 WL 445658, at *2 (S.D. Miss. Feb. 1, 2010).

[17] Agenda Materials at 116-17.

CONCLUSION

Although the Advisory Committee's proposed meet-and-confer amendment to Rule 30(b)(6) holds some promise to help lawyers reach common understanding about "the number and description of the matters for examination," requiring the conference to include "the identity of each person who will testify" would instead exacerbate an already acrimonious process by up-ending well-established law. The Standing Committee should not publish the proposal as-is because doing so will thwart rather than facilitate the Advisory Committee's goal of obtaining useful input from the bar as to whether Rule 30(b)(6) should require a conference about the substance of the deposition. Instead, the Standing Committee should remove the mandate to confer about "the identity of each person who will testify" from the proposed amendment prior to any decision about publication for public comment.