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I wish to submit the following comments in response to the Advisory Committee on Civil Rules 30(b)(6) Subcommittee's Invitation for Comment on Possible Issues Regarding Rule 30(b)(6). I have been practicing primarily in federal court for over 25 years. I regularly take 30(b)(6) depositions in my cases.

In my view, none of the six (6) possible changes suggested by the Subcommittee would improve current practice under Rule 30(b)(6). A number of the proposed changes would introduce unnecessary costly and time-consuming motion practice to address issues that the parties in this district can and do resolve without court intervention. Others would encourage gamesmanship and similarly unproductive litigation behavior. Moreover, the suggestions appear to favor the interests of organizational litigants at the expense of both individual litigants and broader judicial economy. Proceeding in this manner would represent a serious and troubling departure for the Civil Rules Advisory Committee, which has worked to issue carefully calibrated rule changes that do not favor one set of litigants over another.

I. Inclusion of 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

The Subcommittee suggests in the Invitation for Comment that discussing Rule 30(b)(6) depositions during the Rule 26(f) conference and including them in the Rule 16(f) report "might be a catalyst for early attention and judicial oversight that could iron out difficulties that have emerged in practice." This statement assumes (a) that disputes are arising regarding Rule 30(b)(6) depositions that cannot be resolved without court intervention, and (b) that such disputes, if they do arise, do so early enough in a case to be addressed effectively at the Rule 26(f) conference. That has not been my experience. At the start of discovery, I do not know which topics will need to be

covered in a F.R.C.P. 30(b)(6) deposition. Instead, the need for the deposition and the topics that should be covered are revealed during the course of discovery. Perhaps I have several managerial witnesses taking different positions on a factual or legal issue; perhaps I received a chorus of "I don't recall" from fact witnesses; perhaps I realize that I need additional information about an after-acquired evidence defense. These are the circumstances under which I need to utilize a F.R.C.P. 30(b)(6) deposition and I will not be aware of them at the start of the case.

Inclusion of Rule 30(b)(6) depositions in the initial case planning discussions would therefore waste time and run the risk of grinding the discovery process to a halt, by providing the opportunity to create unnecessary disputes on a host of items - e.g., (a) when and where the deposition will take place, (b) the topics that will be covered, (c) the timeframe(s) at issue, or (d) whether follow-up depositions can be obtained. Under existing practice, these types of issues are resolved by the parties themselves at the time the deposition is noticed, without the need for court involvement and the costly and time-consuming motion practice that comes with it.

II. Potential Treatment of Statements Made During 30(b)(6) Depositions as Judicial Admissions

Although most courts view Rule 30(b)(6) testimony as binding only in the sense of traditional deposition testimony, a different result is appropriate in some instances. For example, in some cases, courts have rejected declarations contradicting prior Rule 30(b)(6) testimony using reasoning analogous to the "sham affidavit" rule. *See, e.g., Orthoarm, Inc. v. Forestadent USA, Inc.*, 2007 WL 4457409, at *2-3 (E.D. Mo. Dec. 14, 2007) (rejecting declaration as a "sham affidavit" at summary judgment because it "directly contradict[ed]" prior Rule 30(b)(6) deposition testimony); *Casas v. Conseco Fin. Corp.*, 2002 WL 507059, at *10-11 (D. Minn. Mar. 31, 2002) (granting summary judgment based on Rule 30(b)(6) testimony and refusing to consider contradictory affidavits); *see also Rainey v. Am. Forest and Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) ("[Rule 30(b)(6)] binds the corporate party to the positions taken by its 30(b)(6) witnesses so that opponents are, by and large, insulated from trial by ambush."). In other cases, the statements are not treated as admissions because the trial court, with knowledge of all of the facts, has found that to do so would not be in the interest of justice. This approach works. Attempting to create a bright line rule to apply in all situations has the potential to create confusion.

III. Requiring and Permitting Supplementation of Rule 30(b)(6) Testimony

Rule 30(b)(6) depositions are useful largely because they require that the corporate party adequately prepare their witnesses to provide all information known or

reasonably available to the organization. Allowing corporate defendants to supplement this testimony would eliminate the efficiency and effectiveness of the process. Allowing supplementation would encourage wasteful forms of gamesmanship, such as intentionally failing to prepare witnesses or introducing sham testimony. Allowing supplementation would permit 30(b)(6) deponents to provide "I don't know, I will need to review our records" type of answers, thereby transforming the 30(b)(6) deposiiton into an unproductive, expensive and largely empty exercise.

Furthermore, allowing supplementation would benefit only organizational parties. As the Subcommittee recognizes in the Invitation for Comment, existing Rule 26(e) does not require or permit supplementation of deposition testimony. Indeed, supplementary testimony from a plaintiff that changes her prior testimony would be subject to a motion to strike and/or impeachment at trial. It is difficult to understand why organizational parties would be allowed to freely supplement, while individual plaintiffs would be subject to the existing, harsher rule. A corporate defendant already has the advantage of choosing the witness (or witnesses) who are most knowledgeable, so it would be unfair to allow these witnesses to provide incomplete testimony, secure in the knowledge that inadequate testimony could be supplemented later.

IV. Forbidding Contention Questions in Rule 30(b)(6) Depositions

As with the preceding item regarding supplementation, forbidding contention questions in Rule 30(b)(6) depositions would unfairly impose a discovery restriction on individual litigants, but not organizational parties. While the Subcommittee is correct that parties have much more time to respond to contention interrogatories, corporate defendants often ask plaintiffs numerous contention questions during their deposition (e.g., "What support do you have for your claim that you suffered discrimination?"; "Do you believe anyone else discriminated against you?"). Allowing these types of questions to be asked of plaintiffs, not corporate defendants, would unfairly tilt the scales in favor of one party to the litigation. Utilizing contention inquiries can also be very useful in Rule 30(b)(6) depositions. I regularly use contention inquiries to gather information as to affirmative defense such as a failure to mitigate or after-acquired evidence. I have found that using a Rule 30(b)(6) deposition in this way clarifies issues for trial. Indeed, if the affirmative defense has been plead without sufficient support, opposing counsel often agrees to withdraw or limit the defense. Whether a Rule 30(b)(6) witness may be asked to express an opinion or contention depends on the circumstances and should not be the subject of rulemaking. *See U.S. v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996) ("Whether a Rule 30(b)(6) deposition or a Rule 33(c) contention interrogatory is more appropriate will be a case by case factual determination.").

V. Adding a Provision for Objections to Rule 30(b)(6)

Injecting a formal objection process into Rule 30(b)(6) would encourage objections and create more motion practice. The suggestion of requiring the objecting party to specify what information they will provide despite their objection (similar to Rule 34) would do little to resolve this issue. Indeed, this would require that a party sit for multiple depositions - one on the topics they have agreed to, and a second after the court rules on an inevitable motion to compel regarding the topics to which they have objected. These types of inefficiencies can be avoided by leaving the rule as it stands, and allowing the parties to try to work out any concerns. In my many years of taking Rule 30(b)(6) depositions, motion practice has been required only twice. On all other occasions, I have been able to work out any concerns with opposing counsel. However, if objections are encouraged I foresee having to involve the Courts far more often.

VI. Amending the Rule to Address the Application of Limits on the Duration and Number of Depositions as Applied to Rule 30(b)(6) Depositions

Currently the corporate party controls the number of witnesses to be deposed as part of a F.R.C.P. 30(b)(6) deposition and the noticing party is entitled to take up to one fully day for each witness, but the Rule 30(b)(6) deposition is counted as only one deposition. This practice encourages corporate defendants to identify the smallest number of witnesses. Limiting the number of depositions or having each witness count as a separate deposition could encourage corporate defendants to identify a large number of witnesses for tactical reasons. This clearly would be inefficient. The noticing party should not be required to use an extra deposition due to the needs (strategic or otherwise) of the corporate party. However, setting a limit on the number of witnesses that a corporate party could identify or limiting the duration of the Rule 30(b)(6) deposition would also be problematic. Sometimes using a different witness for each noticed topic is the most efficient way for a corporate defendant to provide the available information, and each deposition will take an hour. In other cases, one witness will be provided and answer multiple topics and a full day may be needed. What is necessary in one case might not be appropriate in another. Limiting the amount of time that a party can spend with each Rule 30(b)(6) witness may prevent certain topics from being explored as thoroughly as needed, requiring additional fact witness depositions that could otherwise be avoided. Thus, any change is likely to increase conflict and lead to additional motion practice.

VII. Conclusion

I have developed a practice of speaking to the corporate attorney and trying to work out any issues or concerns prior to the deposition. Many of my colleagues do the same. As a result, we are able to limit objections, narrow topics and plan for effective and efficient 30(b)(6) depositions. The Rule 30(b)(6) process as practiced in Connecticut generally works well, and making changes will likely create more problems than it would resolve.

Sincerely yours,

Mary E. Kelly

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