Public Comment on Possible Issues Regarding Rule 30(b)(6)
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17-CV-ZZ

Dear Committee:

I am writing to voice my strong objection to any changes to FRCP Rule 30(b)(6), particularly any along the lines of what is being discussed in the Invitation for Public Comment of May 1, 2017. I will try to be brief. I could provide real life examples for many of my comments, and would be happy to do so if the Committee or Subcommittee would like to see them.

I practice primarily in federal court in employment discrimination cases, representing plaintiff former and current employees in FMLA, ADA, ADEA, Title VII, USERRA, FLSA, and 42 U.S.C. Sec. 1981 actions.

Rule 30(b)(6) is a vital tool to getting any meaningful discovery in theses types of cases. The defendant employers control nearly all of the information and we find that interrogatories and requests for production under Rule 33 and 34 are almost a waste of time. You receive nothing but objections and non-answers to written discovery in our cases. Initial disclosures are also treated as either a joke, or a method to dump huge quantities of largely useless documents in which there may be one or two proverbial needles in a haystack. But the 30(b)(6) deposition, now there is a useful tool to obtain discovery!!! Doing anything to make it less effective or more cumbersome to use would be a travesty.

I will take the suggestions in the May 1, 2017 Request for Public Comment in order:

Inclusion of specific reference to Rule 30(b)(6) among the topics for discussion at the Rule 26(f) conference, and in the report to the court under Rule 16:

It appears that this suggestion is aimed at making it more difficult to get 30(b)(6) depositions. The implication is that if no 30(b)(6) depositions are discussed at the earliest part of the case, that a party could be precluded from using it. This simply makes no sense. Very often until some preliminary discovery and investigation is done, it cannot be determined if the 30(b)(6) deposition will be needed (although it almost always is) or what its scope may be. Recall that in many of the discrimination cases that I do there is a 90 day window to bring suit after the EEOC has finished with the case. Sometimes clients don't make it in to see me until there are just a few days or weeks until the time limit runs out. Front loading the discussion of 30(b)(6) depositions does not seem to help anything.

Judicial admissions:

If anything, the Rule should be amended to make clear that the answers to questions at a Rule 30(b)(6) deposition are indeed judicial admissions equivalent to those made in pleadings. Why not?! My clients as individuals are certainly considered to have made judicial admissions in their depositions. Research the "sham affidavit doctrine" to see what happens when an individual plaintiff attempts to stray from his or her deposition testimony. Why is an organization, particularly a corporation not held to the same standard? Changing the rule to say that 30(b)(6) deposition testimony is not actually "binding" on the

corporation guts the whole purpose of the rule and would encourage organizations and their counsel to avoid proper preparation. This would make it very easy for an organization to avoid providing useful discovery. This is a horrendous idea and should be immediately scrapped, or in the alternative the rule should be strengthened by making clear that an organization's representatives' testimony in a 30(b)(6) deposition is binding as a judicial admission. You could add an escape valve that would permit the organization to move the court to be relieved of such admissions as is available in Rule 36, but the presumption should be that they are admissions unless so relieved.

Requiring and permitting supplementation of Rule 30(b)(6) testimony:

Another idea that would simply gut the Rule. If you permitted supplementation the witness would be coached to testify as to a lack of knowledge about all of the pertinent facts so that later the attorney for the organization could answer all of the questions in writing and in ways that are evasive and seek to hide the truth, or worse, put forth answers merely designed to advance the organization/corporation's theory of the case. Anybody that does not believe that such a thing would happen has not practiced law in court.

Forbidding contention questions in Rule 30(b)(6) depositions:

Oh my god!!! The suggestion here is that a party would be unable to question an adverse party about what their position is on key facts in the case. This is over the top bad. Example: Suppose the complaint says at paragraph 53, "Defendant's managers failed to properly investigate and to take prompt remedial action to correct the sexually harassing conduct described above." (Key factors in a Farragher/Ellerth defense) The answer to the complaint says, "Each and every allegation contained in paragraph 53 of the Complaint is denied." Assume also that in its 27th Affirmative Defense the Defendant has invoked the Farragher/Ellerth doctrine by saying something along the lines that it did investigate and take promote remedial action. The Rule 30(b)(6) topics would be as follows:

"The factual bases for Defendant's answer denying paragraph 53 of the Complaint which states as follows: 'Defendant's managers failed to properly investigate and to take prompt remedial action to correct the sexually harassing conduct described above.'"

"The factual bases for Defendant's 27th affirmative defense in which it claims to have investigated and taken prompt remedial action."

These are "contention questions" without a doubt. Why should a plaintiff employee's counsel not be able to ask questions about this? The Defendant has denied a key allegation in the complaint and raised an affirmative defense that is diametrically opposed to the Plaintiff's theory of the case. Should the Defendant simply be able to hide behind the denial and provide no facts in sworn testimony about what investigation it contends to have done or what prompt remedial actions it claims to have taken? These contentions should be discoverable through the 30(b)(6) deposition.

Adding a provision for objections to Rule 30(b)(6):

The proposal would simply jam up the process and put the onus on the person seeking the discovery to have to prove it is necessary. It merely puts the inmates in charge of the asylum. If the party to be deposed truly believes that a topic is objectionable, the party should move for a protective order on an emergency basis. Even better, make it mandatory that the parties follow Rule 16(b)(3)(B)(v) that says "...before moving for an order relating to discovery, the movant must request a conference with the

court." Have they court's deal with these issues on conference calls. If the party is still not happy, then they can file a formal motion as an emergency motion.

Amending the rule to address the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions:

This is not typically a big problem. The courts have generally spoken on this. In my district the rule is that the 30(b)(6) counts as one deposition no matter how many people the Defendant wants to designate. Each person is presumptively limited to 7 hours. To change this would permit and encourage game playing where organizations use up the limited number of depositions that are presumptively allowed. This suggestions appears to have been made by someone with exactly that in mind.

PLEASE just leave FRCP Rule 30(b)(6) alone. It works pretty much as intended and provides the most meaningful discovery tool in the cases that I litigate.

Please do not hesitate to contact me should you have any questions or concerns about these comments.

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