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COMMENT to the ADVISORY COMMITTEE ON CIVIL RULES and its RULE 30(b)(6) SUBCOMMITTEE on behalf of KENNETH J. REILLY, ESQ.

Kenneth J. Reilly, Esq.,[1] of Shook, Hardy & Bacon LLP respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") and its Rule 30(b)(6) Subcommittee ("Subcommittee") on his behalf and on behalf of his clients.

The Federal Rules of Civil Procedure allow a party seeking information from a corporate entity to serve a notice of deposition requiring that the corporation designate an individual to testify on the corporation's behalf in a deposition on certain topics.[2] Under the Federal Rules, a party may subpoena and/or notice the deposition of a corporation through a "30(b)(6) deposition." Preparing for a Rule 30(b)(6) deposition involves many strategic decisions with great import, including but not limited to, decisions about the subject matter, the scope of questioning, the number of topics, the number of witnesses, the identity of witnesses, the duration, the location, and any potential objections to these issues. As a result, a 30(b)(6) deposition is a vital component of a party's discovery plan, and it is no surprise that these many decisions preceding the deposition itself invite litigation. In its current form, Rule 30(b)(6) does not require that parties meet and confer about the number or substance of topics for deposition or the identity of 30(b)(6) witnesses.

There should be transparency and fairness in practice under Rule 30(b)(6) and there are certain benefits that may result from the draft amendment to 30(b)(6) requiring a good faith conference between parties prior to a 30(b)(6) deposition. In fact, the portion of the Subcommittee's draft amendment to Rule 30(b)(6) requiring a good faith conference about "the number and description of the matters for examination" is progressive and may be widely supported by corporate litigants. Requiring the party seeking to take the 30(b)(6) deposition to identify topics for examination at a meet-and-confer in advance of the deposition will greatly streamline the process for corporate litigants to identify the most qualified and appropriate 30(b)(6) witness from within the corporation. It will also help thwart needless and costly litigation over the misunderstanding and number of topics for examination.

I, however, strongly object to the portion of the draft amendment to Rule 30(b)(6) which requires "identification of each person who will testify" as a discussion topic during the good faith conference. Adoption of such a requirement invites mischief, opens the door to error in the discovery process, and improperly imposes an affirmative discovery

[1] Mr. Reilly has practiced law for forty-five years and is nationally known for serving as lead litigation counsel for *Fortune* 500 corporations and his defense of class actions. He is a Fellow of the American College of Trial Lawyers as well as a member of the American Board of Trial Advocates. Mr. Reilly provides global legal representation across a comprehensive and diverse range of industry and practice areas. Among his clients are large, complex, and multi-faceted corporations engaged in litigation across the United States. As a preeminent trial lawyer representing significant corporate clients, Mr. Reilly closely follows and has an invested interest in the reform of the Federal Rules of Civil Procedure, including Rule 30(b)(6), because of the implications any change to the rules can have for his clients.

[2] *See* FED. R. CIV. P. 30(b)(6).

obligation—not previously in existence—on corporate litigants. Others who have expressed their views on the draft amendment in similar comments share the same concerns outlined in this Comment.

As a trial lawyer, I have vast experience with 30(b)(6) deposition practice in high-stakes cases defending corporate litigants. I have received Rule 30(b)(6) deposition notices on behalf of my clients, and participated in the preparation for, litigation over, and defense of 30(b)(6) depositions. Based on that experience, my first concern with the draft amendment is that certain opposing counsel will attempt to interpret the problematic phrase "identification of each person who will testify" to mean that the party seeking to take the 30(b)(6) deposition has standing to provide input on who the corporate litigant should designate as a 30(b)(6) witness. For example, should the parties' efforts at this newly required meet-and-confer fail because the noticing party disagrees with the corporate litigant's choice of witness, litigation will certainly ensue. I have litigated against counsel who will use this opportunity to litigate over witness choice and demand that the court give some sort of credence and/or deference to the noticing party's position on who the appropriate 30(b)(6) witness should be. There are counsel who will attempt to manipulate how a corporate litigant selects its 30(b)(6) witness by arguing to the court that the draft amendment, if adopted, means that the noticing party is entitled to provide equal input on witness choice. This type of improper argument will open the door for courts to take the bait and allow a noticing party meaningful participation in the witness choice process. This is precisely why there are grave concerns over the draft amendment; it invites mischief and too much room for error by the noticing party and the court.

It is well established that the noticing party has no right to dictate who a corporate litigant's 30(b)(6) witness should be. The operation of Rule 30(b)(6) is clear: the corporate litigant has complete and unfettered discretion and responsibility for determining the identity of a 30(b)(6) witness.[3] Rule 30(b)(6) is a mechanism by which a corporate litigant can speak through its chosen representative. All that is required under the Rule is that the

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[3] *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."); 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.").

corporate litigant choose a witness who is prepared to answer the noticing party's questions regarding the chosen topics. This is precisely why there is support for the language of the draft amendment requiring a good faith conference over the topics to be addressed at a 30(b)(6) deposition. It will afford the corporate litigant greater opportunity to designate the most qualified representative of the corporation to sit for the 30(b)(6) deposition.

This leads into my second concern. The language requiring the corporate litigant to "identif[y] . . . each person who will testify" imposes a new, affirmative discovery obligation. This language gives rise to an expectation that corporate litigants will be required to disclose the 30(b)(6) witness name(s) during the same good faith conference at which the parties discuss the "number and description of the matters for examination." This timing is impossible. Corporate litigants are entitled to know the "matters for examination" prior to ascertaining who will act as the corporation's representative. Corporate litigants should not be forced to disclose witness names on the spot with no opportunity for inquiry and consideration. It is imperative that corporate litigants be comfortable and confident in a witness choice. The draft language of Rule 30(b)(6) unjustifiably and unreasonably creates an unprecedented expectation.

As other commenters who share these concerns have noted, the Subcommittee recognizes this problem. It was discussed on the January 19, 2018, conference call:

> 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.)

However, even when designating only one person, it is not only unreasonably difficult, but also unfairly prejudicial for corporate litigants to identify a witness choice at a good faith conference where "matters for examination" are being meaningfully discussed amongst the parties for the first time. Timing is imperative and the cart cannot go before the horse; witness choice must come after discussion and determination of "matters for examination."

While I recognize and applaud the Subcommittee's efforts to tackle the much needed Rule 30(b)(6) reform, the phrase "the identity of each person who will testify" provides no meaningful reform and instead invites mischief, opens the door to error in the discovery process, and improperly imposes an affirmative discovery obligation on corporate litigants.

Accordingly, I request that the Subcommittee reconsider and delete the phrase from the draft amendment "and the identity of each person who will testify."

Respectfully submitted,

Kenneth J. Reilly

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