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VIA E-MAIL: Rules_Comments@ao.uscourts.gov

Re: Comments on Possible Issues Regarding Rule 30(b)(6)

To the Rule 30(b)(6) Subcommittee:

I reviewed the invitation for comments and the relevant portions of the Advisory Committee's agenda book from its April 25-26, 2017, meeting.

I was admitted to practice in all courts in the State of California in 1983. I am admitted in about 20 district courts around the country; I have appeared pro hac vice in perhaps 20 or 25 more district courts around the country; I am admitted in seven federal appellate courts. I primarily represented civil defendants from roughly 1989-2007; I primarily have represented civil plaintiffs from 2007 to the present. I have been attorney of record in at least 1,000 civil cases. I regularly take 30(b)(6) depositions.

1. Inclusion of Specific Reference to Rule 30(b)(6) Among the Topics for Discussion at the Rule 26(f) Conference and in the Rule 16 Report

I have participated in hundreds of Rule 26(f) conferences; I have submitted hundreds of Rule 16 reports. It is my normal practice to identify by name or title or job description the witnesses whom I wish to depose and it is my normal practice to include a listing for a 30(b)(6) deposition of the adverse party when the adverse party is not an individual. I cannot recall any judge ever asking about my list of proposed witnesses; I cannot recall any judge being remotely interested in the list. In my experience and my perception, judges are interested in the witnesses to be deposed because actually listing witnesses demonstrates that the lawyers understand their cases and need less judicial supervision and because the number of witnesses typically impacts timing, but otherwise are completely disinterested and certainly not interested in the anticipated content of those depositions. Therefore, in my opinion any expectation that there will be early judicial oversight of the structure and nature of Rule 30(b)(6) depositions even if the rule is amended borders on fantasy.

This is also true because it is very rare that early in litigation a party knows what will be asked in a 30(b)(6) deposition. I use 30(b)(6) depositions for different purposes in different cases. Sometimes, when I do not know from either the documentation I have or information I obtain from my client or from documentation provided in initial disclosures who among the adverse party has information about certain topics, I may do a targeted 30(b)(6) deposition relatively early in the case to get that information. But more commonly I use a 30(b)(6) deposition for an entity non-party or for "clean up" purposes after taking individual depositions of persons whom I know have or should have knowledge of the facts of the case. Therefore, at the point of a 26(f) conference if the Court inquired of me what is the purpose of my 30(b)(6) deposition I would normally necessarily say: it depends on what information is provided in other depositions and from interrogatories. If the witnesses for the other side all say "I don't know" about certain areas of inquiry and respond to "who does know" with "I don't know" and if interrogatories don't answer those questions, those would be the areas of inquiry in my 30(b)(6) deposition. In other words it depends.

Therefore, if the rules were amended to require discussion of the topics and contents of Rule 30(b)(6) depositions at Rule 26(f) conferences, you force the court and counsel to waste their time speculating about what might be necessary to address in a Rule 30(b)(6) deposition because most of the time it depends on what other discovery discloses. I understand that some lawyers in taking 30(b)(6) depositions do not clear the timing and content in advance with opposing counsel. That, of course, is inconsistent with civility standards around the country and also stupid. I never take or notice a deposition without first clearing the date with opposing counsel. I never take a 30(b)(6) deposition without first sending a draft of the notice with the areas of inquiry outlined to opposing counsel - - because they have to identify the witness or witnesses and make sure they can be available consistent with their schedule, the lawyer's schedule, my schedule, etc. Rational and competent lawyers work these things out well in advance and do not need judicial intervention or supervision. And, as a practical matter judicial supervision at the 26(f) conference would a waste of time because it would accomplish nothing.

B. Judicial Admissions

This is a non-issue. Every appellate court that has addressed this issue has rejected the conclusion that the organization is forbidden to offer evidence inconsistent with the answers of the Rule 30(b)(6) witness, subject to the usual qualifications applicable to all deposition testimony that on summary judgment that false or obviously sham testimony offered to create a triable issue of fact is inadmissable. The courts have no problem monitoring this issue. See

AstenJohnson, Inc. v. Columbia Casualty Company, 562 F.3d 213, 229, n. 9 (3d Cir. 2009); *Vehicle Market Research, Inc. v. Mitchell International, Inc.,* 839 F.3d 1251, 1255-1256, 1259-1261 (10th Cir. 2016).

Any rule modification on this point will only engender confusion and unnecessary litigation.

3. Requiring/Permitting Supplementation of Rule 30(b)(6) Testimony

The proposal that, like 26(e)(2) a Rule 30(b)(6) deponent be required and permitted to supplement testimony given is mistaken.

Under Rule 26(e)(2) an expert witness is required to submit a detailed written report. If the witness intends to testify about other opinions, the report must be amended and the adverse party has the right to open re-any deposition. The reason is not that witnesses is changing his or her opinions but because the witness is offering new and different opinions not previously offered.

This is neither necessary nor useful in the Rule 30(b)(6) context.

A 30(b)(6) witness has the same right as any other witness to correct or modify the deposition transcript. Rule 30(e) does not limit a party to the correction of stenographic errors; it permits changes in form or substance. When witnesses makes substantive changes to their deposition testimony the district court has the discretion to order depositions to reopened so that the revised answer may be followed up on and the reason for the corrections explored. *Pina v. Children's Place,* 740 F.3d 785, 791-792 (1st Cir. 2014); *Keepers, Inc. v. City of Milford,* 807 F.3d 24, 35-37 (2d Cir. 2015). Admittedly a problem arises with sham changes, which courts know how to address. See *Karpenski v. American General Life Insurance Companies, LLC,* 999 F. Supp. 2d 1218, 1224-1225 (W.D. Wash. 2014).

The most common problem faced the Rule 30(b)(6) deposition - - and likely the reason for most litigation over rule 30(b)(6) - - is that adverse parties deliberately do not properly prepare a witnesses. See, e.g., *In Re Kellogg Brown & Root, Inc.,* 796 F.3d 137, 143-145 (D. C. Cir. 2015): addressing the problem of preparing the 30(b)(6) witness with privileged attorney-client documents. The courts know how to address this problem by imposing sanctions. See, e.g., *Facebook, Inc. v. Power Ventures, Inc.,* 844 F.3d 1058, 1063-1064, 1070 (9th Cir. 2016). Courts sanction parties for selectively preparing a 30(b)(6) witnesses. See also *Sciarretta v. Lincoln National Life Insurance Company,* 778 F.3d 1205, 1205, 1212-1213 (11th Cir. 2015).

Another common problem is that 30(b)(6) deposition notices are overbroad. Courts know how to deal with that, as well. See, e.g., *Mattel Inc. v. Walking Mountain Productions,* 353 F.3d 792, 813-814 (9th Cir. 2003).

The rules applicable to reopening depositions when a witness changes his or her deposition testimony are readily used and applicable here. There is no need to modify the rule.

More significantly any rule requiring or permitting supplementation of a Rule 30(b)(6) testimony is an open invitation to perjury. Any such rule modification does not solve problems, it creates problems.

4. <u>Contention Questions</u>

Contention questions are clearly proper in written interrogatories because answers to interrogatories are prepared with the assistance of counsel. Contention questions are clearly improper in a depositions of any kind. See *Rifkind v. Superior Court (Good)* (1995) 22 Cal. App. 4th 1255, 1259, 27 C.R. 2d 822. Numerous federal cases recognize that contention questions are improper legal questions, not factual questions, which need not be answered. See, e.g., *AstenJohnson, Inc. v. Columbia Casualty Company, supra,* 562 F.3d at 229, n. 9; *Vehicle Market Research, Inc. v. Mitchell International, Inc., supra,* 839 F.3d at 1255-1256, 1259-1261.

In my experience competent counsel do not ask contention questions in Rule 30(b)(6) (or other) depositions. In my experience competent counsel defending Rule 30(b)(6) deposition do not allow their clients to answer such questions. In my experience a carefully crafted Rule 30(b)(6) deposition notice - - designating the topics with sufficient particularity - - after contention interrogatories (which of course must be supplemented by the answering party) and after initial disclosures and requests for production, cover the territory.

I understand that some attorneys do not understand how various type of discovery work in conjunction with each other. In my experience and opinion existing practices are more than sufficient to address this problem: a rule amendment isn't required.

5. <u>Adding a Provision for Objections to Rule 30(b)(6) Deposition</u>

In reality this is a common practice. The rule does not have to be amended to authorize it.

6. Counts As One

In my experience counsel and parties understand that a Rule 30(b)(6) deposition counts as one even if multiple witnesses are presented. The absence of a rule addressing these issues is not relevant. However, I would have no objection to amending Rule 30(b)(6) to provide that no matter how many witnesses are produced at the 30(b)(6) deposition for the purposes of the maximum number of depositions that the 30(b)(6) deposition counts as one deposition.

7. Other Matters

I know that the Subcommittee has also developed a "B" list:

1. Providing exhibits in advance: I always attach exhibits to the deposition notice and integrate the exhibits with the areas of inquiries. If you expect to have an effective 30(b)(6) deposition you have to tell the witness what the areas of inquiry are. If you don't provide the exhibits, it is much more likely that you will have an unprepared witness who is incapable of answering the questions presented at the deposition.

2. Minimum notice requirement: as stated above, if you want to have an effective 30(b)(6) deposition you have to coordinate the date with opposing counsel so that opposing counsel can identify, prepare, and have available the relevant witness or witnesses. Adding a minimal notice requirement is unnecessary.

3. Forbidding questioning beyond the matter specified: that's a meaningless proposition. The standard 30(b)(6) deposition notice will simply include: "I will ask the witness or witnesses about their personal knowledge of the facts of the case outside of the areas of inquiry addressed in the balance of this deposition notice."

4. Substituting interrogatories: as discussed above, if interrogatories are possible or answer the areas of inquiry, there wouldn't be a need for a 30(b)(6) deposition. I like the idea of using depositions on written questions. However, when that possibility is broached to "clean up" discovery loose ends, the usual/common outcome is in an agreement with counsel that I can propound, for example, five more interrogatories and the opposing party will answer them in lieu of taking the deposition. A Rule 31 deposition only works in very narrow circumstances.

5. Advance notice or identity of witnesses: that would be helpful.

6. Second depositions of organizations: the rule does not now prohibit this.

7. Limiting to the parties: bad idea. I use 30(b)(6) deposition to depose entity non-parties because the alternative would often required that I take numerous depositions of non-party employees. In my experience it appears to be much less expensive and much less burdensome for the non-party to produce one witness to answer clearly targeted questions then it is for it to prepare and produce numerous witnesses who had some input on the relevant facts.

8. Identifying documents reviewed and preparing the list of matter: I don't understand how that could possibly benefit anyone.

9. Expanding initial disclosures: I don't see how that could obviate any problems with the Rule 30(b)(6).

10. Forbidding duplication: bad idea. This is a recipe for a party to offer false evidence in a 30(b)(6) deposition and thereafter preclude its employees or agents from testifying truthfully by objecting that the topic has been covered in a Rule 30(b)(6) deposition.

11. Limiting number of areas of inquiry. The requirement of reasonable particularity is sufficient. Clearly limiting the number of areas of inquiry simply forces the deposing party to give vague and general areas of inquiry, defeating the benefits of the Rule 30(b)(6) deposition.

12. Specific references to Rule 37: effectively meaningless.

Conclusion

Thank you for your consideration of my comments.

Very truly yours,

ROBERT J. ROSATI

RJR/mmv