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Changes to Rule 30(b)(6)
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To Whom It May Concern:

I write to address potential changes to Rule 30(b)(6) of the Federal Rules of Civil Procedure. In general, the changes to the Rule listed in the Rule 30(b)(6) Subcommittee's May 1, 2017 Invitation for Comment slant the discovery process in favor of corporate defendants. Accordingly, the Subcommittee should reject those changes.

Rule 30(b)(6) provides a powerful tool to an individual who is litigating against a corporation, especially where the litigation focuses on the corporation's conduct. In such cases, the corporation frequently possesses much—if not nearly all—of the salient information needed to prove the claim. Rule 30(b)(6) was written to stop abusive discovery tactics by corporate parties. Committee Note to 1970 Amendment to Rule 30. Prior to the adoption of Rule 30(b)(6), corporation could play a shell game with information: Corporate Witness A denied knowing Fact X and testified that Corporate Witness B knew that fact; when Corporate Witness B was deposed, he again denied knowledge of Fact X and pointed to Corporate Witness C. This shell game could continue indefinitely. *See* 8A Fed. Prac. & Proc. Civ. § 2103 (3d ed.). Rule 30(b)(6) stopped this abuse by requiring a corporate party to prepare a witness with all information reasonably available to the corporation on a given list of topics.

Elimination of contention questions

The Rule helps to balance out the lack of information that defendants are required to provide in their pleadings. Under Fed. R. Civ. P. 8, there is no consensus that a defendant is required to plead facts to support its affirmative defenses. *See, e.g., Tardif v. City of New York,* 302 F.R.D. 31 (S.D.N.Y. 2014). Accordingly, a plaintiff can face a raft of affirmative defenses, yet be utterly in the dark as to the factual basis of these defenses. Rule 30 allows a plaintiff to question the defendant as to the factual basis of its affirmative defenses. The proposed change to Rule 30(b)(6) to prevent contention questions would prevent a plaintiff from learning the factual basis of a corporate defendant's affirmative defenses. Such questions are vital to efficient discovery and trial preparation. Counsel can easily toss an affirmative defense into an answer, especially where he does not have to plead facts in support of that defense. Preparing a witness to support such a defense is quite another kettle of fish.

Requirement of addressing 30(b)(6) depositions in the initial discovery conference

While promoting cooperation during discovery is a laudable goal, adding a requirement that

the discovery plan address Rule 30(b)(6) testimony substantially disadvantages parties who litigate against corporations. As noted above, corporations frequently possess much of the salient information regarding a dispute. Corporations know who has information, where documents are stored and the ease or difficulty attendant to accessing the important information. The corporation's opponents frequently lack much, if not all, of this information. Moreover, the discovery conference occurs even before initial disclosures, so imposing a requirement to address 30(b)(6) testimony would require litigants to commit to a plan regarding specific depositions before receiving even the limited information provided in initial disclosures.

In addition, in my experience at least, counsel on both sides engage in substantial communication prior to 30(b)(6) depositions under current practice. The corporation nearly always objects to one or more topics, and we frequently attempt to modify topics to make them mutually agreeable. However, this discussion usually occurs after initial written discovery, including document production, has been completed. At that point, both sides can intelligently discuss the parameters of a Rule 30(b)(6) deposition, instead of one side having information while the other side has to guess.

Allowing objections to Rule 30(b)(6) deposition notices

The Invitation suggests adding a procedure to allow a 30(b)(6) deponent to serve objections which would effectively prevent the deposition until the court acts on the objections. This would represent the greatest step backward in civil discovery in my career.

Scheduling 30(b)(6) depositions is frequently an exercise in futility already. In the past, I have provided a draft notice along with a request for dates. Almost universally, my request goes unanswered. When I follow up on that request, I typically get a promise to inquire with the client. Once again, weeks of silence follow. Finally, I serve a notice for a date, time, and place certain, at which point communication about the deposition finally begins in earnest. After that exact set of events happened in a number of different cases, I now begin by serving the actual notice of deposition. I enclose a letter offering to work with opposing counsel as to the date, time, and place of the deposition, but I advise that, if we cannot agree, the deposition will go forward as noticed. Even following this procedure, it can take weeks to get a deposition scheduled. At that point, the deponent corporation must move for a protective order and at least seek a hearing in order to prevent the deposition.

Under the suggested change, discovery would slow even further. A deponent could halt the 30 (b)(6) deposition by merely serving an objection. Notably, only corporations would have this privilege: individual deponents would still be required to move for a protective order. Further, allowing service of objections would substantially increase the amount of litigation over depositions. The mere fact that the discovering party would have to make a motion in order to move forward would mean that nearly every 30(b)(6) deposition would be preceded by a motion to compel. (In my experience, very few corporate deponents actually seek a protective

order for a 30(b)(6) deposition.) Moreover, requiring the discovering party to make the motion *de facto* places the burden of persuasion on the discovering party. That flies in the face of the notion of broad discovery aimed at narrowing issues for trial.

To be sure, some discovering parties abuse Rule 30(b)(6). However, courts are fully empowered to stop—and punish—any abuses via protective orders. Further, where a discovering party is truly abusing the Rule, no defendant will shy away from seeking the court's protection.

Supplementation of 30(b)(6) testimony

Addition of an option, or even a requirement, to supplement Rule 30(b)(6) testimony will gut the preparation requirement of the Rule. If corporations are not bound by the testimony given by the witness, they will skimp on preparing their witness(es), if they prepare them at all, safe in the knowledge that their counsel can supplement the answers after hearing the specific questions. The committee may as well eliminate the 30(b)(6) deposition altogether, as a supplementation option will quickly devolve into little more than a protracted set of interrogatory answers prepared by counsel.

Limitations on number and length of depositions

The comments to the current rule contain the correct answer. The deposing party gets 1 day of deposition time for each person designated under Rule 30(b)(6) and the 30(b)(6) deposition counts as a single deposition, irrespective of how many individuals are designated. Any change invites abuse. For example, if each day counted as a separate deposition, corporations could use up their opponent's deposition days by designating several individuals unnecessarily, requiring the deposing counsel to spend time exploring the background of many different witnesses. Similarly, if the 30(b)(6) deposition were limited to a single day, irrespective of the number of designees, the deponent corporation could eat up the time by designating multiple witnesses.

Thank you for your consideration.

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