Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules

Invitation for Comment on
Possible Issues Regarding Rule 30(b)(6)
May 1, 2017

The Advisory Committee on Civil Rules appointed a Rule 30(b)(6) Subcommittee in April, 2016, and it has begun work. The Advisory Committee spent considerable time looking at this rule about a decade ago, and eventually decided not to propose any amendments at that time. Since then, several bar groups have submitted thoughtful reports to the Committee about problems encountered by their members with the current operation of the rule. Other bar groups have provided submissions questioning the need or appropriateness of amending the rule. Material on these subjects can be found in the agenda book for the Advisory Committee's April 25-26, 2017, meeting at pp. 239-316. That agenda book is available at www.uscourts.gov.

Initial legal research by the Rules Committee Support Office (reported at pp. 249-65 of the agenda book) has cast some light on the concerns that have been raised. The Subcommittee has given initial consideration to a wide range of possible concerns. During the Committee's April 2017 meeting there was considerable discussion of these issues.

As part of its ongoing work, the Rule 30(b)(6) Subcommittee invites input about experience under the rule. Reports received so far indicate both that the rule is an important vehicle for gathering information from organizations in a significant number of cases, and that without it the risk of "bandying" would increase. Other reports indicate, however, that some lawyers may be asking the rule to bear more weight than it was meant to bear, and that some who use the rule impose extremely heavy burdens on opposing parties (and perhaps sometimes on nonparties as well).

Because the Subcommittee's work on the rule is at a preliminary stage, it is not possible presently to determine whether any actual rule amendments would be helpful and therefore warrant the careful drafting effort that would be necessary before any amendment could be formally proposed. For the present, the goal is to determine whether rule changes should be seriously considered, and to identify the topics or areas that offer the most promise that amendments would improve Rule 30(b)(6) practice while preserving its utility.

Based on discussions to date, including the discussion during the Advisory Committee's April 2017 meeting, the following possibilities have been identified as potential rule-amendment ideas:

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: Rule 26(f) already directs the parties to confer and deliver to the court their discovery plan. It specifies some things that should be in that plan but does not refer specifically to 30(b)(6) depositions. Specific reference to Rule 30(b)(6) might be added to both Rule 26(f) and Rule 16(b) or (c). Such a provision might be a catalyst for early attention and judicial oversight that could iron out difficulties that have emerged in practice under Rule 30(b)(6). There have been suggestions, however, that the Rule 26(f) conference comes too early in the case for the lawyers to speak with confidence about their Rule 30(b)(6) needs. But (in keeping with some local rules about cooperation in setting depositions) it could be that such early judicial involvement could forestall later disputes.

Judicial admissions: It appears that the clear majority rule is that statements during a 30(b)(6) deposition are not judicial admissions in the sense that the organization is forbidden to offer evidence inconsistent with the answers of the Rule 30(b)(6) witness. Yet there are repeated statements, including some in cases, that testimony by a Rule 30(b)(6) witness is "binding" on the organization. It may be that all these statements mean is that, under Fed. R. Evid. 801(b)(2)(C), this testimony is admissible over a hearsay objection. But it does appear that there is widespread concern that organizations will face arguments that the testimony offered is "binding" in the same way that an admission in a pleading or in response to a Rule 36 request for admissions forecloses admission of evidence about the subject matter. If so, that concern may fuel disputes about a variety of matters that would not generate disputes were the rule amended to make it clear that testimony at a Rule 30(b)(6) deposition is not a judicial admission. (At the same time, it might be affirmed that a finding that a party has failed to prepare its witness adequately could, under Rule 37(c)(1), justify foreclosing the use of evidence that should have been provided earlier.)

Requiring and permitting supplementation of Rule 30(b)(6) testimony: In general, Rule 26(e) does not require supplementation of deposition testimony. But Rule 26(e)(2) directs that the deposition of an expert witness who is required to provide a report (a specially retained expert) must be supplemented. A similar provision could be added for 30(b)(6) deponents, perhaps specifying that the supplementation must be done in writing and providing that it is a ground for re-opening the deposition to explore the supplemental information. Concerns in the past have included the risk that the right to supplement would weaken the duty to prepare the witness.

Forbidding contention questions in Rule 30(b)(6) depositions: Rule 33(a)(2) provides that "[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time." Interrogatory answers are usually composed by attorneys who have at least 30 days to prepare the answers, and Rule 33 nonetheless suggests that the answer date should sometimes be deferred. A spontaneous answer in a deposition seems quite different. It may be that questions of this sort are rarely if ever used in ordinary depositions, even with witnesses testifying from their personal knowledge. It might be that Rule 30(b)(6) should forbid asking such questions of the witness designated to testify about the organization's knowledge.

Adding a provision for objections to Rule 30(b)(6): An explicit provision authorizing pre-deposition objections by the organization could be added to the rule. One possibility would be a requirement like the one now in Rule 34(b) that objections be specific. Objections might, on analogy to Rule 45(d)(2)(B), excuse performance absent a court order. But that Rule 45 provision ordinarily applies to nonparties who must be subpoenaed. Presently, it may be that the only remedy for an organizational party is a motion for a protective order, which may be difficult to present before the scheduled date for the deposition. If making an objection excused the duty to comply absent court order, a rule could (also like Rule 34(b)) direct that the objecting party specify what it will provide despite the objection.

Amending the rule to address the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions: Rule 30 has general limitations on number and duration of depositions, but they are not keyed to Rule 30(b)(6) depositions. Those depositions can complicate the application of the general rules because (a) multiple individuals may be designated by the organization, and (b) those individuals may also be subject to individual depositions in which they are not speaking for the organization. The Committee Notes accompanying those general limitations discuss the way such limitations should apply in the 30(b)(6) context (stating that one day should be allowed for each person designated, and that the 30(b)(6) deposition counts as one of the ten for the limit on number of depositions no matter how many people are designated to testify) but those statements in Committee Notes are not rules and those prescriptions may not be right. Ideally, such issues should be worked out between counsel. Is the absence of such rule provisions at present a source of disputes? Would the addition of specifics to the rule reduce or increase the number of disputes? If specifics would be a desirable addition to the

rule, what should the specifics be?

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The foregoing listing does not include many other matters that the Subcommittee has discussed, or that the Advisory Committee considered when it studied Rule 30(b)(6) a decade ago. As emphasized above, it is consciously tentative and provided only to suggest some ideas that have been discussed and on which the Subcommittee seeks further guidance. For the present, a key focus is to evaluate the desirability of beginning serious study of any of the issues identified above. Drafting actual amendment proposals will involve much further work and will identify further issues. At the same time, the Subcommittee is aware that there may be reason to give serious consideration to a variety of other Rule 30(b)(6) topics, and it therefore invites interested parties to submit suggestions for additional issues that might deserve serious consideration.

Because this is an ongoing project, there is no formal time limit on submission of commentary about Rule 30(b)(6). But for the Subcommittee to receive maximum benefit from any submission, it would be most helpful if it were received no later than August 1, 2017. Any comments should be submitted to: Rules_Comments@ao.uscourts.gov.