Cooley

18-CV-N

Koji F. Fukumura
+1 858 550 6008
kfukumura@cooley.com

VIA EMAIL AND US MAIL

May 24, 2018

Honorable David G. Campbell
U.S. District Court, District of Arizona
Sandra Day O'Connor U.S. Courthouse
401 W. Washington Street, SPC 58
Phoenix, AZ 85003

Re: Rule 30(b)(6)

Dear Judge Campbell:

We write to you in your capacity as Chair of the Standing Committee on Rules of Practice and Procedure of the United States Judicial Conference to address changes to Fed. R. Civ. P. 30(b)(6) proposed by the Advisory Committee on Court Rules.

As an initial matter, we greatly appreciate the fact that the Advisory Committee decided to review Rule 30(b)(6) at the request of the ABA Section of Litigation's Federal Practice Task Force based upon the Task Force's Report of November 23, 2015, as well as other requests noted by the Committee. While we are disappointed that the proposals emanating from the Advisory Committee did not address more of the issues we highlighted in the Task Force Report, we will reserve additional comments for the formal comment period after publication of a specific proposed amended rule. We write now, however, to raise two modest proposals we hope the Standing Committee will incorporate prior to publication of the Advisory Committee's proposed amended rule.

First, we focus on the following language that we understand is being proposed regarding requiring parties to meet and confer before taking a Rule 30(b)(6) deposition:

> Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person who will testify.

We suggest that the following, in words or substance, be added:

> If the parties cannot resolve material disagreements, they are encouraged to request a conference with the court to obtain an early resolution of the matters.

At present, if issues emanating from the service of notices or subpoenas for Rule 30(b)(6) depositions of organizations cannot be resolved prior to the deposition, the only recognized course is for the responding organization to move for a protective order, or for the noticing party to move to compel additional testimony after an inadequate deposition, both of which are often expensive for the parties and time-consuming for all, including the Court. Consistent with rule changes encouraging more informal practices for resolving discovery disputes, we believe a more efficient mechanism for resolving these disputes should be available. We endorse early court conferences on discovery disputes, and Rule 30(b)(6) disputes are no different. It will of course be up to the individual judge or magistrate judge to decide how to handle requests for conferences. Some may have a short call or brief in-person conference, preceded by, or in lieu of, short letters, or handle the requests in a different manner.

Moreover, the availability of early court intervention without the need for formal motion practice is likely salutary in resolving, or at least narrowing, the disputes. Lawyers are plainly more reasonable when they understand they will need to defend their positions orally, face-to-face to the court. Pre-deposition involvement of a court to address issues, such as the number of topics that may be requested, selection of particular witnesses, or the number of witnesses to offer, not only is consistent with the objectives of Rule 1, but also better enables lawyers to push back on possible unreasonable demands of both adversaries and even clients. This informal approach is far superior to formal motions for protection or enforcement, with the attendant expense and delay.

Second, we seek the resolution of what we perceive as an inconsistency in the Rule Notes. We previously identified this point in the Task Force Report, dated November 23, 2015, at 7, but the point may not have been addressed due to the volume of comments received by the Committee. The Note states a Rule 30(b)(6) deposition counts as a single deposition but, if multiple witnesses are identified, each witness may be deposed for seven hours. We urge that this approach carries unintended consequences. An organization is disincentivized to produce more than one witness, even when multiple witnesses with knowledge in different areas might be more appropriate. By designating multiple witnesses, organizations subject themselves to multiple days of depositions, when the organization could limit the deposition to a single day by educating a person without any independent knowledge on all subjects. We submit a person with second-hand information is often less knowledgeable than more than one witness with first-hand knowledge.

Instead, we propose a practical approach based upon the time actually expended. If multiple witnesses can cover the subjects identified in a single seven-hour day, the deposition should count as one deposition. If, on the other hand, it is necessary to exceed seven hours in a single day to complete the number of subjects identified, regardless of the number of witnesses, each seven hours should be treated as a separate deposition for purposes of the ten-deposition limit, or any other limits as may be set by the Court.

We hope the Standing Committee will find these two modest suggestions persuasive for the rule revision process.

Respectfully yours,

KOJI F. FUKUMURA*
PALMER G. VANCE II*
BARBARA J. DAWSON*
JAMES A. REEDER, JR.*
LAURENCE F. PULGRAM*
STEVEN A. WEISS*
JEFFREY J. GREENBAUM*
GREGORY R. HANTHORN*
IRWIN H. WARREN*
WILLIAM T. HANGLEY*
MICHELE D. HANGLEY*
GEORGE KRYDER*
TRACEY SALMON SMITH*

* The signers are present, past and upcoming Chairs of the ABA Section of Litigation, the current co-chairs and members of the ABA Section of Litigation Federal Practice Task Force, and the Section Liaison to the Advisory Committee on Civil Rules. As required by ABA protocol, we offer these comments only in our individual capacities. Additionally, the views expressed in this letter are solely our own and may not reflect the views of our respective law firms.