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August 4, 2017

Honorable Joan N. Ericksen
United States District Judge
Chair of the Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
12W U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Re: Amendment of Rule 30(b)(6)

Dear Judge Ericksen:

I am writing on behalf of the Maglio Christopher & Toale, PA Law Firm. Our law firm has a national complex civil litigation practice in both federal and state court. We regularly engage in depositions under Rule 30(b)(6) and equivalent state rules, both taking and defending such depositions. Our attorneys believe that the proposed changes are misguided, will result in significantly increased litigation and costs, and do not address the biggest problem currently with such depositions. We urge the committee to forgo altering the rule, but if the committee chooses to attempt to apply fixes to the rule, we request that the committee address the elephant in the room: the unprepared or nonresponsive witness.

30(b)(6) depositions are important tools in litigation involving large organizations.

Depositions under 30(b)(6) serve multiple varied important purposes. These range from an efficient means to determine where information in the possession of an opposing organization resides to narrowing the issues for trial. Not all litigation necessitates the use of 30(b)(6)

depositions, but when large organizations are parties, these depositions typically are most essential.

Permitting supplementation could render 30(b)(6) depositions valueless.

Permitting supplementation of 30(b)(6) testimony would serve to greatly exacerbate one of the biggest problems with such depositions: the "I don't know" or evasive witness. Depending on the drafting, this could completely eliminate the utility of 30(b)(6) depositions to narrow issues for trial. The already difficult task of obtaining remedies from the trial court for such behavior would likely be undermined or effectively eliminated. Instead, "I don't know" coupled with "we'll get back to you" (when it suits our purposes), would be the new rule.

"Contention" questions in 30(b)(6) depositions narrow issues for trial and thus limit the need for discovery.

The proposal to eliminate "contention" questions in 30(b)(6) depositions runs completely counter to any efforts to increase the speed and efficiency of litigation. Together with requests for admission, "contention" questions are the best tools to narrow issues for trial and thus eliminate the need for discovery on those topics. "Contention" questions are utilized in almost every party deposition, regardless of whether the deponent is an individual or an organization. Giving organizations special protection against "contention" questions makes absolutely no sense. This proposal would bar discovery into the basis and validity of an organization's claims or affirmative defenses. Furthermore, what constitutes a "contention" question is often a complicated analysis with a large body of case law developed over years to delineate which avenues of questioning are permissible and which are not. Foraying into this potential morass as suggested would almost certainly serve to complicate the situation.

If the committee elects to amend 30(b)(6), the problem of the "I don't know" or evasive witness must be addressed.

One of the biggest problems encountered by practitioners taking 30(b)(6) depositions of organizations is the "I don't know" or evasive witness. The time, expense, and uncertainty of obtaining a remedy from the judiciary for this behavior often means that this tactic succeeds. The noticing party is stymied in obtaining answers to appropriate lines of inquiry but due to the above, gives-up without seeking court intervention. When court intervention is sought, courts often feel constrained to the remedy of ordering a second deposition. When a court grants this inadequate remedy, increased costs, wasted time, and the likelihood of a second, fruitless deposition results. In our view, the remedy provided by some courts: "what an organization does not know at deposition, it cannot later know at trial;" is the answer. If the committee chooses to amend this rule, this concept should be added to the text of the rule itself. This will assist practitioners, courts, and organizations in conducting 30(b)(6) depositions as intended by and in the spirit of the rules.

The negatives of changing 30(b)(6) outweigh the benefits, but if the committee elects to do so, the purpose of 30(b)(6) depositions must be considered and preserved.

In the view of the attorneys of this firm, the case for changing 30(b)(6) has not been made. However, if the committee does not agree, and chooses to amend the rule, some of the proposed changes are extremely problematic. Permitting supplementation or banning "contention" questions would both undermine the purpose of the rule. Furthermore, if the rule is opened up for changes, a fix for the problem of the "I don't know" or evasive witness must be included.

We thank the committee for its time and its consideration of these comments.

Sincerely,

Altom M. Maglio
For the Firm