June 7, 2018

18-CV-P

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Comment on Proposed Amendment to Rule 30(b)(6)

Dear Committee Members:

I write to respectfully urge you not to publish the proposed amendment to Rule 30(b)(6) stating that a corporation or other organization "must confer" about the "identity of each person who will testify" on its behalf. Although designed to "avoid unnecessary burdens," the amendment would likely produce the exact opposite result.

As a former law professor and law school dean of the University of Cincinnati College of Law, who maintains an affiliation as an adjunct professor of law, I have long had an interest in the development of rules of civil procedure. This interest goes back to my very first law review article, published in 1968 by the University of Cincinnati Law Review, which analyzed the proposed Federal Rules of Evidence. I have since entered private practice where I currently co-chair the Public Policy Group of the law firm of Shook, Hardy & Bacon L.L.P. I am submitting this comment in my individual capacity and on my firm's behalf, as my experiences both as an academic and practitioner inform the significant concerns expressed.

The basic objective of the proposed Rule 30(b)(6) amendment appears sound. Requiring parties to meet and confer in "good faith" when a party seeks to depose a corporation or other organization has the potential to improve communication among the parties, promote greater fairness with respect to the scope of a deposition, and facilitate the selection of the most appropriate witness to testify. As the Advisory Committee on Civil Rules (Advisory Committee) stated in its proposed draft note supporting the Rule 30(b)(6) amendment, a good faith conference will likely alleviate some specific "problems" that have emerged regarding Rule 30(b)(6) practice, "reduce the difficulty of identifying the right person to testify and the materials needed to prepare that person," and "avoid unnecessary burdens." Each of the goals, however, can be accomplished by the portion of the proposed amendment stating that the parties "must confer in good faith about the number and description of the matters for examination."

The portion of the proposed amendment requiring the parties to confer in good faith about "the identity of each person who will testify," in contrast, appears both unnecessary and problematic. This requirement would invite unfair and unprecedented participation by opposing counsel in an organization's 30(b)(6) witness selection where current law is well-established that the organization has complete and unfettered discretion in that selection. Opposing counsel will likely contend that the Rule 30(b)(6) amendment affords them some measure of input as to which person within an organization should be designated to sit for a deposition. This argument, if

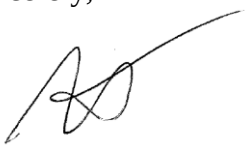
accepted by courts, would undermine an organization's discretion and flexibility in witness selection, radically changing existing law.

Relatedly, the proposed amendment would exacerbate disagreements among opposing counsel about witness selection. If the identity of a witness must be disclosed by an organization at a required meet-and-confer, opposing counsel will be incentivized to use this information to gain litigation advantages. For example, opposing counsel may object to proffered witnesses on grounds unrelated to their qualifications, such as a witness known from other cases to connect well with a jury.

In addition, the proposed amendment would place an unfair burden on an organization to determine at a meet-and-confer when matters for examination in a 30(b)(6) deposition are initially raised and discussed the most appropriate person to testify without an opportunity to fully vet that selection. This concern is also not resolved by the Advisory Committee's recent addition of language stating that the identification requirement may be satisfied on a "continuing as necessary" basis because any perceived delay in an organization's witness identification could be subject to challenge by opposing counsel as violating the amendment's "good faith" requirement.

At a minimum, each of these stated concerns will give rise to costly new and protracted litigation if the Advisory Committee's proposed amendment is accepted. This Committee should recognize the highly controversial nature of requiring corporate litigants to confer about the identify of each witness who will testify on their behalf and reject any amendment which threatens to so transform and stain Rule 30(b)(6), and overshadow potential positive aspects of the Rule's amendment deserving of further consideration. Accordingly, I respectfully urge the Committee not to publish the draft amendment.

Sincerely,



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