PUBLIC HEARING ON

PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF CIVIL PROCEDURE

JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON CIVIL RULES

U. S. District Courthouse, Special Proceedings Courtroom
401 Washington Street, Phoenix, AZ 85003
January 4, 2019

List of Confirmed Witnesses for the
Public Hearing on Proposed Amendments to the
Federal Rules of Civil Procedure
Judicial Conference Advisory Committee on Civil Rules
U. S. District Courthouse, Special Proceedings Courtroom
401 Washington Street, Phoenix, AZ 85003
January 4, 2019 – 9:00 A.M.

	Witness Name	Organization	Testimony / Comments
1	Jennie Lee Anderson	Andrus Anderson LLP	Tab 1
2	M. Nieves Bolaños	Potter Bolaños LLC	Tab 2
3	Michael R. Carey	Bowman and Brooke	No written testimony submitted
4	Gray T. Culbreath	Gallivan, White & Boyd P.A.	No written testimony submitted
5	A. J. de Bartolomeo	Milberg Tadler Phillips Grossman LLP	Tab 3
6	Michael D. Denton, Jr.	Denton Law Firm	No written testimony submitted
7	Sandra Ezell	Bowman and Brooke, LLP	No written testimony submitted
8	Patrick Fowler	Snell & Wilmer	No written testimony submitted
9	Bina Ghanaat	Lankford Crawford Moreno & Ostertag LLP	No written testimony submitted
10	John W. Griffin, Jr.	Marek, Griffin & Knaupp	Tab 4
11	Lisa LaConte	Heyl, Royster, Voelker & Allen	No written testimony submitted
12	James L. McCrystal	DRI-The Voice of the Defense Bar	Tab 5
13	Keith McDaniel	McCranie Sistrunk Anzelmo Hardy McDaniel & Welch LLC	No written testimony submitted
14	Francis M. McDonald, Jr.	McDonald Toole Wiggins, PA	No written testimony submitted
15	Mark J. Kenney	Severson & Werson	No written testimony submitted
16	Lee Mickus	Taylor Anderson	Tab 6
17	Donald Myles, Jr.	Jones, Skelton & Hochuli, P.L.C.	No written testimony submitted
18	Amir Nassihi	Shook, Hardy & Bacon L.L.P.	No written testimony submitted
19	Bradley W. Petersen	Slattery Petersen PLLC	Tab 7
20	Tim Pratt		No written testimony submitted
21	Bill Rossbach	Rossbach Law, P.C.	Tab 8
22	Bradley W. Smith	Baker, Donelson, Bearman, Caldwell & Berkowitz, PC	No written testimony submitted
23	John Isaac Southerland	Huie, Fernambucq & Stewart, LLP	Tab 9
24	John Sundahl	Defense Lawyers Association of Wyoming	Tab 10
25	Philip L. Willman	DRI–The Voice of the Defense Bar	Tab 5

TAB 1

TESTIMONY AND COMMENT OF

JENNIE LEE ANDERSON ANDRUS
ANDERSON LLP

ANDRUS ANDERSON LLP

December 14, 2018

Via Email
RulesCommittee_Secretary@ao.uscourts.gov

Rules Committee Secretary
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E, Room 7-240
Washington, D.C. 20544

Re: Anticipated Testimony Regarding Proposed Amendment to FRCP 30(b)(6)

Dear Committee Secretary and Members,

Thank you for the opportunity to testify before the Committee on January 4, 2019. By way of background, I am a founding member of Andrus Anderson LLP in San Francisco, California. We represent consumers and employees in class and complex cases nationwide.

While I will be submitting more detailed comments before January 4, I write today to identify the topics I intend to cover during my testimony. Specifically, I intend to discuss the following topics:

1. Efficiencies Rule 30(b)(6) procedures provide in consumer and antitrust class actions, particularly at the class certification stage;
2. Tensions between being precise in identifying the topics of testimony and limiting the number of topics; and
3. Benefits of disclosing the identity of the witness(es) in advance of the deposition.

I look forward to testifying before the Committee on January 4.

Sincerely,

/s/ Jennie Lee Anderson

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ANDRUS ANDERSON LLP

January 2, 2019

Advisory Committee on Civil Rules
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, D.C. 20544 A

Re: Comments on Proposed Amendment to Fed. R. Civ. P. 30(b)(6)

Dear Members of the Committee:

I am a partner at the San Francisco law firm Andrus Anderson LLP. My firm represents plaintiffs in class, individual and mass actions across the nation in the areas of employment, antitrust, product liability and consumer protection law. I respectfully submit the following comments regarding the proposed amendments to Rule 30(b)(6) of the Federal Rules of Civil Procedure.

A majority of defendants named in the lawsuits my firm files are corporations, the structure and management of which we know very little about at the beginning of the litigation. Rule 30(b)(6) provides an efficient and effective means of gathering corporate information to lay a foundation for discovery for the duration of the litigation. In class actions, class certification may turn entirely on testimony elicited from a Rule 30(b)(6) deposition regarding core certification questions such as whether the conduct arose from uniform policies and practices, whether an injury is tied to a universal design or manufacturing defect or whether a common chain of distribution or pricing method existed throughout the class period.

Efficiency is further served when the parties are transparent about identifying the witness and the topics he or she will be covering in advance. In many cases, a corporate defendant will designate different witnesses for different topics. In one international price-fixing case where my firm represented consumer plaintiffs, for example, having candid communications with opposing counsel regarding who would testify about which topics vastly improved the process. Knowing the identity of the witnesses allowed for better preparation and planning. I was able to quickly cover each witness's background and experience and confirm the topics of inquiry to be covered at the outset of each deposition, allowing us to move on to the substantive topics at hand. Some of the witnesses covered very discrete topics. Others had worked at the company for decades and were addressing multiple topics. Because this was disclosed in advance, the parties were also able to more efficiently schedule the testimony, including scheduling more than one witness in a single day in some instances.

I agree with and applaud the Committee's draft note acknowledging that, even under the amended rule, the responding party is still responsible for identifying and preparing an appropriate witness, and that the meet and confer process envisioned by the proposed amendment **does not** require that the parties to reach **any** agreement. Rather, the amendment and accompanying note

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recognize that by reducing surprises the parties can maximize discovery efficiencies and save resources. Indeed, the draft note is consistent with Rule 1's requirement that the Rules be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding" and is an important aspect of the proposed amendment.

Some of the comments submitted in response to the proposed amendment encourage the Committee to abandon the current draft in favor of inflexible restrictions, such as a presumptive limit on the number of topics to be included in the notice. I support the Committee's sound decision to avoid imposing such limitations, which would undermine many efficiencies achieved by the Rule. Limiting the number of topics would necessarily lead to broader and less precise descriptions, thereby eliciting new objections that the noticing party's topics are too vague, incomprehensible or overbroad. The more specific the noticing party can be, the more effective the process. An example from the same international price-fixing case mentioned above comes to mind. There, plaintiffs served a 30(b)(6) deposition notice encompassing five general categories: 1) manufacturing and production, 2) sales and pricing, 3) costs and profits, 4) U.S. commerce, and 5) transactional data. Alone, these categories are very broad. But for each category, we identified anywhere from two to ten specific topics to let the defendants know precisely what we were looking for. The number of categories did not increase the burden on either party. On the contrary, it allowed defendants to identify and prepare appropriate witnesses and eliminated the guess work. Utilizing Rule 30(b)(6) should be encouraged, not discouraged. The procedure allows the noticing party to get a crash course in the inner workings of the company at issue in the case. This fact-finding exercise provides information the parties need to proceed with discovery, narrow claims and defenses, present class certification arguments and propose a workable trial schedule.

Overall, I believe the existing Rule works very well, but I appreciate the guidance the Committee seeks to include in the proposed amendments and, very importantly, the accompanying note. Thank you for your time and attention.

Sincerely,

/s/ Jennie Lee Anderson

TAB 2

TESTIMONY OF

M. Nieves Bolaños
Potter Bolaños LLC

POTTER BOLAÑOS LLC
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December 14, 2018

Submitted Via Email to: RulesCommittee_Secretary@ao.uscourts.gov

Rebecca A. Womeldorf
Rules Committee Chief Counsel
Office of the General Counsel
Administrative Office of the United States Courts

Re: Written Testimony of M. Nieves Bolaños Regarding The Proposed Amendment To Federal Rule of Civil Procedure 30(b)(6)

Dear Advisory Committee on Civil Rules:

I respectfully submit this testimony both as a Partner at Potter Bolaños LLC and a member of the Executive Board of the National Employment Lawyers Association (NELA), regarding the proposed amendment to Federal Rule of Civil Procedure 30(b)(6) (Proposed Amendment). I appreciate the Committee's careful attention to the various perspectives provided throughout the process that led to the Proposed Amendment, and thank the Committee for the opportunity to offer my impressions.

Our firm represents employees and labor organizations in individual and class actions, involving claims of employment discrimination, harassment, retaliation, whistleblowing, and wage and hour violations. NELA is the country's largest professional organization that is exclusively comprised of lawyers who represent individuals in employment-related matters, with 69 state and local affiliates around the country. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace.

Our clients come from all walks of life, from hourly workers to executives and other professionals. Like many NELA members and firms, as well as anyone who regularly or primarily represents employees, our cases almost always involve a substantial asymmetry in access to the information and witnesses essential to the claims and defenses at issue. In addition, organizational employers always have access to far greater resources than either our firm or our clients.

I. The Proposed Amendment, as Revised, Adopts Existing Best Practices Regarding Rule 30(b)(6) Depositions

The imbalance in access to information, documents, witnesses, and resources between organizations and individuals necessitates rules that promote both efficiency and fundamental fairness.

We regularly take Rule 30(b)(6) depositions in our cases, and have found them to be an essential vehicle for gathering information. As we described in earlier comments our firm submitted to the Rule 30(b)(6) Subcommittee, in our experience, the current rule is working well, including because in our jurisdiction (the Seventh Circuit), parties regularly meet and confer regarding discovery issues, including the number and description of matters for examination and the identity of witnesses for Rule 30(b)(6) depositions. Therefore, the Proposed Amendment makes an explicit requirement of what is already common practice among responsible counsel representing both individual plaintiffs and organizational defendants.

II. The Committee's Decisions Regarding What To Exclude Versus What To Include In The Proposed Amendment Will Serve The Legitimate Needs Of All Litigants & Promote More Cooperative Dispute Resolution

We commend the Rule 30(b)(6) Subcommittee for its careful review of and ultimate rejection of a number of proposals that would have undermined many of the benefits of Rule 30(b)(6). The Proposed Amendment balances the legitimate concerns of both the defense bar and plaintiffs-side counsel, and essentially codifies best practices that have in our experience improved efficiency, discouraged gamesmanship, reduced disputes, preserved judicial economy, and promoted the just, speedy, and inexpensive resolution of claims.

A. Rejecting The Imposition Of Rigid Topic Limits

Based on our experience, we agree with the Committee's sensible decision to reject arbitrary limits on the number of topics for examination. That decision acknowledges the practical realities of cases and promotes fairness. Parties will not be bound by arbitrary caps, and will retain ultimate control of the subject-matter covered. Both parties will benefit from having clarity on topics that can be refined, narrowed, eliminated, or shifted to a later stage in the litigation in light of the particular circumstances of a given case.

Any presumptive cap on the number of topics for examination would in practice be counterproductive. As a practical matter, it would serve to encourage counsel to broaden the definition of each topic in order to avoid exceeding the limit. This would make it more difficult for witnesses to prepare, which would undermine effective information gathering and lead to costly, wasteful disputes.

While we are aware of the 100-topic 30(b)(6) deposition notices provided by members and representatives of the defense bar, such examples are in our experience anomalous. While such lists might be appropriate in certain cases, we have not found them to be necessary or efficient in

our practice. Engaging in such tactics where not necessary would represent a monumental waste of our firm's and our clients' time and other resources. Our firm, and those like it that operate with limited resources, recognize that serving such a notice unnecessarily would immediately devolve into a series of intractable disputes that would not be directed in any way towards furthering the resolution of the actual underlying claims.

Our firm's clients are largely working people under immense pressure to resolve their claims as equitably and cost-effectively as possible. As such, we carefully tailor the number and description of topics in our 30(b)(6) notices to gathering necessary information from the witnesses possessing it, and for the same reasons, our colleagues in the workers' rights advocacy community do the same. Further, in our experience, judges would limit an overly broad notice on a motion for protective order, which could potentially subject our client to shifting of fees. See, *Rickles v. City of South Bend*, 33 F.3d. 785, 786-7 (7th Cir. 1994).

Our firm has litigated against a number of public entities, which in general maintain systems and rules governing most of their employment practices. These systems and rules are most effectively discovered through initial 30(b)(6) depositions. However, they often need to be explored further, after we have established through fact witnesses whether the rules and formal policies were applied or followed. This is of particular import in section 1983 claims where plaintiffs might have the burden of demonstrating a *de facto* policy was being utilized, despite the existence of a contrary official policy, thus requiring a fact-intensive inquiry into policies both official and not. A rigid limit on topics would present a real risk of preventing plaintiffs from obtaining information essential to their cases.

B. Requiring Advance Notice Of The Identity Of Witnesses

Requiring advance notice of the identity of witnesses is a practical necessity, and in our experience, responsible counsel provide this information as a matter of course. Making the practice mandatory will eliminate wasteful gamesmanship and delays in which parties refuse to identify witnesses, thereby hindering counsel's ability to adequately prepare, and causing depositions to be longer, less productive, and more costly. Of course, the party being deposed will retain ultimate control over the witnesses to be produced. We agree, as stated in the Draft Committee Note, that advance discussion should help avoid later disputes about whether the witness was appropriately knowledgeable or prepared.

Knowing the identity of the witness in advance assists counsel in assessing what personal knowledge the witness will have, in addition to what they are required to discover and prepare to discuss as an organizational representative. This, in conjunction with the meet and confer requirements of the proposed rule, allows for more productive discussions about the scope, timing, and limitations of the deposition. For example, if a 30(b)(6) witness is also a regular witness, the parties can discuss how to structure the examination to ensure that the witness will not be required to attend multiple depositions. We have been able to reach such agreements with opposing counsel in the past, thus reducing the costs of the discovery process considerably.

C. Making Explicit The Ongoing Responsibility To Meet & Confer

Finally, we agree with the Proposed Amendment's clarification that the new meet and confer process will be ongoing, as necessary. As the Draft Committee Note makes clear, the process does not mandate that the parties reach an agreement on all issues. However, specifying that the process should be ongoing is in keeping with the spirit of the rules, will help ensure that all parties take their responsibilities seriously, and recognizes the practical reality that cases and their particular needs can evolve over time.

In the many years' experience of our firm's attorneys, the most common issue that arises in the context of 30(b)(6) depositions is that 30(b)(6) witnesses come to their deposition unprepared to testify about the organization's knowledge and information regarding the designated topics. The identification of a witness in advance of the deposition, coupled with an ongoing requirement to meet and confer, will provide the parties an opportunity to ensure the witness is an appropriate designee and is being properly prepared with respect to the scope of the deposition notice. This practice helps minimize the risk that the witness will come to a deposition unprepared to testify on the topics for which they have been designated. Making the practice an explicit part of the Rule will assist the parties in streamlining and properly preparing for depositions.

III. The Committee Should Consider Amending The Draft Committee Note To Remove The Reference To Discussing Documents To Be Used During The Deposition

We believe that the Committee should consider removing the following sentence from the Draft Committee Note: "At the same time, it may be productive to discuss other matters, such as having the serving party identify in advance of the deposition the documents it intends to use during the deposition, thereby facilitating deposition preparation." During the initial discussions of the proposed rule change, there was a suggestion to mandate a pre-deposition exchange of exhibits. NELA, along with other groups, opposed this because it (1) would cause counsel to over-disclose numerous exhibits out of an abundance of caution, and (2) could effectively turn what should be a cross-examination into a mere live version of interrogatories.

Discovery is a fluid and ongoing process and preparation goes on right up to the date of a deposition. As a practical matter, such a requirement does not recognize that, while not ideal, sometimes documents are produced very near to, or even on the day of, the deposition. A well-tailored set of topics, accompanied by or identifying documents, should be at the discretion of the noticing party. Additionally, such a requirement would bar use of documents the relevance of which only becomes clear after the testimony is heard, for instance, for refreshment or impeachment.

Including the suggestion of an early exchange of deposition exhibits in the Committee Note risks reading into the new rule a requirement that has already been considered and justifiably set aside.

I once again thank the Committee for their hard work in developing the Proposed Amendment, and their attention to the various perspectives provided, including my own.

Respectfully Submitted,

M. Nieves Bolaños
Potter Bolaños LLC
NELA Executive Board

TAB 3

TESTIMONY OF

A. J. de Bartolomeo
Milberg Tadler Phillips Grossman LLP

MILBERG
TADLER PHILLIPS GROSSMAN LLP

NEW YORK
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December 12, 2018

SENT VIA E-MAIL

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

RulesCommittee_Secretary@ao.uscourts.gov

Re: Rule 30(b)(6) Public Hearing – January 4, 2019 in Phoenix, Arizona

Dear Members of the Committee on Rules of Practice and Procedure:

I am a partner at Milberg Tadler Phillips Grossman LLP in the San Francisco, California Bay Area, and I will be testifying on January 4, 2019 at the hearing in Phoenix, Arizona. Milberg Tadler is nationally recognized as a leader in defending the rights of victims of corporate and other complex wrongdoing. Milberg Tadler's practice focuses on the prosecution of class and complex actions in many practice areas, including securities, antitrust, consumer, False Claims Act, mass tort, and qui tam. Our litigation and trial work has shown us that Rule 30(b)(6) depositions are one of the most effective tools available to get to the heart of discovery, enabling us to prosecute the case more efficiently through written discovery, electronically stored information protocols and identifying other witnesses for deposition.

I would like to thank the Advisory Committee for its hard work in drafting the Proposed Amendments to Federal Rule of Civil Procedure 30(b)(6). The Advisory Committee had requested comments from the public early on in its initial comment period, in the summer of 2017. It is evident that the Committee carefully and thoughtfully considered the public comments because the final product presents a balanced and fair procedure with evenly imposed obligations on all parties in the litigation. The Committee's measured and conservative approach to evaluating changes to existing Federal Rule 30(b)(6) is textbook "best practices" in rulemaking, where even the slightest change can have unintended consequences. We appreciate

the precise and thorough approach the Advisory Committee took in crafting the Proposed Amendments. With a few comments and textual suggestion, I support the Proposed Amendments and believe that the Advisory Committee has achieved a fair and balanced rule that does not favor one side over the other.

Comments:

- A good faith meet and confer requirement as to the **identity of the designated witness** will facilitate efficiency and economy in the discovery process. The goal of Rule 30(b)(6) is to obtain testimony from a competent witness knowledgeable about the topics identified in the Rule 30(b)(6) Notice. The Proposed Rule's requirement that the parties have a constructive discussion as to the identity of the witness who will testify on the given subjects should help parties avoid the disputes that arise when the designee cannot answer questions on the stated subjects. This unfortunate situation leads to delay, protracted litigation and often necessitates motion practice and court involvement. I support the Committee's inclusion of the "identity of" requirement for the meet and confer process but I suggest the amendment would be strengthened if the Committee clarified, either in the Rule itself or the Committee Note, that the "identity of" of the witness for this purpose includes the witness' qualifications to speak competently on the topics for testimony. Without this additional information, discussion of the witness' name or job title may be meaningless.

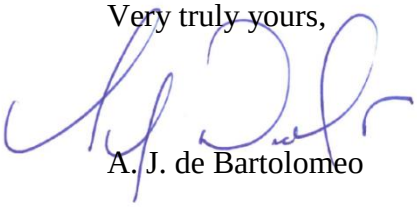
- The Meet and Confer Process **does not need** the words "number and" in the text. The **description of the matters for examination** is what the parties should be discussing in order to resolve potential disputes before the deposition occurs. Competent testimony on the stated subject areas is the whole point of a Rule 30(b)(6) deposition. The inclusion of "the number" of topics as a mandatory subject for discussion confers an unwarranted, independent level of importance on the form of the list. But one size does not fit all. In some cases, for example, there may be only 5 relevant subject areas for examination. In more complex matters, it may be more than 50. In addition, the number of topics listed is easily manipulated. The Proposed Amendment's emphasis on the number of topics may encourage noticing parties to list a few broad topics rather than more specific topics that would be more informative but might encourage the receiving party to object to the number of topics. In short, the Amendment and Committee Note should encourage the parties to discuss substance, not form.

- The text of the Proposed Rule makes clear that the witness is a person that **"the organization designates"** to testify. Paragraph 2 of the Draft Committee Note also makes clear that "the named organization ultimately has the right to select its

designees. . .". Some of the comments submitted in response to the Proposed Amendments seem concerned that the Proposed Rule somehow removes the designation choice from the organization or otherwise imposes an outside influence into the mix. The Proposed Rule does no such thing and I believe these comments are unfounded. If the word "ultimately" is a basis for concern or ambiguity, the Committee may want to consider striking it from the Proposed Note.

Please do not hesitate to contact me should you need any additional information or have any questions.

Very truly yours,



A. J. de Bartolomeo

TAB 4

COMMENT OF

John W. Griffin, Jr.
Marek, Griffin & Knaupp

MAREK, GRIFFIN & KNAUPP

HOWARD R. MAREK***
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OF COUNSEL
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December 13, 2018

Comment to Advisory Committee on Civil Rules on the Proposed Amendment to Federal Rule of Civil Procedure 30(b)(6)

Dear Committee Members:

Wow what a difference there is in the lay of the land since the hearings the Committee held in 2014 regarding proportionality and preservation of evidence. Rule 30(b)(6) is a much more discrete topic, and I am in support of the Committee's work.

Many of us are believers in periodic review of the Rules, so the Committee shouldn't be criticized for seeking input from the Bar and those we represent. No other country has this Rule, although many states have some variation of it. In its 40 plus years, it has made few enemies and many friends among those who try cases to a jury. The original version of the Rule improved what discovery is: a search for the truth. While I am a firm believer in the "if it's not broke, don't fix it" concept, the tweaks and adjustments stand to make the Rule work better.

As some of you know from the hearings in 2014, I litigate commercial cases, but now primarily litigate disability rights cases, especially blanket bans against people with a specific disability like diabetes or hearing loss. As some members may recall, from the 2014 hearing in Dallas, I have had the privilege of litigating Court Security Officer cases with the United States Marshals Service, which is responsible for the security of the federal courts and the public in federal courthouses around the United States. In the past, the USMS would fire your CSOs if they needed hearing aids to pass their hearing tests. No more. Now they are tested on how well they hear, period, with or without hearing aids. Why? Because these officers secured important discovery from the USMS. That was important to this Committee in 2014. It's important today, too, since a Rule 30(b)(6) notice of deposition helped congeal the issues and get the case resolved in a manner that keeps the judiciary safer and which prevents needless firings. Topics like which functions the employer thinks are essential, whether the worker was qualified, whether the worker was a direct threat, how the employer determines direct threat and risk, the basis for the Agency's objection to hearing aids and the worker's on the job performance.

Without this tool, the retired career law enforcement officers who serve as CSOs and were challenging the USMS practices, would have had no way to obtain critical information. It turned out that removing these officers compromised judicial security instead of enhancing it by banning use of hearing aids to pass the hearing tests. They had chosen to weaken the actual hearing standards for CSOs, yet removed officers with

virtually normal hearing with hearing aids.

Other important doors were opened by the text of the Rule. Some in the DC area may recall the Washington Post and NPR stories on the young veteran who the FBI hired as a Special Agent but then removed from Quantico because of a war injury.[1] His non-dominant hand was blown off by a grenade. He served three tours during the war, as an Army Ranger, but when he showed up at Quantico, trainers got him removed because they claimed that shooting with the off hand was required. He could shoot with his prosthesis, but the FBI refused to allow him to demonstrate this, and it kicked him out of the Quantico Training Academy.

He brought suit, and a Rule 30(b)(6) deposition, not written discovery, brought out the facts and helped decide the case. Here is how:

First, since the FBI claimed an agent had to be able to shoot with the non-dominant hand in order to be qualified, the deposition notice included that topic. The designee testified that in the dozen or so occasions when a Special Agent discharged a weapon with the non-dominant hand, mayhem ensued, with bullets going into bathroom walls and even into the Special Agent's dominant hand in one case. The designee explained that the lesson learned was that this mishap would never occurred if the Special Agent had utilized his dominant hand.

Second, the FBI claimed they had never had anyone who had a serious hand injury who worked as a special agent. Again, this was a topic of the notice. Because of Rule 30(b)(6)'s requirement to produce a witness with knowledge, the jury heard what we had learned from that topic – that numerous on board Special Agents had suffered the loss of a hand or the use of a hand and still were deemed qualified to work.

Third, we learned something else in that Rule 30(b)(6) deposition. We learned that a Special Agent can elect to pass on all the shots with the non-dominant hand, so long as they achieve enough points on the firearms qualification test with the dominant hand. That is, points are points, regardless of how they accumulate them. Finally, the designees confirmed that the FBI had no written requirement that Special Agents be able to hit the broad side of a barn with the nondominant hand. Written discovery did not reveal this evidence. It was because of the Rule that the truth was elicited.

This testimony was the foundation for the jury's verdict. Anthony Trenga, the district judge, ordered reinstatement, and then Director James Comey decided not to appeal the case, and readmitted the young

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[1]https://www.npr.org/2013/07/25/205508566/federal-case-pits-wounded-warrior-against-fbi and https://www.washingtonpost.com/local/injured-veteran-wins-75000-in-lawsuit-against-fbi/2013/08/07/67624f18-ff81-11e2-96a8-d3b921c0924a_story.html?utm_term=.60113b9b179c https://www.washingtonpost.com/local/crime/judge-gives-fbi-deadline-to-resume-training-disabled-veteran-justin-slaby/2013/11/22/a4e81d9c-53a8-11e3-9fe0-fd2ca728e67c_story.html?utm_term=.599de2de7bea

veteran to the academy, where he thrived. At graduation, he was elected by his class to be the class representative. He now serves our country today, in large part because of the no nonsense provisions of Rule 30(b)(6).

Parties can fudge and fence over written discovery requests, but a witness under oath is much more forthcoming. The Rule, in the context of CSO cases and FBI cases, made our country safer since the USMS and the FBI designated witnesses who candidly shared the organization's true view of the topic, leading to results that strengthen those Agencies and the public they serve.

Yes, over the past 35 years, there have been sporadic issues about the scope and the parties' understanding of the topics, so the meet and confer tweak should help avoid those occasional dustups. The Rule will also be improved by having the organization identify the designees before the day of the deposition, since last minute designations are the ones that have caused difficulties to both the party seeking discovery and the organization as well. The draft amendment will discourage procrastination and prevent needless dustups on the responding party's diligence in complying with the notice. The Committee's proposal is consistent with the original Rule in insuring that responding organization gets to choose its designee, and must properly prepare them to give testimony on the topics, and requires the party seeking discovery to identify the topics with reasonable particularity.

The Texas Rule, 199.2(b)(1) is patterned on Rule 30(b)(6), and it features one of the tweaks that the Committee is considering, in that the Texas Rule does require the organization to designate the witnesses on the topics a reasonable time before the deposition. In the 35 years since the Rule was adopted in Texas, there is not a single reported case arising out of that requirement. For Texas, that is significant. In fact, there is only one case that actually discusses the utility and scope of the Rule.[2] So the draft that the Committee is considering has two important improvements. First, the organization will know that it has done what the courts require: produce a witness who can speak for the organization. When I am defending cases, it's good for my client to face the topics and find the person who can speak about them and helps us evaluate the exposure of our client. Second, it helps shorten the deposition when both sides know who the designee is before the deposition, avoiding needless questioning and exploring that is avoided by identity ahead of time.

Both these improvements will help counsel in streamlining the discovery process. The party noticing the deposition must still draft topics with reasonably specificity, and the organization responding will still have to designate and prepare a witness to testify on the topics, but the tweaks will make that process even more streamlined.

I tend to think that it would work better if we don't apply an across the board rule that parties must meet and confer on the precise *number* of topics, since that is a more granulated discrete subject than the description of the matters to be addressed in the notice. It sort of invites bandying over something that would not otherwise provoke a fight. In 35 years, I have never had any argument about the number of topics, while there have been discussions over the propriety of the topics. In those cases, conferral invariably yielded

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[2] *Hospital Corporation of America v. Farrar*, 733 S.W.2d 393 (Tex. App.–Ft. Worth 1987)

resolution.

The amendment makes it clear that parties who have no need to meet and confer can continue to operate as they do under the existing Rule. And that's good, since I have never ever heard a district judge say that its docket is overloaded with Rule 30(b)(6) disputes.

My own view, having taken dozens of these depositions under Rule 30(b)(6), is that the Rule is elegantly simple and has helped resolve many cases. In the 5th Circuit, the leading case is now 15 years old.[3] It is well settled for counsel and for our clients, whether they are seeking the 30(b)(6) deposition or defending it. And the courts have been pretty good at keeping disputes to a minimum, rejecting arguments that Rule 30(b)(6) testimony is some sort of judicial admission, but also recognizing that there can be no ambush, and that parties should supplement when it secures knowledge about a topic that was disclaimed during the deposition.[4]

So while the Rule isn't broken in any sense, it can be improved, and the Committee's draft is a move in that direction. The best course is to continue that course, and avoid invitations to do mischief to the very advantage the Rule has: direct testimony on topics that are important to the case. As a 35 year veteran of discovery and 70 plus jury trials, my thought is that the Committee has faithfully considered the feedback you've received, and have done what all of would hope: make the Rule a bit better. It wouldn't be a problem if this Rule remained unchanged, but the changes that the Committee proposes are a balanced and thoughtful effort at making it work even better for the parties, and I commend the current draft for your consideration.

Sincerely,

John W. Griffin, Jr.

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[3] *Brazos River Authority v. GE Ionics, Inc*., 469 F.3d 416 (5th Cir. 2006)

[4] *Rainey v. American Forest and Paper Assn*., 26 F.Supp.2d 82,95-96 (D.D.C 1996)

TAB 5

COMMENT OF

DRI-The Voice of the Defense Bar

November 20, 2018

Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules
Administrative Office of the United States Courts
One Columbus Circle, NE, Suite 7-240
Washington, D.C. 20544

Dear Members of the Civil Rules Advisory Committee:

I am President of DRI – *The Voice of the Defense Bar,* (DRI), and am writing to you on behalf of our organization to respectfully comment on the changes recently proposed to Rule 30(b)(6).

With a membership of 20,000 individual and corporate members, DRI is the world's largest international membership organization of lawyers involved in the defense of civil litigation. The history of DRI encompasses many years of effort by dedicated lawyers who see the need for a coordinated approach by defense lawyers to the challenges of a civil defense practice. We see Rule 30(b)(6) as one of those challenges. DRI is committed to anticipating and addressing issues germane to defense lawyers and the interests they represent, improving the civil justice system, and preserving the civil jury trial.

The suggested rule change, in the main, should be helpful to all litigants by imposing the duty to meet and confer concerning the number and description of the matters for examination which should help all parties clarify the scope of the deposition to hopefully allow better preparation by each side. What is missing is a framework for that discussion. It would be helpful to have Rule 30(b)(6) clarify that such depositions are subject to Rule 30(a) and (d), so that such depositions are included within the limited number of depositions and the time limits on them, unless otherwise provided by a stipulation of the parties or court order. In addition, it would promote further efficiency by providing a presumptive limit on the number of "matters for examination" at such deposition.

In addition to those elements which, if added, would improve the rule, the proposed rule would impose a new unwarranted duty on organizations requiring them to confer about the identity of each person to be designated to testify. Organizations might be encouraged by way of the Committee Note to do so, but imposing that as a duty in each case is unwise, and that language should be removed from the proposed amendment.

In most cases, once the subjects and the likely scope of inquiry are understood by both sides, the burden on the organization to designate who will testify on its behalf concerning "information known or reasonably available to the organization" is easily met and seldom is the designation of concern. After all, the designee is testifying to the organization's information about the matters under examination, not the designee's personal knowledge concerning those topics. Compelling the organization to confer in good faith about "the identity of each person the organization will designate to testify" implies that the party

issuing the notice has some right to participate in that choice, which contradicts the rule's clear and unambiguous mandate that it is the *organization* that must designate who the witness will be.

When a party wants a specific witness to testify, the party is free to depose that individual about their personal knowledge, which knowledge may include matters inquired of the organizational witness, but those depositions are subject to the limitations on the number and time length for such depositions contained elsewhere in Rule 30.

In its 2017 comments, DRI identified other useful improvements to the rule which remain areas where we believe useful rulemaking should occur:

- Amendments to Rules 16 and 26(f) that would include Rule 30(b)(6) in party conferences, pretrial conferences and scheduling orders;
- An amendment to Rule 26(e) allowing for supplementation of Rule 30(b)(6) depositions;
- An amendment to Rule 30(b)(6) that provides a mechanism for making and resolving objections to the notice;
- An amendment to Rule 30(b)(6) that provides a presumptive limit of ten topics;
- An amendment to Rule 30(b)(6) that establishes a means for organizations to certify that they have no knowledge beyond information contained in documents and, where such certification is made, no deposition is required;
- An amendment to Rule 30(b)(6) clarifying that a deposition is not required on topics that have been subject to deposition before and where the transcript is available; and
- An amendment to Rule 30(b)(6) prohibiting contention questions.

Some of these are included in the Committee Note, which is helpful; however, DRI continues to believe provisions allowing supplementation of responses to organizational depositions, setting a presumptive limit on the number of topics, allowing an organization to certify there is no information beyond documents available within the organization or submitting prior transcripts sufficiently responsive to a topic in the notice to remove that topic from the notice, remain worthy of further consideration because they are in the spirit of the Committee's 2015 discovery amendments which encourage cooperation, proportionality and early case management.

Also, DRI supports the positions and reasoning provided by Lawyers for Civil Justice in their September 12, 2018 submission to the Advisory Committee.

DRI respectfully urges the Advisory Committee to improve the proposed amendment by making further revisions as suggested here. Thank you for your consideration.

Sincerely,

Toyja E. Kelley
DRI President

TAB 6

TESTIMONY AND COMMENTS OF

Lee Mickus
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December 13, 2018

Advisory Committee on Civil Rules
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Room 7-240
Washington, DC 20544

Re: Testimony on Proposed Amendments to Federal Rule of Civil Procedure 30(b)(6)

Dear Members of the Civil Rules Advisory Committee:

I look forward to presenting my testimony at the January 4, 2019 public hearing in Phoenix. My testimony will generally track the written comments I submitted on December 12, 2018. My comments are posted at: https://www.regulations.gov/document?D=USC-RULES-CV-2018-0003-0141

As discussed in my written comments, I urge the committee to reject the proposed amendment to Rule 30(b)(6) in its current form and reconsider concepts that would address functional inadequacies, such as the lack of a defined procedure for raising and resolving objections. The proposed amendment fails to address the real needs of Rule 30(b)(6), but will likely create new grounds for disagreement. In particular, the mandate to confer regarding witness identity creates an unnecessary new discovery obligation that provides no meaningful benefit, will confuse the parties' responsibilities, and will encourage disputes. The Committee should reject any amendment to Rule 30(b)(6) that includes the requirement of conferral in advance of the deposition regarding the identity of the witness.

Very truly yours,

Lee Mickus

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December 12, 2018

Advisory Committee on Civil Rules
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Room 7-240
Washington, DC 20544

Re: Comments on Proposed Amendments to Federal Rule of Civil Procedure 30(b)(6)

Dear Members of the Civil Rules Advisory Committee:

I appreciate the opportunity to respond to the Request for Comments on Proposed Rules Amendments and submit for your consideration my comments on the proposed amendments to Federal Rules of Civil Procedure 30(b)(6).

My observations regarding the proposed amendments arise from my experience as a civil litigator, which primarily involves the representation of manufacturers and other corporations in product liability lawsuits. In this capacity, I have participated in the response to dozens of Rule 30(b)(6) deposition notices, including identifying corporate representatives to act as witnesses, preparing those individuals to testify regarding the organization's knowledge, interacting with opposing counsel to clarify the areas of inquiry and resolve objections, and defending the witness and the responding party at the deposition.

In my experience, Rule 30(b)(6) depositions generate disagreements at a particularly high rate. Disputes regarding issues such as the adequacy of notice to prepare the witness to address fully the corporate knowledge and the amount of deposition time appropriate for the needs of the case are common. More central to the functioning of the Rule 30(b)(6) procedure, parties frequently fail to reach a common understanding of the nature and scope of the identified areas for examination, leading to arguments and often motions pitting assertions of incomplete witness preparation against contentions that the topics set forth in the deposition notice were not described with sufficient particularity.

The proposed amendments to Rule 30(b)(6) will accomplish little to prevent the occurrence of such disputes. Practitioners will still receive no guidance about limits on testimony time or proper notice. Although conferring about the number of topics and the description of the areas of inquiry appropriately focuses the parties' attention on issues critical to the functioning of the procedure and most likely to spark disagreements and even motions,[1] many courts already require such conferral and most practitioners will undertake these efforts. Because pre-deposition conferral already occurs widely, building this requirement into the rule itself cannot be expected to yield significant improvement in Rule 30(b)(6) practice.

Far more problematic is the proposed amendment's requirement to confer in advance of the deposition regarding the identity of the person who will testify. The addition of this provision offers no meaningful benefit, but will confuse the parties' responsibilities, encourage more disputes, and create complexity and gamesmanship concerns. The Committee should reject any amendment that directs a party responding to a Rule 30(b)(6) notice to discuss the identity of the witness with the opposing party in advance of the deposition.

The proposed addition of a mandated conferral regarding witness identity will establish a new discovery obligation never before recognized.[2] As with any discovery obligation, the existence of this requirement would create the opportunity for litigants to disagree and pursue motions necessitating court involvement. With the proposed witness identity provision, this likelihood is apparent from current practice: even though courts consistently recognize that determining the representative who will testify at a Rule 30(b)(6) deposition is the exclusive province of the party responding to the notice,[3] some litigants who serve Rule 30(b)(6)

[1] The Rule 30(b)(6) procedure simply cannot operate as intended unless the parties share an understanding of the scope and boundaries of the areas of inquiry. *See*, *e.g.*, *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 125 (D.D.C. 2005)("The purpose of designating matters for the 30(b)(6) deposition is to give the opposing party notice of the areas of inquiry that will be pursued so that it can identify appropriate deponents and ensure they are prepared for the deposition."); *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000)("the noticed party must designate persons knowledgeable in the areas of inquiry listed in the notice. Where ... the [deponent] cannot identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible.")(citations omitted). *See also Federal Ins. Co. v. Delta Mech. Contractors, LLC*, No. 11-048ML, 2013 WL 1343528, at *4 (D.R.I. Apr. 2, 2013) ("Delta's list of twenty-four topics are sufficiently broad and amorphous as to run afoul of the requirement that Rule 30(b)(6) topics must be described with reasonable particularity. . . . This is precisely the sort of overbroad Rule 30(b)(6) notice that subjects the noticed party to an impossible task.")(citations and quotation omitted).

[2] *See Roca Labs, Inc. v. Consumer Opinion Corp.*, No. 8:14-CV-2096-T-33EAJ, 2015 WL 12844307, at *2 (M.D. Fla. May 29, 2015)("Defendants are not required to identify their Rule 30(b)(6) witnesses prior to deposition."); *Klorczyk v. Sears, Roebuck & Co.*, Civ. No. 3:13CV257 (JAM), 2015 WL 1600299, at *5 (D. Conn. Apr. 9, 2015)("the Court will not require Sears to disclose the name(s) or resume(s) of its 30(b)(6) witness."); *Cruz v. Durbin*, No. 2:11-CV-342-LDG-VCF, 2014 WL 5364068, at *8 (D. Nev. Oct. 20, 2014)("the court denies Cruz's motion to compel with regard to the identify of Wabash's Rule 30(b)(6) deponent").

[3] *See, e.g.*, *Merriweather v. United Parcel Service, Inc.*, No. 3:17-CV-349-CRS-LLK, 2018 WL 3572527, at *4 (W.D. Ky. July 25, 2018)("By its terms, Rule 30(b)(6) does not permit the plaintiff to designate a deponent to speak

deposition notices nonetheless improperly demand their preferred individual appear as the witness.[4] The proposed amendment would foster such disputes over the responding party's witness selection by suggesting that a noticing party has a basis in the language of the rule itself for insisting on a particular person's designation. Creating this new area of disagreement over Rule 30(b)(6) procedure would not improve the discovery process.

The proposed witness identity conferral requirement will also lead to confusion in some Rule 30(b)(6) depositions regarding the capacity of the witness and create the potential for sharp dealing. Rule 30(b)(6) depositions exist to provide discovery of the full information known to the responding organization, and not the information personally known by the specific witness.[5] Because Rule 30(b)(6) depositions only address what is known or reasonably available to the organization and may be learned by the representative in preparing to testify, the designated

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for the corporate defendants."); *Thermolife Int'l, LLC v. Vital Pharmaceuticals, Inc*., No. 14-61864-CIV-ZLOCH, 2015 WL 1119773, at *1 (S.D. Fla. Oct. 5, 2015)("Under Rule 30(b)(6), the corporation has the obligation to select the individual witness."); *Quilez-Velar v. Ox Bodies, Inc*., Civ. No. 12-1780(GAG/SCC), 2014 WL 12725818, at *1 (D.P.R. Jan. 3, 2014)("the noticed corporation alone determines the individuals who will testify on those subjects."); *Thompson v. Kawasaki Heavy Indus., Ltd.*, 291 F.R.D. 297, 304 (N.D. Iowa 2013)("the corporation itself selects the deponent who will speak for it"); *Galvan v. Mississippi Power Co.*, Civil Action No. 1:10CV159–KS–MTP, 2012 WL 5873633, at *3 (S.D. Miss. Nov. 20, 2012) ("MPC has the right to designate its corporate representatives as it sees fit."); *Folwell v. Hernandez*, 210 F.R.D. 169, 172 (M.D.N.C. 2002) ("One of the most important consequences of Rule 30(b)(6) is that under it, only the corporation selects the persons who will testify. . . . Rule 30(b)(6) does not allow for the opposing party to make the selection.").

[4] *See*, *e.g.*, *Progress Bulk Carriers v. American Steamship Owners Mut. Prot. and Indem. Asso*. 939 F. Supp. 2d 422, 430 (S.D.N.Y. 2013) ("[Rule 30(b)(6)], however, does not permit the party issuing the notice to select who will testify on the organization's behalf—which is exactly what Progress Bulk has attempted to do in this case."); *McPherson v. Wells Fargo Bank, N.A*., 292 F.R.D. 695, 698 (S.D. Fla. 2013)(rejecting attempt to require presentation of the noticing party's preferred witness, finding "Plaintiff cannot, however, dictate under Rule 30(b)(6) which individuals the corporation should designate, even if there is cause for Plaintiff's position."); *Ash v. Ford Motor Co*., No. 2:06CV210-B-A, 2008 WL 1745545, at *3 (N.D. Miss. Apr. 11, 2008)(the "party seeking discovery is not permitted to insist that [the responding party] choose a specific person to testify" as a Rule 30(b)(6) deponent and so "plaintiff was not entitled to insist on [the specified person's] presence absent having served him with a subpoena."); *Booker v. Massachusetts Dept. of Public Health*, 246 F.R.D. 387, 389 (D. Mass. 2007)("Plaintiff may not impose his belief on Defendants as to whom to designate as a 30(B)(6) witness."); *Sanders v. Circle K Corp*., 137 F.R.D. 292, 294 (D. Ariz. 1991)("Sanders' motion to compel seeks to compel Circle K to designate Edmonds as the Rule 30(b)(6) deponent[,]" but the court concluded that "it would be clearly inappropriate to require Circle K to designate Edmonds as the corporate spokesperson[.]").

[5] *See Jarvis v. Carnival Corp*., No. 16-CV-23727-MORENO/TURNOFF, 2017 WL 6987754, at *3 (S.D. Fla. Aug. 29, 2017)("The testimony of a Rule 30(b)(6) witness represents the collective knowledge of the corporation, not of the specific individual deponents."); *Richardson v. Rock City Mechanical Co*., No. 3-09-0092, 2010 WL 711830, at *6 (M.D. Tenn. Feb. 24, 2010)("The testimony of a Rule 30(b)(6) deponent represents the knowledge of the corporation, not the individual deponent, and thus the testimony of a Rule 30(b)(6) witness is different from that of a 'mere corporate employee[.]'").

representative need not have any personal knowledge pertaining to the topics of inquiry[6] and his or her identity is not even considered relevant to the procedure.[7] Once the identity of the witness becomes information mandated for disclosure, however, the noticing party can be expected to use that information to its advantage. As one example, the noticing party may use the advance notice of the witness's identity to prepare an ambush in which a witness prepared to address corporate knowledge on topics identified in the Rule 30(b)(6) notice instead faces a barrage of questioning on matters within the witness's personal knowledge but outside the scope of the topics listed in the Rule 30(b)(6) notice. The responding party cannot stop such questioning.[8] The record of such a deposition that mixes corporate representative and personal knowledge questions will be deeply confusing as to the capacity in which the witness is speaking at any given point, and will require frequently interjections by counsel to clarify the record and extensive jury instructions if presented at trial.[9]

Mandating pre-deposition conferral about witness identity does not address any need present in current Rule 30(b)(6) practice. This information has never been necessary for Rule 30(b)(6) depositions to provide useful and efficient discovery on information known and available to an organization. Problematically, if conferral about the identity of the witness leads to disagreement between the parties,[10] neither the proposed amendment nor the existing structure

[6] *See Great American Ins. Co. of New York v. Vegas Constr. Co*., 251 F.R.D 534, 538 (D. Nev. 2008)("A Rule 30(b)(6) designee is not required to have personal knowledge on the designated subject matter."); *Sprint Communications Co. v. TheGlobe.com, Inc*., 236 F.R.D. 524, 528 (D. Kan. 2006)("In other words, personal knowledge of the designated subject matter by the selected deponent is of no consequence.").

[7] *See Roca Labs*, 2015 WL 12844307, at *2 ("the identity of Defendants' corporate representatives is not relevant"); *Cruz*, 2014 WL 5364068, at *8 ("the Rule 30(b)(6) deponent's name is irrelevant.").

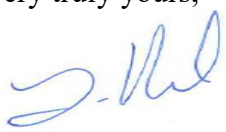
[8] *See*, *e.g.*, *Rivas v. Greyhound Lines, Inc*., No. EP-14-CV-166-DB, 2015 WL 13710124, at *6, *8 (W.D. Tex. Apr. 27, 2015), *amended in part as to amount of the sanction* at 2016 WL 11164796 (Jan. 11, 2016) (ruling that "depositions of corporate representatives designated pursuant to Rule 30(b)(6) are not limited to the topics listed in a Rule 30(b)(6) notice" and sanctioning counsel for instructing the witness not to answer questions outside the scope of the noticed Rule 30(b)(6) matters of inquiry); *King v. Pratt & Whitney*, 161 F.R.D. 475, (S.D. Fla. 1995)("this Court concludes that Rule 30(b)(6) cannot be used to limit what is asked of a designated witness at a deposition.").

[9] *See*, *e.g.*, *DeToy v. City and Cty. of San Francisco*, 196 F.R.D. 362, 367 (N.D. Cal. 2000)(describing detailed objections and clarifications that defending counsel may make during a Rule 30(b)(6) deposition when questions beyond the scope of the noticed areas of examination are asked, and noting that jury instructions should be considered to indicate that responses to such questions "were merely the answers or opinions of individual fact witnesses, not admissions of the party.").

[10] The committee note seems to recognize the potential for disagreements to occur, noting that "the amendment does not require the parties to reach agreement." Committee Note to Proposed Amendment to Federal Rule of Civil Procedure 30(b)(6), Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure, and the Federal Rules of Evidence - Request for Comment, August 2018, at 38.

of Rule 30(b)(6) provides an objection mechanism for raising and resolving disputes. Rather than adopt the deeply flawed proposed amendment with its requirement to confer about witness identity, the Committee should reconsider concepts – such as a defined procedure for asserting and resolving objections – to address the functional inadequacies that have caused Rule 30(b)(6) to spawn a disproportionately large number of discovery disputes.

Very truly yours,



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TAB 7

COMMENT OF

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December 7, 2018

Comment to Advisory Committee on Civil Rules on the Proposed Amendment to Federal Rule of Civil Procedure 30(b)(6)

Dear Committee Members:

I appreciate the opportunity to submit this comment in response to the proposed amendments to Federal Rule of Civil Procedure Rule 30(b)(6). While including a meet-and-confer requirement regarding the number and description of topics to be covered in a Rule 30(b)(6) deposition may be directionally helpful and is something I teach and endeavor to follow as part of my practice, I am very concerned about adopting a meet-and-confer requirement as to who the company chooses to vicariously represent it and testify as the company's agent. Requiring a company to confer about its selection of a witness would be inappropriate and unhelpful because (1) it is and must be the company's sole right and responsibility to select a representative of its choosing to speak for it vicariously as its agent; (2) allowing the noticing party select or even have a say in the selection of a company's representative would contravene the purpose for adopting Rule 30(b)(6), duplicate Rule 30(b)(1), and impose significant, unnecessary duties; and (3) it would be fundamentally unfair to allow a noticing party to force a company to prepare an undesirable representative to be knowledgeable and testify as the "face of the company." Instead, the Committee should amend Rule 30(b)(6) to provide a better notice procedure, a formal procedure for making and resolving objections to noticed topics, a presumptive limit as to the number of topics, a clear statement regarding the use of multiple witnesses, and protection for work product used to prepare a company witness.

Experience suggests that the proposed change to include a meet-and-confer requirement for selecting a company representative will lead to more problems, not less.

By way of background, I have been practicing law for more than 19 years. I primarily represent large corporate clients in product liability, healthcare, and commercial litigation. In my career, I have had the privilege of trying cases throughout the United States. I began at Snell & Wilmer L.L.P., where I was a partner before leaving to grow Slattery Petersen PLLC, a trial and litigation boutique law firm with offices in Phoenix and Tucson, Arizona. Our firm represents some of the largest companies in the United States and Arizona.

I have significant experience with Rule 30(b)(6) depositions, including the preparation and defense of dozens of depositions as well as noticing and taking depositions. The depositions

include not only federal courts but also state courts applying their concomitant rules. Given my experience, many years ago, I was asked to prepare and present a local continuing legal education course regarding preparation, problems, and suggestions associated with Rule 30(b)(6) depositions. Since that time, I have prepared and presented additional CLE courses through national webinars. The courses were generally titled something like *Defending Rule 30(b)(6) Corporate Depositions and Successful Strategies* and provided by the Clear Law Institute National CLE Webinar (April 2015); Strafford National CLE Webinar (June 2014, April 2013, June 2012, and August 2011); and National Constitution Center CLE Webinar (October 2013).

I often introduce a Rule 30(b)(6) CLE by telling attendees that, while I love trying cases, the worst part of any trial is when my opponent plays a video of damaging testimony from my client's company representative using a deposition taken in some prior case in which I was not involved. In the hands of a skilled trial lawyer, Rule 30(b)(6) can be a highly-efficient, highly-effective discovery device. It provides parties in multi-million-dollar, high exposure cases with a significant tool that can be used in program litigation for years and years. Unfortunately, the Rule gets abused—used as weapon to create discovery disputes that already over-worked courts often do not spend enough time trying to understand and fairly resolve thus leading to sanctions and a resolution based on something other than the true facts, evidence, and justice.

While the Committee has an opportunity to adopt changes to Rule 30(b)(6) that would provide better certainty to litigants and lawyers, which could avoid many of the discovery disputes that plague our courts, the proposed amendment is likely to have an opposite effect. More specifically, while meeting and conferring with counsel for the noticing party has long been a best practice that I advocate and follow when trying to understand the scope of the notice and deposition, it would be improper and counter-productive to meet-and-confer regarding my client's proposed representative. As described below, identifying and selecting a representative to testify on behalf of a company must be the sole province of the company itself, particularly when the noticing party otherwise has an opportunity to select a company's individual officer, director, or managing agent to testify by serving a Rule 30(b)(1) notice of deposition.

It must be the company's sole right and responsibility to select a representative of its choosing to speak for it vicariously as its agent.

Currently, Rule 30(b)(6) provides the company with the opportunity to "designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify." The witness designated by a corporation "represents the corporation just as an individual represents him or herself at a deposition." *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996). "When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent." *Resolution Trust Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993); *see also Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006) ("When a corporation produces an employee pursuant to a Rule 30(b)(6) notice, it represents that the employee has the authority to speak on behalf of the corporation with respect to the areas within the notice of deposition."). "In other words [due to this vicarious, agency relationship], the testimony of the Rule 30(b)(6) designee is deemed to be the testimony of the corporation itself." *State Farm*

Mut. Auto. Ins. Co. v. New Horizont, Inc., 250 F.R.D. 203, 212 (E.D. Pa. 2008) (citing *Resolution Trust*, *supra*).

When making a conscientious, good faith effort to select and prepare a representative to testify, under Rule 30(b)(6), companies face several duties: to be knowledgeable, to prepare, to designate more, and to supplement. *Starlight Int'l, Inc., v. Herlihy*, 186 F.R.D. 626, 638 (D. Kan. 1999); *Alexander v. FBI*, 186 F.R.D. 148, 151 (D.D.C. 1999). While these duties may be onerous, courts generally view these burdens as the "concomitant obligation from the privilege of being able to use the corporate form in order to conduct business." *See United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996); *see also AG-Innovations, Inc. v. U.S.*, 82 Fed. Cl. 69, 81 (2008). In most instances, it is not acceptable for a company's representative to merely rely on "personal knowledge;" rather, the representative must be prepared to testify as to information that is known or reasonably available to the company, as a whole. *Reed v. Bennett*, 193 F.R.D. 689 (D. Kan. 2000). In that way, a Rule 30(b)(6) deposition of a company employee is considered to be a distinct, different deposition from the same employee as an individual because the depositions serve distinct purposes and impose different obligations. *United States v. Taylor*, 166 F.R.D. at 361.

Right now, Rule 30(b)(6) operates well in conjunction with other rules, like Federal Rules of Evidence 801 and 802. Rules 801 and 802 provide that a declarant's out-of-court testimony offered for the truth of the matter asserted is inadmissible hearsay, except that an opposing party's statement is not hearsay when it is made by the party in a representative capacity, by a person who the party authorized to make the statement, or by the party's agent or employee on a matter within the scope of the relationship while it existed. *See* Fed. R. Evid. 801, 802. A party who takes the deposition of an opposing party's representative may ultimately use that out-of-court deposition testimony at trial to prove the truth of the matter asserted because the testimony is made in the witness's representative capacity, who the company authorized to speak on its behalf, while the agent was discussing matters within the scope of the company-representative relationship. *See* Fed. R. Evid. 801, 802. The admission of party opponent testimony is consistent with Federal Rule of Civil Procedure 32, which negates the effect of a hearsay objection under Rules 801 and 802, if the testimony is of a party; the party's officer, director, or managing agent; or the party's designee under Rule 30(b)(6). Fed. R. Civ. P. 32(a); *Ueland v. U.S.*, 291 F.3d 993 (7th Cir. 2002).

It would make little sense for anyone other than the company to select or even have a say-so in the selection of a representative to testify vicariously for the company as its agent. By including a meet-and-confer obligation, it pre-supposes that the noticing party or the court could participate in choosing the witness or, at the extreme, impose their will and choose the company's representative for it. In doing so, however, it would remove the vicarious, agency associations with the company. In other words, the deposition testimony would no longer be of the company itself. Further, if an employee was chosen to testify for the company by someone else—a representative whom the company did not vicariously adopt as its agent—the employee's testimony would not be of the company but that of the employee; and if the employee's testimony was based on something other than personal knowledge, like preparation provided by reading documents and talking to other employees, it would be inadmissible hearsay without foundation under Federal Rules of Evidence 602, 801, and 802. Similarly, while the testimony of an employee with no associated vicarious, agency relationship should not qualify for Rule 32 admissibility, even if it did, Rule 32 cures only

one layer of what would likely be "double hearsay" or "hearsay within hearsay" within the meaning of Federal Rule of Evidence 805; it may cure the "deponent" layer but not the "declarant" layer. *Estate of Thompson v. Kawasaki Heavy Indus.*, 291 F.R.D. 297, 308 (N.D. Iowa 2013). If the company did not vicariously accept the employee as its agent, it would be improper and fundamentally unfair for the employee's testimony to be use against it.

Allowing the noticing party to select or have any say-so in the selection of a company's representative would contravene the purpose for adopting Rule 30(b)(6), duplicate Rule 30(b)(1), and impose significant, unnecessary duties.

For the last 80 years since the Federal Rules of Civil Procedure were first adopted, parties have been able take the deposition of a company through an officer, director, or managing agent of the noticing parties' choosing through Rule 30(b)(1). Not surprisingly, this led to problems that the Advisory Committee sought to eliminate almost 50 years ago. Rule 30(b)(6) was designed as an optional discovery device to supplement the existing practice where the noticing party designates the specific company officer, director, or managing agent to be deposed. *Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623 (5th Cir. 1973) (citing Advisory Committee Notes to Rule 30(b)(6), 48 F.R.D. at 515.). The Advisory Committee Notes to Rule 30(b)(6) provide:

> This procedure supplements the existing practice whereby the examining party designates the corporate official to be deposed. Thus, if the examining party believes that certain officials who have not testified pursuant to this subdivision have added information, he may depose them. On the other hand, a court's decision whether to issue a protective order may take account of the availability and use made of the procedures provided in this subdivision.
>
> The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. It will reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a "managing agent." *See* Note, *Discovery Against Corporations Under the Federal Rules*, 47 Iowa L. Rev. 1006-1016 (1962). It will curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. *Cf. Haney v. Woodward & Lothrop, Inc.*, 330 F.2d 940, 944 (4th Cir. 1964).

Advisory Committee Notes to Rule 30(b)(6) (1970).

For almost 50 years, the Rules and courts applying the Rules have recognized the distinction between an individual deposition and a company representative deposition. If the noticing party wants to take a particular company employee's deposition regarding that employee's personal knowledge and can establish that the employee is a managing agent appropriate to sit for deposition, then the noticing party may choose to proceed under Rule 30(b)(1). *GTE Products Corp. v. Gee*, 115 F.R.D. 67 68 (D. Mass. 1987); *Sugarhill Records, Ltd. v. Motown Record Corp.*, 105 F.R.D. 166, 169 (S.D.N.Y. 1985).

Thus, if a noticing party wants information from a specific company officer, director, or managing agent, that party may proceed to obtain that witness's personal-knowledge-based testimony. A company's obligation to prepare a representative applies only to a deposition taken pursuant to Rule 30(b)(6); it does not apply to a deposition taken under Rule 30(b)(1). While a Rule 30(b)(1) deposition of an officer, director, or managing agent may be used against the company, there is no duty for such a witness to review anything or to be prepared and able to answer questions. If the noticing party wants prepared, educated testimony regardless of the witness's position in the company, then the noticing party can proceed under Rule 30(b)(6). And if still not satisfied, the noticing party may always pursue the deposition of a specific, "regular" employee (i.e., not an officer, director, managing agent, or Rule 30(b)(6) representative) under Rule 45. *Archer Daniels Midland Co. v. Aon Risk Servs., Inc.*, 187 F.R.D. 578, 587 (D. Minn. 1999). The differences between Rules 30(b)(1), 30(b)(6), and 45 provide options to the noticing party as well as balance, fairness, and appropriate protections to the responding party.

It would be fundamentally unfair to allow a noticing party to force a company to prepare an undesirable representative to be knowledgeable and testify as the "face of the company."

While the predominant rule across the country is that Rule 30(b)(6) testimony should be treated as an evidentiary (not judicial) admission which may be explained or rebutted, it is in all parties' best interests to get it right the first time. In my experience, company defendants work very hard to identify appropriate witnesses who can be educated to testify as to the company's knowledge regarding a host of topics and answer questions appropriately. Decisions regarding the selection of a company representative are not made in a vacuum and are often based on a variety of factors. In my experience, I consider:

- Witness's qualifications;
- Witness's personal knowledge and experience;
- Witness's prior experience testifying;
- Witness's disposition (potentially as it relates to the noticing attorney's disposition);
- Witness's ability to be educated to testify regarding the depth and breadth of topics;
- Organization's interest in having someone with personal knowledge testifying (both good and bad);
- The time and resources of the company, its counsel, and the witness to become knowledgeable through preparation;
- Whether the witness may be pulled away from a day job and fulfilling normal responsibilities to the company;
- Access to company resources, including present and potentially former employees; and
- Witness as "the face of the company."

This analysis takes time before recommendations and decisions can be made. The inclusion of a meet-and-confer requirement as to the witness will only make this more difficult, time-consuming, and costly. Further, it begs the question as to how much of the analysis must be shared with the noticing party and the court, particularly when the analysis should be protected by attorney-client privilege and work product.

The concerns about meeting and conferring regarding a company's witness are magnified when the designated topics number in the dozens. In one recent extreme example, a notice of company representative deposition included 149 separate topics. It is not unusual for my clients in non-class-action, personal-injury product liability cases to receive a notice of deposition with 20 to 60 topics, sometimes with subparts. It is too much. Company parties should not have to face those types of notices, let alone have to meet-and-confer as to the one or more witnesses the company must designate to testify in response.

Nonetheless, if a company has to proceed in the face of these types of notices, the company should at least get to choose its witness to testify vicariously as its agent. It would be an awfully strange rule that would allow an opposing party to select or even have a say in making such a decision. When the company makes the decision to identify a particular company representative, it does so trying to get it right, both for the sake of defending the case on the merits but also to avoid a potential discovery dispute and possible sanctions.

Consider a situation in which an opposing party insists on have a specific company employee serve as the company's Rule 30(b)(6) witness. Whether through some knowledge, guesswork, or sheer happenstance, it turns out that the employee has a learning disability or social anxiety or a bad temper—or all three. Perhaps the company may have to produce the employee under Rule 30(b)(1) or Rule 45. But doing so would be just one employee's testimony limited to personal knowledge. The company would not pick that employee to try to educate, give testimony on dozens of topics, and be the face of the company, particularly against opposing counsel who may be aggressive and overbearing.

Under the scenario described above or many others that could be contemplated, it is easy to foresee many issues:

- Should the company have to publicly disclose its concerns about having a specific employee serve as its representative?
- Will sharing information avoid having the employee deposed or simply invite more notices of deposition?
- If the noticing party or court chooses the representative for the company, but the representative fails to give knowledgeable testimony despite the company's best efforts to educate the employee, will it be admissible against the company?
- How will any jury be able to set aside the earlier testimony?
- Will the company be sanctioned for not giving knowledgeable, educated answers to questions about the proper topics of a Rule 30(b)(6) deposition when the noticing party chose the witness?
- If the Committee is concerned about the discovery disputes still arising from Rule 30(b)(6) almost 50 years after its inception, can the Committee imagine the discovery disputes that will arise if it takes away the company's exclusive ability to select an agent to testify vicariously for it?

While some concerns are easy to see coming, there will no doubt be others that arise and even more difficult to resolve.

There are several changes that the Committee could make to Rule 30(b)(6) that would greatly help litigants and lawyers.

I spend a disproportionate amount of my time in discovery arguing about, preparing for, and defending Rule 30(b)(6) depositions largely because the Rule lacks clarity and the case law interpreting and applying the Rule varies greatly, sometimes diametrically, from jurisdiction to jurisdiction. The Committee should consider changes to Rule 30(b)(6) and related Rules.

Meet-and-Confer: As indicated above, the Committee's proposed change to include a meet-and-confer requirement regarding the scope of the deposition and topics may be directionally helpful, but falls short. It lacks clear guidance as to what must be discussed. Also, the discussion needs to happen sooner—at the Rule 26(f) conference stage and as part of the parties' joint report for a Rule 16 scheduling conference. When I have been able to raise Rule 30(b)(6) deposition-related issues early and discuss topics, timing, limitations, and other logistics, it has avoided later discovery disputes.

Notice: There should be a better notice procedure that recognizes the significant differences between a Rule 30(b)(1) deposition based on a witness's then-existing personal knowledge and a Rule 30(b)(6) deposition which requires preparation and education. The time and resources required to respond to a Rule 30(b)(6) deposition are often more significant than responding to Rule 33 interrogatories, Rule 34 requests for production, and Rule 36 requests of admission, which give 30 days to respond. Nonetheless, Rule 30(b)(6) does not give a presumptive notice requirement that would allow a company to timely respond. The Committee should amend Rule 30(b)(6) to include a presumptive, minimum 30-day notice requirement, while also giving the parties the latitude to meet-and-confer as to whether more or less time may be reasonable under the particular circumstances of the case.

Response and Objection: There is no formal, efficient procedure for responding and objecting to Rule 30(b)(6) notice topics or resolving any differences. I generally advocate for and follow a process similar to Rule 45 whenever possible. Within a reasonable amount of time before the noticed deposition, I serve a response indicating the topics for which a witness will be produced to respond and any objections or limitations as to others. I then meet-and-confer with opposing counsel to try to reach an agreement that will allow the deposition to proceed. Often this is successful. But when it is not, the Rules are vague and the case law varies greatly. As to disagreements, either the noticing party could file a motion to compel or the responding party could file a motion for protective order and courts often punish parties who do nothing. The Committee should amend Rule 30(b)(6) to include a process similar to Rule 45 whereby the responding party must serve any objections at least 14 days before the noticed deposition and then allowing for a motion to compel to be filed if the parties cannot resolve their differences through a meet-and-confer process.

Presumptive Limit on Topics: The Rules include presumptive limits for many forms of discovery, including the number and duration of depositions and the number of interrogatories. Given the significant time and resources required to respond to a properly noticed Rule 30(b)(6) deposition, there should be some presumptive limit as to the number of topics and discrete subparts.

It is mind-boggling that a party would serve a notice of deposition with dozens of topics, let alone 149 topics in the example described above. It is discovery abuse. The Committee should amend Rule 30(b)(6) to include a presumptive limit of 10 topics including discrete subparts, while also giving the parties the latitude to meet-and-confer as to whether more or less may be reasonable under the particular circumstances of the case. Further, limiting the number of Rule 30(b)(6) topics still allows the noticing party to pursue other depositions under Rules 30(b)(1) and 45.

Scope of the Deposition and Counting: There is significant disagreement as whether a noticing party should be able to ask questions of a company representative that go beyond the scope of the topics. There also is significant disagreement as to how a Rule 30(b)(6) deposition with multiple witnesses should be counted toward the presumptive limits of 10 depositions and completion of a deposition in one day, not to exceed seven hours. These disagreements are related and stem from differences in the Committee notes and case law applying Rule 30(b)(6). The more recent Committee note, which suggests counting a Rule 30(b)(6) as one deposition but allowing deposition questioning of each witness for up to seven hours, is causing negative effects particularly in jurisdictions that permit questioning beyond the scope of topics. Companies should be encouraged to identify the right witnesses to testify on the designated topics and not be penalized by extending depositions and increasing costs. And a noticing party should not be allowed to take two depositions of a witness by exceeding the scope of the Rule 30(b)(6) notice and then later taking an individual deposition under Rule 30(b)(1) or Rule 45.

There are legitimate discovery disputes that can easily be resolved by an amendment to the Rules that acknowledges the purpose of Rule 30(b)(6) as well as the practical availability of taking depositions via Rules 30(b)(1) and 45. The Committee should amend Rule 30(b)(6) to count as one deposition (one day, seven-hour limit), subject to a presumptive limit on topics and limited to the scope of the topics, regardless of the number witnesses. By doing so, it appropriately protects the responding party and witness, while still giving the noticing party an opportunity to proceed with another deposition of an individual witness under Rule 30(b)(1) or Rule 45. If a noticing party chooses to exceed the scope of the topics, it would then prevent the noticing party from taking another deposition of that witness under Rule 30(b)(1) or Rule 45. To that end, there could be an exception to the counting and scope rule that would allow the parties to agree that the deposition of individual company representative witnesses could exceed the scope of the topics and be expanded to the seven-hour limit so long as the deposition also counts as that witness's individual deposition, which may otherwise have been noticed under Rule 30(b)(1) or Rule 45. For example, if a defendant company designates John and Jane to testify as company representatives, the plaintiff could elect to depose both John and Jane in their company representative and individual capacities to be counted as two depositions toward the presumptive limit with each deposition limited to seven hours on a single day; thus neither John nor Jane could be deposed for a second time without leave of Court. In other words, so long as each individual representative must only sit for one day of deposition, not to exceed seven hours, that day of deposition counts as one deposition for each witness, even if taken under Rule 30(b)(6) and Rule 30(b)(1) or Rule 45. If the noticing party will not agree to this process, then the Rule 30(b)(6) deposition must be limited to the topics and completed in one day, not to exceed seven hours.

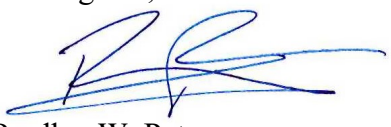
Documents: Rule 30(b)(6) depositions often concern company documents that are not specifically included as topics in a notice but does include a topic and request for production related to the materials and information the witness received and reviewed to prepare for the deposition. When I receive one of these notices, as part of my meet-and-confer efforts, I ask the opposing attorney to provide any documents that may be used in the deposition. The opposing attorney often refuses on the basis of work product protection, apparently wanting to "surprise" the witness and not give away any strategy. Yet the opposing party demands to know and obtain any documents used to prepare the witness, including those selected by attorneys which could similarly be argued is work product and reveals the company's strategy. Many courts have correctly ruled that documents selected by an attorney to prepare a Rule 30(b)(6) witness are work product. Some have not and yet they allow a noticing attorney to use company documents to question a witness without identifying those documents before the deposition. The Committee should amend Rule 30(b)(6) to expressly protect from disclosure any attorney work product including the selection of documents used to prepare a company witness. Alternatively, the Rule should be amended to reflect a balanced approach. If the noticing party is going to ask a Rule 30(b)(6) witness about company documents, the noticing party must specifically identify those documents in the notice and only then can the noticing party demand that the company witness identify and produce the documents used to prepare for the deposition.

Conclusion.

The Committee should not proceed with the proposed amendment to Rule 30(b)(6) requiring a company to meet-and-confer regarding the witness a company selects to vicariously represent it, as it is improper and will undoubtedly lead to even more discovery disputes and evidentiary issues. Instead, the Committee should adopt concrete amendments that can provide certainty to litigants and lawyers and will prevent future discovery disputes.

Thank you for your time and consideration. I have requested the opportunity to testify at the January 4, 2019 hearing in Phoenix, Arizona.

Best regards,



Bradley W. Petersen

TAB 8

TESTIMONY OF

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Shelley M. Young, Paralegal
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December 14, 2018

Advisory Committee on Civil Rules
Thurgood Marshall Federal Judiciary Building
One Columbus Circle
Washington, DC 20544

Re: Written Statement of William Rossbach for January 4, 2019 Phoenix hearing

Members of the Committee:

Thank you for giving me the opportunity to testify at the Phoenix hearing on the proposed amendments to FRCP 30(b)(6).

I am a trial lawyer with nearly 40 years experience litigating hundreds of cases, ranging from individual injury cases to large class actions such as the Exxon Valdez Oil Spill, in both state and federal courts. For the past dozen years I have represented state attorneys general in consumer protection litigation for fraudulent pharmaceutical marketing. Almost all of these cases have been based on scientific, medical, and engineering evidence.

I am admitted in six United States District Courts, four Courts of Appeal and the Supreme Court of the United States. I have also been admitted pro hac vice in numerous other state and federal courts around the country and particularly in the West. I have been a member of the Board of Governors of AAJ and the Boards of Directors of MTLA and Public Justice for 30 years, and now the Board of Advisors of IAALS for the past three years. I have also been nominated and elected by my peers to membership in the American Board of Trial Advocates.

I am testifying here today for myself and this letter will outline my expected testimony before the committee. I anticipate that I may also be submitting a more detailed written statement on behalf of the Montana Trial Lawyers before the formal comment period ends.

I begin any analysis of proposed changes to the Federal Rules of Civil Procedure by viewing the proposal through the lens of Rule 1. How will the proposed changes affect the mandate of Rule One to secure the "just, speedy, and inexpensive determination" of matters in disputes? Will the changes facilitate resolution? Will they save time and resources of one or both parties? And as Judge Campbell pointed out at the IAALS Rule One Civil Justice Summit in February 2016, referring to the 2015 amendments, in our

desire to reduce time and costs, we must not neglect Rule 1's third requirement of justice.

The 2015 amendments made it clear that these three words are not just window dressing, adding express language to place responsibility for these mandates on both the court *and* the parties. As the Committee noted to the amendment was intended to "emphasize that ... the parties share the responsibility to employ the rules in the same way."

My first and most important point here is that in my experience Rule 30(b)(6)—even in its present form-- may be the single, most effective rule in meeting the mandates of Rule 1. With carefully drafted, focused descriptions of subject matters for the deposition and well qualified and prepared witnesses designated to testify on behalf of the organization about information known to the organization, much of the maligned "fishing expeditions" that written discovery so often entail can be limited and reduced. Likewise, many of the very expensive and time consuming fishing expedition depositions can be eliminated if the right, qualified, and knowledgeable person is designated by the organization and comes prepared in good faith to testify about evidence in the case.

To illustrate how effective a 30(b)(6) deposition can be in the just, speedy, and inexpensive determination of matters in dispute, I would like to describe a few examples from my practice and the practice of my colleagues. In some cases a single 30(b)(6) notice may be the only factual, non-expert deposition that needs to be taken.

Early in my practice as a young and underfunded attorney I litigated an exploding battery case. Although the manufacturer had a large engineering department with many branches and many employees, I knew from reviewing certain quality control documents with my expert that there was a gap in their quality control procedure that could potentially result in a safety element being left out of the assembly without being recognized. Instead of having to take multiple depositions of many different members of the engineering department to find out who knew about the specific aspects of the quality control system at issue, I sent a focused 30(b)(6) notice and the manufacturer designated a single witness that knew exactly the system and procedures at issue. We were able to get crucial testimony from him that confirmed what we had uncovered in the documents. When we settled the case shortly thereafter the defense counsel told me that witness wanted to thank us for bringing that gap in their procedures to their attention.

I am currently litigating a document intensive environmental case involving a coal fired power plant. The documents identified tens of people who might have had some information about the issues in the case. Instead of taking tens of depositions, we served a single, comprehensive 30(b)(6) notice with very specific descriptions of many enumerated subject matters we needed to prove our claim, including reference to

language in specific documents. The defendant designated two witnesses and identified which witness would testify about which matters. We took depositions of both witnesses in less than two days. The defendant also took a single 30(b)(6) deposition of each of the plaintiff environmental organizations. Although there were also expert depositions and a deposition of one of our "standing" witnesses, we were able to prepare for trial a case with potentially several million dollars at issue for minimal out of pocket expenses for our citizen group clients.

A colleague is litigating a class action involving an insurance company's claim procedures. Rule 30(b)(6) depositions have been critical to securing just, speedy, and inexpensive resolution in that case in two ways. First, counsel was able to conduct 30(b)(6) depositions regarding the defendant's efforts to produce documents responsive to discovery requests. This provided information that otherwise would be difficult to obtain regarding whether the defendant had made a proper and good faith effort to respond to discovery. Second, using 30(b)(6) depositions to obtain the company's position regarding the policies and procedures used in adjusting claims saved the class from having to depose entire departments of claims adjusters to get the information. This, of course, also saved the defendant's employees and attorneys tens, or hundreds, of hours of depositions.

I do not profess any special expertise in electronic discovery, but in large multi-party product liability litigation, where in recent years e-discovery has often become a major drain of time and resources, my colleagues responsible for e-discovery often begin each case with a targeted 30(b)(6) to discover early the details of the electronic document storage and retention procedures and practices of the organization. Focused written discovery then can facilitate speedy and inexpensive document production.

These few examples show how valuable and effective the current simple and straight forward rule is in securing just, speedy, and inexpensive determinations of matters in dispute. Thus, when I learned of the initial proposal submitted by a number of defense lawyers claiming ABA affiliation to radically amend the rule I was deeply concerned. Those proposals which included limiting the number of topics, making the testimony not binding, allowing after the fact changes and supplementation by counsel, and prohibiting contention questions would have eviscerated the rule and made it effectively useless in achieving the mandate of Rule 1 in most cases. These proposals would not have addressed or resolved any significant problem with Rule 30(b)(6) but were entirely one sided and arguably intended only to discourage and eliminate the use of the depositions provided for by the rule.

The major problem I and others have experienced with Rule 30(b)(6) is the lack of good faith in the designation and preparation of the witnesses. Too often the problem is that the witness comes unprepared and lacks information and knowledge about the listed subject matter. At the same time, to be fair and balanced, I have also seen 30(b)(6)

notices that fail to describe the matters with "reasonable particularity" so that there is confusion and uncertainty about the witness that should be designated and the usefulness of the deposition is thus limited as a result of the failure of the taking party to be clear and specific in describing the subject matters for the deposition.

I appreciate the work of the subcommittee that drafted the proposed amendments and came up with a reasoned and balanced proposal that maintains the important values of Rule 30(b)(6), but also attempts to find a solution to the problems of unprepared witnesses and inadequate particularity and clarity of focus for the matters for deposition by imposing a meet and confer requirement. I recognize that lawyers often criticize meet and confer requirements. In my experience the problem is not with the need to meet and confer, but with the lack of real diligence and good faith on the part of some counsel to make a meaningful effort to resolve any disputes. I strongly commend the drafting committee for addressing in the note the problems with 30(b)(6) depositions that result from the lack of communication and good faith efforts to clarify the matters for examination, the documents that may be used, and the identity of the witnesses. It is important that the note also makes clear that the designation and identity of the witness is always the right of the organization.

The only suggestion I have for additions to the rule is that there may be need to add some language either in the rule itself or in the Committee Notes to require or at least indicate, that there could be a written report of some kind to the court when the meet and confer process has not resolved all disputes. Such a report would describe to the court the respective positions of the parties that have not been resolved. In some cases a requirement to explain to the court why the parties have not been able on their own to resolve disputes will by itself compel resolution.

I strongly urge the committee to maintain the language in the rule and in the notes describing the identification in advance of the witnesses to be designated. Identification of the witness or witnesses in advance facilitates the depositions and greatly reduces the time spent taking the deposition. Opponents provide no good, principled reason why disclosing the names of witness should not be required. That disclosure eliminates time wasted during the deposition that could be used instead getting to the substance of the matters at issue and helps assure that the witness designated is appropriate and qualified to testify on the particular matters.

I also oppose any limitation on what are called contention questions. Nowhere else do the rules expressly provide such limits. Disputes about what is or isn't a contention question will result in time consuming and expensive satellite litigation, directly counter to the principles and mandates of Rule 1. There already exist tools to limit or exclude inappropriate questions from use and admission at trial.

While I begin any analysis with the mandates of Rule 1, it is equally important to end any analysis by remembering the express principles of proportionality in the 2015 amendments to Rule 26. Many, if not most, of the defense bar's claimed problems and recommendations ignore the proportionality requirements of Rule 26. If there are legitimate concerns that a party is overreaching or making excessive or unnecessary requests, Rule 26 already provides the means for addressing those concerns at a meet and confer, and if not resolved, by the court.

Thank you for your consideration. I look forward to speaking with you in Phoenix.

Very truly yours,

William A. Rossbach

TAB 9

COMMENT OF

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December 14, 2018

Dear Advisory Committee on Civil Rules:

I appreciate the opportunity to respectfully submit this Comment in response to the request concerning proposed amendment to Federal Rule of Civil Procedure 30(b)(6). I am a Partner with Huie, Fernambucq & Stewart, LLP ("Huie") in Birmingham, Alabama. For 65 years, Huie has proudly represented and currently represents a wide range of businesses and individuals. I have personally been practicing law for over 14 years representing a range of clients from large corporations to local small business owners as both plaintiffs and defendants. As a result, my practice has afforded me the opportunity to practice in federal and state courts across the country. In particular with respect to the proposed amendment discussed herein, I have submitted numerous parties for deposition pursuant to F.R.C.P. 30(b)(6) or its state law counter-part representing both Plaintiffs and Defendants.

Prior to the current proposal being suggested, Huie submitted a comment on August 17, 2018, that outlined suggested changes to the Rule for your consideration. I urge the Committee to consider those suggestions going forward and as set forth herein. Although I recognize and greatly appreciate the effort and intent of the Committee, unfortunately, the proposed amendment implementing a meet and confer requirement about the identify of a designated representative will lead to more problems than it will solve; will frustrate the very purpose of Rule 30(b)(6); and will conflict with other available means of discovery. Thus, I strongly urge the Committee to reject the current proposed amendment and re-evaluate more effective and practical solutions to improving Rule 30(b)(6).

I. The Proposed Amendment to Rule 30(b)(6) Will Lead to More Problems Than It Will Solve and Frustrate the Purpose of the Rule

As originally intended, the purpose of Rule 30(b)(6) was to supplement then existing Rule 30(b)(1) by offering a party the opportunity to seek discovery, not from a particular individual who may or may not have knowledge of the issue at hand, but, instead, on the particular matter(s) at issue in the case. This, in turn, allowed the noticing party the option of assessing whether they should depose a particular individual or seek the testimony of the party as a whole concerning information known or reasonably available to the party. Indeed, the Advisory Committee Notes to Rule 30(b)(6) state, in pertinent part:

> The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. It will reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a 'managing agent.' ***It will curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are***

> ***clearly known to persons in the organization and thereby to it. The provision should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge.***

Advisory Committee Notes to Rule 30(b)(6) (1970) (internal citations omitted) (emphasis supplied).

The current proposed amendment to Rule 30(b)(6) essentially eviscerates the Advisory Committee's stated purpose, particularly that of the last two sentences emphasized above. In stark contrast to Rule 30(b)(6)'s stated purpose, the current proposed amendment will not "curb the bandying," but, instead, will encourage gamesmanship by the requesting party. Likewise, it increases the possibility that a responding party will still have to produce multiple employees or witnesses for a deposition. All of this, of course, is likely to lead to increased court intervention that takes time away from many already crowded dockets.

In addition to creating disputes rather than preventing them, the proposed amendment, if ultimately adopted, will turn decades of case law on its head. Rule 30(b)(6) as originally drafted is clear that the right to select a witness to address reasonably articulated deposition topics rests with the responding party. This provision of the Rule is well-reasoned and well-grounded in the foundational purposes set forth in the Advisory Committee Notes.

A great body of case law analyzing Rule 30(b)(6) supports this proposition as well. *See, e.g., Ortiz v. Cybex Int'l, Inc.*, No. 15-2989 (PAD), 2018 WL 2448130, at *8 (D.P.R. May 30, 2018)("[Plaintiffs] have not directed the court to any rule allowing a party that seeks to depose a corporation to unilaterally choose the corporate representative. Nor could they, for Rule 30(b)(6) does not allow such a move. . . . As a consequence, Cybex was under no obligation to designate Vatsaas or Wendt as corporate representatives.")(citation omitted); *Progress Bulk Carriers v. American S.S. Owners Mut. Protection and Indem. Ass'n,*, 939 F.Supp.2d 422, 430 (S.D.N.Y. 2013) , *aff'd*, 2 F. Supp. 3d 499 (S.D.N.Y. 2014)("The rule ... does not permit the party issuing the notice to select who will testify on the organization's behalf"); *Colwell v. Rite Aid Corp.*, No. 3:07cv502, 2008 WL 11336789, at *1 (M.D. Penn. Jan. 24, 2008)("Nothing in the rule indicates that the party seeking the deposition can determine the identity of the person to be deposed. "); *Booker v. Massachusetts Dept. of Public Health*, 246 F.R.D 387, 389 (D.Mass. 2007)("Plaintiff may not impose his belief on Defendants as to whom to designate as a 30(B)(6) witness."); *Dillman v. Indiana Ins. Co.*, No. 3:04-CV-576-S, 2007 WL 437730, at *1 (W.D. Ky. Feb. 1, 2007)(Rule 30(b)(6) "does not permit the plaintiff to designate a deponent to speak for the corporate defendants [and] the plaintiff's attempt to do so is not appropriate."); *see also*, *Roca Labs, Inc. v. Consumer Opinion Corp.*, No. 8:14-CV-2096-T-33EAJ, 2015 WL 12844307, at *2 (M.D.Fla. May 29, 2015)(denying motion to compel identity of witnesses and stating "the identity of Defendants' corporate representatives is not relevant and Defendants are not required to identify their Rule 30(b)(6) witnesses prior to deposition."); *Klorczyk v. Sears, Roebuck & Co.*, Civ. No. 3:13CV257 (JAM), 2015 WL 1600299, at *5 (D.Conn. Apr. 9, 2015)("the Court will not require Sears to disclose the name(s) or resume(s) of its 30(b)(6) witness."); *Cruz v. Durbin*, No. 2:11-CV-342-LDG-VCF, 2014 WL 5364068, at *8 (D.Nev. Oct. 20, 2014)("the Rule 30(b)(6) deponent's name is irrelevant. Rule 30(b)(6) deponent[s] testify on behalf of the organization. *See* FED.R.CIV.P. 30(b)(6). Therefore, the court denies Cruz's motion to compel with regard to the identify of Wabash's Rule 30(b)(6) deponent because it seeks irrelevant information.").

Stated simply, as part of the 2015 Amendments to the Federal Rules, 8 words were added to Rule 1, which now reads, "[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Chief Justice Roberts reiterated this intent when speaking about the 2015 Amendments. The current proposal to Rule 30(b)(6) is more likely to frustrate this purpose than it is to facilitate a "just, speedy and inexpensive" outcome. For these reasons, I respectfully ask the Committee to reject this proposal and look to other, more appropriate ways to amend Rule 30(b)(6).

II. The Proposed Amendment Will Conflict with Rule 30(b)(1)

Taking into account the very real concerns that the proposed amendment will increase, not decrease discovery disagreements begs the question whether, if adopted, the proposed amendment will afford a tool for discovering information that is not already available to a party. It will not. If a party prefers to depose a specific individual as opposed to a corporate designee, the party can do that pursuant to Rule 30(b)(1), which provides that a party may depose a person by oral questions if the party provides reasonable written notice and states the time and place and, if known, the name and address of the individual deponent. Thus, the current proposed amendment is unnecessary, confusing and cumulative of already available discovery methods.

Some may argue that the proposed amendment will allow a party to depose a specific individual regarding matters known or reasonably available to the responding party. However, this is a distinction without a difference because, regardless the identity of the specific designee being deposed, the responding party remains under a duty to properly prepare the witness to testify pursuant to Rule 30(b)(6). In other words, the onus on the responding party remains the same with or without the proposed amendment, but the opportunity for disagreement and dispute between parties increases with the current proposed amendment. *See. e.g., QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 700 (S.D. Fla. 2012) (barring a company from introducing testimony at trial on any matters on which the company's selected deponent had been unable or unwilling testify); *State Farm Mut. Auto. Ins. Co. v. New HorizonT, Inc.*, 250 F.R.D. 203, 217 (E.D.Pa. 2008)(compelling additional testimony and granting monetary sanctions where a company failed to adequately prepare its designated representative for deposition). Again, there is simply nothing "just, speedy or efficient about that foreseeable process, and there is no reasonable justification for why the current proposed amendment is necessary.

III. The Committee Should Consider More Practical Solutions to Amend Rule 30(b)(6)

Rather than adopt an amendment that is unnecessary, and which will only create problems, rather than solve them, I urge the Committee to re-evaluate its position and consider some of the proposals made by Huie in its initial submission.

a. Rule 30(b)(6) Should Include a Process for Objecting That Already Exists in Other Rules and Which Will Provide Basic Due Process and Guidance

There are 4 primary methods outlined in the Federal Rules for a party to obtain discovery: (1) Interrogatories; (2) Requests for Production; (3) Requests for Admission; and, (4) Depositions. All of these discovery methods, except Rule 30, contain a provision allowing for objections to be lodged ***prior to the discovery being had***. Rule 30(b)(6), in particular does not provide any

meaningful method to object to individual topics for testimony. Even during the testimony, absent a prior court order, a party may object but the deposition must proceed, and testimony can only be refused if it will disclose information protected by the attorney-client privilege or work product doctrine. The failure of Rule 30(b)(6) to contain a reasonable method for lodging objections is thus inconsistent with other means of discovery and promotes oftentimes burdensome and last-minute motion practice or discovery disputes.

Because Rule 30(b)(6) fails to include a method for objecting, I see it used as often as a sword as it is a legitimate discovery tool. For example, it is not uncommon for a requesting party to unilaterally schedule a deposition on a date and time that either is not available to the responding party or does not allow sufficient time for the responding party to properly prepare and present a witness. In many circumstances, this occurs when the responding party is unable to provide a witness precisely when the requesting party wants the deposition to be set. In this situation, because Rule 30(b)(6) lacks a reasonable objection procedure, the requesting party takes the position that the responding party must either present a witness or file a motion and have it heard prior to the unilateral date set by the requesting party. Thus, instead of promoting the efficiency and cooperation between parties envisioned by the 2015 Rules Amendments, the current Rule 30(b)(6), and the current proposed amendment, actually promotes adversarial motion practice that leads to greater burden on the parties and the court.

I believe Rule 45 is a good example of how to amend Rule 30(b)(6). Under Rule 45, the responding party initially must serve a written objection on the requesting party prior to the time set forth for compliance or fourteen (14) days, whichever is earlier. Once the responding party serves the written objection, the requesting party may then choose to proceed pursuant to the objections or file a motion to compel compliance. If a motion to compel is not filed, then compliance is made as to the non-objectionable requests. This objection procedure is similar to other discovery methods as well and provides clarity for the benefit of all parties involved.

Taking the Rule 45 approach is reasonable in several respects. *First*, it will lead to greater care being taken by the requesting party to properly tailor Rule 30(b)(6) topics prior to serving the notice. *Second*, it will incentivize more cooperation prior to a Rule 30(b)(6) notice being issued because the requesting party will want to avoid the time and expense of becoming embroiled in unnecessary discovery disputes and potentially having to take two or more depositions at different times depending on the ultimate ruling from the court. *Third*, it will reduce motion practice before the court by allowing parties to complete discovery in a way that is more proportional to the actual needs of the case as opposed to the whims of a requesting party.

b. Rule 30(b)(6) Should Contain A Provision That Protects Attorney Work-Product And Attorney-Client Communications

Perhaps the most troubling issue I see in Rule 30(b)(6) depositions is the requesting party's insistence that materials relied upon by a witness to prepare for a deposition or chosen by an attorney to prepare a witness are subject to disclosure. Despite Rule 26(b)(3)(A)'s admonition that a party may not discover "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative," attorneys requesting or taking a Rule 30(b)(6) deposition almost universally ask a party's representative to disclose the materials the witness relied upon to prepare for the deposition. The lack of any discernible protection of these type materials is a glaring hole that must be filled in Rule 30(b)(6).

A great deal of time and effort is often expended to prepare a witness or group of witnesses to testify pursuant to Rule 30(b)(6). Proper preparation requires a responding party's attorney(s) to select documents from the larger production already made in a case in order to focus the preparation and concentrate on the areas pertinent to the issues to be addressed. The selection of these documents are strategic mental impressions of both the responding party and its attorney and the selection should absolutely be protected from disclosure. *See, e.g., Sporck v. Peil*, 759 F. 2d 312 (3rd Cir. 1985). Although this concept is not uniformly accepted in all courts or across all jurisdictions, many courts do correctly recognize that work product includes the selection and compilation of documents by counsel.

A good example is the Florida state court case of *Proskauer Rose LLP v. Boca Airport, Inc.*, 987 So. 2d 116 (Fla. 4th DCA 2008). *Proskauer* was a legal malpractice case. *Id.* at 117. During the deposition of one of the Proskauer partners, the deponent indicated that he met with Proskauer's attorney and "reviewed certain documents counsel selected to prepare him for the deposition." *Id.* The deponent also reviewed summaries prepared by the firm's attorney and also highlighting and notations on portions of some of the documents. *Id.* Although the witness agreed that review of these documents assisted his preparation for the deposition, he did not view any of them during the deposition. *Id.*

Defendant Boca Airport moved to compel production of the documents reviewed by the witness prior to deposition and the trial court granted the motion. *Id.* Boca's motion and the trial court's order were based on a specific Florida Statute that requires disclosure of documents if a witness uses the document(s) *during his/her testimony. Id.* Florida's 4th District Court of Appeals disagreed and granted a writ of cert to Proskauer that quashed the trial court order requiring production. *Id.* at 118. In its holding, the 4th DCA found there is no common law right in Florida to discovery of documents used to prepare to testify. *Id.* Further, the Court of Appeals found that the trial court's order would "disclose to the opponent which documents petitioner's counsel thought were most relevant, which, along with the summaries it prepared ... were clearly work product and privileged attorney-client communications." *Id.*

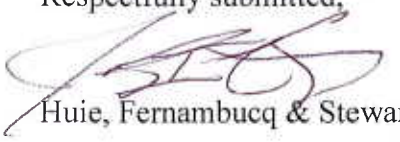
Like Florida, there is no general common law right to discovery of documents used by a corporate representative to prepare to testify. I therefore urge the Committee to propose a provision in Rule 30(b)(6) that is in line with the reasoning from *Proskauer Rose, supra,* and other similarly situated courts. By providing that attorney-client privilege and work-product materials are not proper subjects for disclosure or questioning before or during a Rule 30(b)(6) deposition, this amendment will create greater uniformity in federal courts across the country; protect the privileged and protected materials of attorneys and their clients; and, decrease the amount of time and resources necessary to prepare for a Rule 30(b)(6) deposition. As it stands, when faced with the prospect of disclosing privileged and protected materials and communications, most attorneys and Rule 30(b)(6) witnesses will simply review every document produced in a case, which of course increases exponentially the time and cost it takes to prepare. This is out of line with Rule 1 and the 2015 Rules amendments.

Conclusion

Rule 30(b)(6) is an important tool in the Federal Rules to obtain needed and proportional discovery. However, it is too often used as a weapon by opposing parties to do what all other discovery devices will not allow. The current proposed amendment, which will mandate a meet and confer process about the identity of a Rule 30(b)(6) designee, will only further the opportunity

for parties to improperly use the Rule as a weapon, rather than a tool. I strongly ask that the Committee to reject this proposal and consider other, more appropriate, amendments that will truly enhance the efficiency of the Rule and meet with Rule 1's mandate to achieve "just, speedy and efficient" resolution of matters. I appreciate the opportunity to comment on this important amendment.

Respectfully submitted,



Huie, Fernambucq & Stewart, LLP

John Isaac Southerland

TAB 10

TESTIMONY OF

John Sundahl
Defense Lawyers Association of Wyoming

DEFENSE LAWYERS ASSOCIATION OF WYOMING

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December 14, 2018

Via U.S. Mail and Electronic Mail

Rule Committee Staff
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
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Washington, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

Dear Members of the Civil Rules Advisory Committee:

The Defense Lawyers Association of Wyoming ("DLAW") is an organization of defense attorneys dedicated to the just and efficient administration of justice throughout the state and federal courts within the State of Wyoming. While its members are largely comprised of civil defense attorneys, its members also engage in representation of plaintiffs in all types of civil cases. In that capacity, the members of DLAW routinely deal with Rule 30(b)(6), its intended and practical operation. DLAW respectfully submits these comments to the Advisory Committee on Civil Rules, and thanks the Advisory Committee for the opportunity to submit comments, both written and verbally, on this topic of great importance.

DLAW is opposed to the adoption of the proposed amendment. DLAW fully supports Rule 1 of the Federal Rules of Civil Procedure that mandates construction, administration, and employment by both courts and parties to the just, speedy, and inexpensive determination of every action and proceeding. We believe that great strides have been made through the implementation of Rule 16, F.R.Civ.P., as a mechanism to address the anticipated use of Rule 30(b)(6) so that an orderly procedure can be established to address the control and schedule of discovery, the identification of witnesses and documents anticipated for use in the case, and the adoption of

procedures that involve unusual or difficult legal questions or unusual proof problems. We applaud the courts in encouraging orderly and expeditious administration of the case.

DLAW also supports the proportionality rule contained in Rule 26(b)(1) and (2), F.R.Civ.P. This Rule clearly engages the federal judges and magistrates in a process designed to eliminate discovery where the burden or expense of proposed discovery outweighs its likely benefit.

Unfortunately, the proposed Amendment will likely create more litigation and confusion. It will spark unnecessarily contentious discovery battles for courts to decide. The proposed Amendment is a radical departure from well-established case law by mandating that the defendant organization confer with the plaintiff about "the identity of each person the organization will designate to testify." Rule 30(b)(6), F.R.Civ.P., states on its face that upon receipt of a proper notice or subpoena directed to the organization, "the named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify." The Rule that the responding organization has the sole right to choose the witnesses who speak on its behalf is well-established. *See, e.g. Resolution Tr. Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993) ("[Rule 30(b)(6)] places the burden of identifying responsive witnesses for a corporation on the corporation."); *Quilez-Velar v. Ox Bodies, Inc.*, Civ. No. 12-1780(GAG/SCC), 2014 WL 12725818, at *1 (D.P.R. Jan. 3, 2014) ("the noticed corporation alone determines the individuals who will testify on those subjects."); *Kendall Lakes Towers Condo. Ass'n, Inc, v. Pac. Ins. Co.*, No. 10-24310-CIV, 2011 WL 6190160. At *8 (S.D. Fla. Dec. 2, 2011) ("Rule 30(b)(6) imposes an obligation on the organization to select an individual to testify."); *Lizana v. State Farm Fire & Cas. Co.*, No. CIV.A.108CV501LTSMTP, 2010 WL 445658, at *2 (S.D. Miss. Feb. 1, 2010) ("it is Defendant's choice to designate its corporate representative(s) who consent to testify on its behalf."). *See also* 7 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 30.25[3](3d ed.2013) ("It is ultimately up to the organization to choose the Rule 30(b)(6) deponent."). The noticing party has no right to demand any input in the responding organization's decision to select its witnesses. *See, e.g., Ortiz v. Cybex Int'l, Inc.*, No. 15-2989 (PAD), 2018 WL 2448130, at *8 (D.P.R. May 30, 2018)("[Plaintiffs] have not directed the court to any rule allowing a party that seeks to depose a corporation to unilaterally choose the corporate representative. Nor could they, for Rule 30(b)(6) does not allow such a move. . . . As a consequence, Cybex was under no obligation to designate Vatsaas or Wendt as corporate representatives."); *Progress Bulk Carriers v. American S.S. Owners Mut. Protection and Indem Ass'n,*, 939 F.Supp.2d 422, 430 (S.D.N.Y. 2013) , *aff'd*, 2 F. Supp. 3d 499 (S.D.N.Y. 2014)("The rule ... does not permit the party issuing the notice to select who will testify on the organization's behalf"); *Colwell v. Rite Aid Corp.*, No. 3:07cv502, 2008 WL 11336789, at *1 (M.D. Penn. Jan. 24, 2008)("Nothing in the rule indicates that the party seeking the deposition can determine the identity of the person to be deposed. "); *Booker v. Massachusetts Dept. of Public Health*, 246 F.R.D 387, 389 (D.Mass. 2007)("Plaintiff may not impose his belief on Defendants as to whom to designate as a 30(B)(6)

witness."); *Dillman v. Indiana Ins. Co.*, No. 3:04-CV-576-S, 2007 WL 437730, at *1 (W.D. Ky. Feb. 1, 2007)(Rule 30(b)(6) "does not permit the plaintiff to designate a deponent to speak for the corporate defendants [and] the plaintiff's attempt to do so is not appropriate."). Leading federal courts commentators agree. *See* 8A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2103 (3d ed. 2013) ("[T]he party seeking discovery under [Rule 30(b)(6)] is not permitted to insist that it choose a specific person to testify[.]"); 7 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 30.25[3](3d ed.2013) ("the party requesting the deposition generally has no right to assert a preference if the designee is sufficiently knowledgeable on the subject matter."). The need to preserve this absolute right is fundamental to jurisprudence because the person selected as the witness binds the organization. To allow the opponent to have input and dispute the name of the person(s) who will speak for the organization compromises the due process right of the organization to be heard with its own witnesses in a meaningful manner.

An example of the toxic fallout of allowing a plaintiff to participate in the selection of the organization's designated witness is found in *Sanders v. Circle K Corp.*, 137 F.R.D. 292 (D. AZ 1991). The plaintiff was an employee of Circle K Corp. and claimed to have been sexually harassed and discriminated against by his supervisor. When the defendant designated, as its Rule 30(b)(6) witness, the Division Human Resource Manager who was responsible for investigation of the incident, plaintiff filed a motion to compel, asserting that the designated witness had no personal knowledge of the incident and that the appropriate designated witness was the supervisor who was charged with the harassment and discrimination. The court rejected the motion to compel, noting that the supervisor had interests directly adverse to the organization because it was in his interest to argue that all of his actions were within the course and scope of his employment. Circle K's interest was to show the supervisor acted outside the scope and course of his employment. The court noted on page 293 of the opinion:

> It would be contrary to the purpose of Rule 30(b)(6) to require Circle K to designate an individual as a corporate spokesperson who has interests diametrically opposed to those of the corporation.

The Circle K case demonstrates how the dilution of the organization's absolute right to designate who will speak for it can result in unnecessary but contentious discovery battles. The proposed Amendment will unquestionably be seen as an invitation to inject a new requirement that the selection of the designated 30(b)(6) witness be but a give-and-take, with each party having the right not only to provide input but to also affect the selection of each designated witness. The draft Committee Note appears to encourage such a result by asserting that the parties' exchanges will facilitate "identifying the right person to testify."

Opening the door to negotiation on which witness can be designated to represent the organization is an invitation to tactical abuse. Under the guise of seeking the "right" witness, aggressive lawyers will use the rule to block or challenge organizational witnesses perceived to be the most experienced, articulate and effective spokespersons for their organization. The proposed Amendment also imposes the duty to confer as "continuing if necessary." This additional requirement invites further disputes. Who decides when the additional duty to confer becomes "necessary?" If one of the parties is unhappy with the results of the conference, does that party have the right to seek discovery sanctions for prematurely terminating the duty to confer? This risk is heightened if the parties are required under the proposed Amendment to confer over witness identity. Will this Amendment result in disputes over who is the "most knowledgeable" witness? There is no requirement in Rule 30(b)(6) that the organization must designated the "most knowledgeable" person or a person that will please the requesting party. If the requesting party is able to inject its view on the witness selection, how can the established Rule that the witness speaks on behalf of the organization have continued validity? *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012) identifies practical reasons why the person designated by the organization as the 30(b)(6) witness should rest exclusively with the organization. The court explained the practical bases that can influence the selection of the individual:

> Moreover, a corporation may have good grounds not to produce the "most knowledgeable" witness for a 30(b)(6) deposition. For example, that witness might be comparatively inarticulate, he might have a criminal conviction, she might be out of town for an extended trip, he might not be photogenic (for a videotaped deposition), she might prefer to avoid the entire process or the corporation might want to save the witness for trial. From a practical perspective, it might be difficult to determine which witness is the "most" knowledgeable on any given topic. And permitting a requesting party to insist on the production of the most knowledgeable witness could lead to time-wasting disputes over the comparative level of the witness' knowledge. For example, if the rule authorized a demand for the most knowledgeable witness, then the requesting party could presumably obtain sanctions if the witness produced had the *second* most amount of knowledge. This result is impractical, inefficient and problematic, but it would be required by a procedure authorizing a demand for the "most" knowledgeable witness. But the rule says no such thing. (Italics supplied by court.)

This unwarranted proposed expansion of the Rule will impose additional costs on the parties, inflame tensions among the attorneys, and add burdens to judicial workloads. The existing Federal Rules of Civil Procedure already have in place a mechanism available to address, through

a motion to compel, what the requesting party believes to be inadequate responses at the deposition.

DLAW respectfully suggests that a better approach is to clarify the basic process to be employed in Rule 30(b)(6) depositions. We urge the Advisory Committee to consider the Comment of Lawyers for Civil Justice, FIXING WHAT'S BROKEN: A CALL FOR STRAIGHTFORWARD ANSWERS TO THE QUESTIONS THAT REGULARLY CONFOUND RULE 30(b)(6) PRACTICE, submitted on September 12, 2018 to this Advisory Committee.

John A. Sundahl of the firm Sundahl, Powers, Kapp & Martin, LLC will attend the January 4, 2019 hearing to testify on this very important topic on behalf of DLAW. Thank you in advance for your consideration of these comments and Mr. Sundahl's testimony.

Yours very truly,

Jane M. France
DLAW President