TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
ADVISORY COMMITTEE MEETING)
ON THE RULES OF CIVIL)
PROCEDURE)

Pages: 1 through 336

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Date: February 8, 2019

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IN THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS

In the Matter of:)
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ADVISORY COMMITTEE MEETING)
ON THE RULES OF CIVIL)
PROCEDURE)

Mecham Conference Center
Thurgood Marshall Federal
Judiciary Building
One Columbus Circle, NE
Washington, DC

Thursday,
February 8, 2019

The parties met, pursuant to notice, at 9:00 a.m.

BEFORE: HONORABLE JOHN D. BATES
Chairman

APPEARANCES:

Committee Members:

JUDGE JENNIFER BOAL
PROFESSOR EDWARD COOPER
JUDGE JOAN ERICKSEN
JUDGE KENT JORDAN
PROFESSOR RICHARD MARCUS
JUDGE ROBIN ROSENBERG
MS. VIRGINIA SEITZ
MR. JOSEPH SELLERS
MS. ARIANA TADLER
MS. HELEN WITT
MR. JOSHUA GARDNER
JUDGE DAVID CAMPBELL
JUDGE ROBERT DOW
PROFESSOR CATHERINE STRUVE
PROFESSOR DANIEL COQUILLETTE

APPEARANCES: (Continued)

Speakers:

MARK BEHRENS, International Association of Defense Counsel
MEGAN CACACE, Relman, Dane & Colfax PLLC
BRAD MARSH, Swift, Currie, McGhee & Hiers, LLP
MARK CHALOS, Lieff Cabraser Heimann & Bernstein LLP
MARY NOVACHECK, Bowman and Brooke, LLP
SHERRY ROZELL, McAfee & Taft
BRUCE PARKER, Venable LLP
PATRICK SEYFERTH, Bush Seyferth & Paige PLLC
SHARON CAFFREY, Duane Morris, LLP
TERRENCE ZIC, Whiteford Taylor Preston, LLP
KATHY BYRNE, Cooney & Conway
STERLING KIDD, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
ANDREW COOKE, Flaherty Sensabaugh Bonasso PLLC
JESSICA KENNEDY, McDonald Toole Wiggins, PA
KEITH ALTMAN, Excolo Law, PLLC
ALEX DAHL, Lawyers for Civil Justice
MICHAEL SLACK, Slack Davis Sanger LLP
TERRI REISKIN, Dykema Gossett PLLC
SUSANNAH CHESTER-SCHINDLER, Waters Kraus & Paul
VIRGINIA BONDURANT PRICE, McGuire Woods LLP
DONALD SLAVIK, Slavik Law Firm LLC
JILL JACOBSON, Husqvarna Professional Products, Inc.
TOYJA KELLEY, DRI-The voice of the Defense Bar
PATRICK REGAN, Regan Zambri Long, PLLC
MIKE WESTON, Lederer Weston Craig, PLC
CHRISTINE WEBBER, Cohen Milstein Sellers & Toll PLLC
JULIE YAP, Seyfarth Shaw LLP
RICHARD BENENSON, Brownstein Hyatt Farber Schreck, LLP
CHAD LIEBERMAN, Brosseau Bartlett Lieberman, LLC
MICHAEL NELSON, Eversheds Sutherland (US) LLP
JONATHAN REDGRAVE, Redgrave LLP
HASSAN ZAVAREEI, Tycko & Zavareei LLP
WILLIAM CONROY, Campbell Conroy & O'Neil, PC
CRAIG LESLIE, Phillips Lytle LLP
LAUREN BARNES, Hagens Berman Sobol Shapiro, LLP
PALMER VANCE, ABA Section of Litigation
TOBIAS MILLROOD, American Association for Justice

GREG SCHUCK, Huie, Fernambucq & Stewart, LLP
PAUL BLAND, Public Justice

APPEARANCES: (Continued)

Speakers:

PHILIPPA ELLIS, Owen Gleaton Egan Jones & Sweeney, LLP
PETER FAZIO, Aaronson Rappaport Feinstein & Deutsch, LLP
MARK KOSIERADZKI, Kosieradzki Smith Law Firm, LLC
ALTOM MAGLIO, Maglio Christopher & Toale, P.A.
JOHN GUTTMANN, Beveridge & Diamond, P.C.
EDWARD BLIZZARD, Blizzard Law, PLLC
ANDREW TRASK, Shook, Hardy & Bacon
IRA RHEINGOLD, National Association of Consumer Advocates
THOMAS REGAN, LeClair Ryan
MICHAEL NEFF, Neff Law
THOMAS PIRTLE, Laminack, Pirtle & Martines
BRITTANY SCHULTZ, Ford Motor Company
TERRY O'NEILL, National Employment Lawyers Association

P R O C E E D I N G S

(9:00 a.m.)

JUDGE BATES: Good morning again to everyone. We're here today for our second public hearing with respect to the proposed amendments to Rule 30(b)(6) of the Civil Rules of Procedure. We have a very busy schedule today because many want to testify. Fifty-some witnesses we expect to hear from today and that, unfortunately, limits the time that is available for each witness. It also limits the time available for questioning, so everyone suffers a little bit. But, we need to do it in a curtailed manner in order to get through the day and give everyone a chance to testify.

So, without further ado I'm just going to thank everyone for being here today, both the witnesses who will be testifying and the members of the advisory committee who are here, and of course the various staff both of the Rules staff and the staff of the AO who make it possible for us to have a hearing such as this in an efficient manner. With that, let's go with the first witness. Our first witness today is Mark Behrens.

Let me just say for everyone to remind you,

five minutes per witness is what we're targeted so keep that in mind as you are presenting your testimony.

Mr. Behrens.

MR. BEHRENS: Good morning, Mr. Chair, members of the Committee, it's an honor to be here. My name is Mark Behrens. I co-chair the public policy group at Shook, Hardy and Bacon here in Washington, D.C. Our firm primarily represents corporate defendants in complex civil cases. Today I'm representing the International Association of Defense Counsel. The IADC is an invitation only peer reviewed membership organization of some 2500 leading civil defense lawyers from around the globe, most of whom are based here in the United States.

My practice is primarily not at the District Court level, but I'm here today because I chair the IADC's Civil Justice Response Committee and we've heard from a lot of our members on this and so today I'm here to try to channel the views that we're hearing. We really appreciate the work that the Committee has done. I was at the hearing in Phoenix and had the opportunity and I've seen how hard you work. But, the message from our membership loud and

clear, what we're hearing, is that the members believe that the current proposal is flawed, that it should be withdrawn and reworked. And I say that with the utmost respect because I know how much work has gone into this already.

The strongest opposition we're hearing is on the meet and confer requirement with regard to the identification of the individual that the organization chooses to use. We appreciate that the notes try to clarify that the organization will be the one who chooses who speaks on its behalf, but that is intention with the black letter of the rule itself. Confer presupposes that there will be a dialogue and that will open a door that hasn't existed to give the noticing party an opportunity to try to influence the selection process. Our view is that the organization alone should choose who is going to bind it through testimony.

JUDGE BATES: What if the rule only required identification of the witness without any need to meet and confer with respect to the identification of the witness, say a couple of days before the scheduled date of the deposition. What's your position with respect to that?

MR. BEHRENS: That would be an improvement but as we noticed in our, wrote in our comments, that would still be problematic and something that we would oppose. And the reason, and you heard some testimony on this in Phoenix, I recall, where there were lawyers who said, and they may be IADC members, that oftentimes lawyers do disclose in advance and so there is some of this occurring already. The problem that we see, though, is in a rigid one size fits all rule. When you move away from a discretionary situation to a mandatory situation that's going to create problems. And we heard some real-life examples of lawyers that have made disclosures and then it's blown up in their face, and I think you're going to hear more of that today.

JUDGE BATES: But the one-size-fits-all is an interesting concept.

MR. BEHRENS: Yes?

JUDGE BATES: Because isn't that a response that could be made to many of the suggestions that your organization makes for certain other requirements in terms of notice -- a notice period, in terms of accounting for the number of depositions, et cetera, et cetera. Those are all one-size-fits-all situations

as well.

MR. BEHRENS: Well, but I don't think they are, Mr. Chairman, and, you know, the presumptive limits is something that I'll mention and others will as well, there is more flexibility with regard to presumptive limit idea. But, most of the rules are one size fits all, and in most cases that will work. Here the problem is that we've seen that it can be used -- the term was used to weaponize the rule. We all know how social media research works today. People will go out and they will look at Facebook pages and so forth and one of the concerns is that the 30(b)(6) deposition will move away from where it is supposed to focus, and that is the knowledge of the corporation, and will focus more on the individual who is testifying. It will look into their background, there will be opportunities to harass that person and frankly in a 30(b)(6) situation the identity of the witness is irrelevant because they are not there speaking on their behalf, they are there speaking on behalf of the corporation.

JUDGE ROSENBERG: In your experience is it the case that more often than not just through general meet and confer that is not imposed on the parties

that the attorney, that the defense attorney does disclose the identity? Would you say that happens more often than not? And in those instances where they do, is it more often than not that the 30(b)(6) turns into a personal deposition with use of the social media?

MR. BEHRENS: I think there's other people that are better prepared, that have had many opportunities in defending 30(b)(6) depositions, but that's exactly what we're hearing is that when you give that notice in advance, what somebody is going to do with that, they're going to go on the internet, they're going to look on Facebook, they are going to try to find everything they can about that individual and the deposition then begins to focus more on that individual than on the corporation's knowledge, which is really the purpose of the 30(b)(6).

And, you know, one of the things that I heard also in Phoenix -- and I think there's a disconnect here -- one of the concerns I heard reflected by members of the Committee is this notion that some witnesses are showing up unprepared. Well, having witness disclosure, whether it's part of a conferral process or just mandating disclosure is not

going solve that problem. Identifying a witness does not equate to knowledge or preparation. They are totally disconnected. So, we see in some regard that the proposed amendment is a solution in search of a problem that we don't know what it's trying to solve. But there are problems --

JUDGE JORDAN: They can't really be --

MR. BEHRENS: Yeah.

JUDGE JORDAN: -- disconnected, are they? I mean, if the other side knows you are putting up for this deposition about conflicts chemistry in a pharmaceutical case, somebody responsible for keeping the plumbing operating in a plant somewhere, they might reasonably say to you well how is that person going to be knowledgeable and prepared. How can you say those are disconnected? The identity will tell somebody on the other side something meaningful about the quality of the knowledge base, right?

MR. BEHRENS: Yes, but the -- again, because a 30(b)(6) person is speaking for the corporation, it's the corporation's duty to put forward a witness that's prepared to answer the question that's on notice.

JUDGE JORDAN: Precisely. That's the point.

The question that's behind the proposal is isn't it better to let the other side know this is who we propose to put forward because if there is somebody who seems manifestly problematic to the other side at least there can be a discussion in advance.

MR. BEHRENS: Again, I think you'll hear, you know, stories throughout the day from defense counsel that have been in that position and they found that it creates new problems. And, again, there are provisions and I think you'll hear from people existing in the rules already. If somebody shows up unprepared, there are existing mechanisms in the rules to sanction that kind of conduct. I don't think that this rule will solve that problem. There are already existing rules that will solve that problem.

JUDGE BATES: Mr. Behrens.

MR. BEHRENS: Yeah.

JUDGE BATES: I'm going to have to move to the next witness. Thank you very much.

MR. BEHRENS: Thank you very much to the Committee.

JUDGE BATES: We appreciate it. Let me remind everyone, including those up at the table here, when you are speaking for the benefit of the court

reporter to try to turn your mics on, the green light will come on when you push the button.

Our next witness will be Megan, and excuse me, is it, Cacace?

MS. CACACE: It used to be Cacache (phonetic) and now it's Cacace. Americanized. So you're right either way.

JUDGE BATES: Ms. Cacace, welcome.

MS. CACACE: Good morning and thank you for the opportunity to speak with you here today. My name is Megan Cacace, I'm a partner at Relman, Dane & Colfax which is a civil rights law firm based here in D.C. We have a national practice litigating civil rights cases on issues like housing, employment, lending, public accommodations. We represent both individuals and organizations and individual plaintiff and class action suits.

I'm here today to speak in favor of the proposed amendment because I think it, in my experience, would promote efficiency and the avoidance of disputes by codifying sort of existing best practices. And given time constraints I wanted to focus my time in talking about the meet and confer requirement with respect to witness identity and how,

based on my experience, I think that advances those goals in at least three ways.

First, I think building off what Your Honor mentioned it does help identify misunderstandings that would otherwise manifest themselves in preparedness problems. So, sometimes you can tell based on the individual put forth that they may not understand what you're seeking with a particular topic. I'll give an example. So in my practice our 30(b)(6) notices often include a topic that relates to the information that the entity maintains and how it is maintained. It may be loan files, it may be tenant information, it may be employment data. What we are seeking is pretty technical information about databases usually requiring some type of IT background. Sometimes the corporation will indicate that they are going to designate an individual such as the regional manager of loans, or a regional manager of HR, and that sparks a conversation, not saying you much change who your designee is, that's not up to me, but saying hey you may not understand the information I'm seeking here is quite technical and this is what I'm going for.

JUDGE JORDAN: Can't you make that clear up front without asking them to confer with you? I mean,

the repeated refrain multiple sources on the defense side is this invades our exclusive province. This is our specific right. And to require a meet and confer both invades the work product privilege potentially and cannot but help draw plaintiff's counsel into dictating who our witness is going to be. How do you respond to that? I mean, are those things just false, or are they concerns that are legitimate but not legitimate enough to overcome the advantage to plaintiff's side?

MS. CACACE: I don't think that's really what meet and confer means. I mean, we're talking about meeting and conferring about notice topics. Nobody is saying that means defense counsel will get to dictate what the topics are in the notice. All it means is that you have a conversation. And I think there is something lost in not having that conversation and allowing one side to just identify and not have to engage in a communication about what this person's background is or whether they truly understand the nature of the information sought.

JUDGE JORDAN: I'm sorry, let me just follow up real quickly.

MS. CACACE: Sure.

JUDGE JORDAN: What I'm trying to ask is, and I think this goes to some things we've heard from the defense. If the topics were sufficiently targeted and clear and specific you wouldn't get people who were unconnected from what you are trying to get at. So the solution to the problem isn't to make them tell you who their witness is, or confer about it, it's for you folks to give more specific clear topic designations. That's what I'm trying to get you to respond to.

MS. CACACE: Yeah, I guess I don't see that being how this plays out in practice. I think a lot of times there is an opportunity for communication on both sides and saying it just goes to the wording of the topics I don't know how the other side is necessarily interpreting the wording no matter how hard I try to make it clear sometimes there may be misunderstandings. And I don't think there is going to be a significant issue with just saying let's just have a conversation about it, and frankly I think that's what happens a lot of the time anyway.

Just briefly, because I see my time is limited, I wanted to raise two additional reasons in my practice why I think this practice is valuable.

One is it does help tailor questioning for it to have more clearer and targeted depositions. So, for example, if I'm using examples to help make a line of inquiry more concrete I can choose examples that this witness is more likely to be familiar with. Or if I, oftentimes in discovery you have multiple versions of a document, I will use the version that the designee has seen before to provide some more familiarity and some more context for questioning. The third reason is I think it does help with efficiency in terms of individual capacity depositions. A lot of times it is the same person, so what we will do is you'll have a conversation and you will do the 30(b)(6) on topic four in the morning and the individual capacity deposition in the afternoon and then everybody only has to travel once, only one court reporter appearance fee, only, you know, it's just much more streamlined.

JUDGE BATES: Just knowing the identity of the witness might address that concern, wouldn't it?

MS. CACACE: On some level. I mean, it depends on timing and again you lose the benefit of the other two factors where you are talking about the misunderstanding concerns and the sort of being able to tailor the questioning a little bit more. Thank

you.

JUDGE BATES: Any other questions? All right. Thank you very much for coming. We appreciate it.

MS. CACACE: Thank you.

JUDGE BATES: Our next witness is Brad Marsh.

MR. MARSH: Good morning. My name is Brad Marsh. I'm a partner in the firm of Swift, Currie, McGhee & Hiers, Peachtree Street in Atlanta, Georgia. I've never done this before and I'm having recurring visions of Civil Procedure, or Federal Rules, and there's not one professor, there's 15. So, bear with me. I appreciate the efforts of this group.

I recognize what a significant burden it is to try to figure out what works for everybody. I happened to think and adopt the quaint notion that lawyers do appreciate rules. Lawyers follow the rules for the most part in our business and they follow the rules, especially that the federal courts make. And I think it's important from down on Peachtree Street for you to understand that what the federal courts do make their way into all the state court rules ultimately. And that becomes a very significant effort that you're

making. And to the extent that they are certain and clear, that's great. To the extent that you inject uncertainty into the rules, lawyers take advantage of that. As effective advocates they do that to try to gain advantage for their client, appropriately.

Bad lawyers, and there's two of them out there, they take advantage of it in a way that tries to create in civil cases, discovery disputes. And, I would ask this group not to inject uncertainty into an area about which there has never been any uncertainty, and that has to do with the designation by the defendant. I've defended companies, small and large, for 34 years and I can tell you that in 34 years the person's name and who the designee is has never been the source of dispute. But, the issue is stated with reasonable particularity and whether or not the defendant offered a witness to address those areas with specific specificity.

I tend to agree that this group needs to adopt changes with respect to 30(b)(6) but it's not as it relates to the designee. The selection of the designee is one area that does not cause disputes, in my experience. And primarily because the rule itself has never suggested that anybody had any say. And I

read some of the comments from Arizona, and it is like going back to law school where you see the history of the rule.

For 50 years somebody had the real good idea to say a company speaks through an individual that they choose. The other side states with reasonable particularity the areas about which they seen inquiry and they need to be -- it's a tough job to come up with the areas of inquiry, if you're going to do it right. And it's a real tough job on the defense side to come up with the right person, with the right areas.

And to your point, Professor, or Honorable Judge, to your point, it doesn't matter, according to the rule, it doesn't matter who it is. In fact the rule allows for any other person who consents to testify. So, the fact that it's the guy down the hall, if he's properly prepared and he speaks -- and what's so important about that --

JUDGE BATES: Are you telling us that you, if you were taking the deposition wouldn't like to know whether the person you were deposing had testified about the same subject on three or four prior occasions so that you could be better prepared

for the deposition?

MR. MARSH: You know --

JUDGE BATES: Are you saying you wouldn't like to know that?

MR. MARSH: You know, I would. And to the --

JUDGE BATES: And shouldn't you be able to know that for efficiency's sake?

MR. MARSH: No.

JUDGE BATES: Why not?

MR. MARSH: Because I, in fact, usually provide the name of the person, two or three days before, and it doesn't change anything. For 34 years it never changes anything. They might say, well why that person? And I say, well, you know, that's who we've chosen. And I think that if you required the designation of the name prior, you then shift the ability to make those decisions to the other side.

JUDGE JORDAN: I thought you had just said that if you do it two or three days in advance --

MR. MARSH: I do.

JUDGE JORDAN: -- it doesn't change anything.

MR. MARSH: I do. And guess what? Two days before, if that person ends up having some issue or

literally freaks out, which happens, because they've never been deposed before I have to make a decision about somebody else. And according to the rule, I wouldn't be able to designate somebody else, I've already designated that person.

JUDGE JORDAN: Well, why would -- if there was an identification of the witness in advance and there was some legitimate why that witness couldn't appear, wouldn't that be just like any other circumstance where you've got something scheduled and there is an unforeseen event and you deal with it.

MR. MARSH: But -- exactly. Reasonable people would think that would be the approach, but an enterprising requesting party might say, oh well this is -- you're doing this because I'm able to find out something about that particular witness. I see nothing -- and what's interesting is that this committee in the proposed draft says that the decision remains with the defendant --

JUDGE JORDAN: Right.

MR. MARSH: -- or the designating party. So this --

JUDGE JORDAN: So what is the problem if it's literally the case that in 34 years of practice,

your custom practice is to identify somebody two or three days in advance and it hasn't created any problems, if that's sort of a best practice what's wrong with putting it into the rules so it becomes the custom of best practice for everybody?

MR. MARSH: As long as you have language which is not there now which says: And by the way, the requesting party can't change that designation and that requesting party can't really know why you chose that person. I don't know enough about -- I just see that as being a problem if it's mandated.

Am I done? Thank you so much.

JUDGE BATES: We'll take the thank you.

MR. MARSH: Thank you all. Thank you so much.

JUDGE BATES: And we'll take no offense, those of us who are not professors at being referred to as professors.

MR. MARSH: Thank you. Thank you so much.

JUDGE BATES: Thank you very much. All right. Our next witness is Mark Chalos.

MR. CHALOS: Thank you very much for having me here. My name is Mark Chalos, I'm a partner with the Lieff Cabraser law firm in Nashville, Tennessee.

I'm here today on my individual capacity also representing the Tennessee Trial Lawyers Association, an organization whose mission it is to protect the right to jury trial, protect access to justice and protect the independence of the judiciary.

In my practice I represent businesses, organizations as well as individuals in a variety of different types of lawsuits so I'm regularly on both sides of this issue, both as a requesting party and a producing party. So, I certainly empathize with some of the concerns raised. I've read the transcript of the Phoenix hearing. I have yet to hear a good reason why they shouldn't disclose the identity of the 30(b)(6) witness. I've not ever not disclosed that as a producing party. As a requesting party it certainly is more efficient to know the name of the witness in advance for some of the reasons we've already talked about.

PROF. MARCUS: Mr. Chalos.

MR. CHALOS: Yes, sir.

PROF. MARCUS: Has it ever happened after you identified one person as a witness that for some reason you had to substitute a different one?

MR. CHALOS: Yes, it has.

PROF. MARCUS: What happened when that occurred?

MR. CHALOS: Nothing.

PROF. MARCUS: You didn't run into big difficulties?

MR. CHALOS: I ran into no difficulties. In fact, there have been times where during the deposition we realized, you know what, we probably need to have another deposition on some of these issues. So, you know, it's not ever been an issue. I've never contemplated bringing a witness with a paper bag over his or her head so that they couldn't look at their Facebook page or something ahead of time. It's just not been an issue and I don't really understand why we are hearing some of the things we're hearing.

JUDGE ROSENBERG: What's the biggest advantage you've seen in depositions where you have had the identity disclosed in advance when you're on the plaintiff's side and those which you have not? Have you seen a big difference?

MR. CHALOS: Yeah, well, earlier this week I took a deposition of a person who was a high up financial person in the corporation and I said what

company do you work for, and he said I don't know. I don't know which of the related entities I actually work for. Well, I had his LinkedIn resume which I was able to present and say well is it this company, he said, oh right, yeah, that's right. That's the one.

So, it's been very helpful to have advanced understanding of who the witness is, what the witness's background is and --

JUDGE BATES: So, let's differentiate between the --

MR. CHALOS: Yes.

JUDGE BATES: -- identity and a requirement to confer about the identity.

MR. CHALOS: Yeah.

JUDGE BATES: What would the advantage be from a requirement to confer, if in fact you support that?

MR. CHALOS: Yeah, as the requesting party I've never felt any great need to select the witness, and I don't think that would be that helpful. I don't know who the best witness is for the producing party to address these issues, so, you know, a confer requirement is nice. I think a more direct requirement that the identity be disclosed really

addresses the issue more directly. I don't feel that as a requesting party we should have much of a role in selecting the name of the witness.

MS. WITT: You noted in your comments that you sometimes see a 30(b)(1) deposition being taken in connection --

MR. CHALOS: Mm-hmm.

MS. WITT: -- with the 30(b)(6) notice --

MR. CHALOS: Right.

MS. WITT: -- and note in your view that might promote efficiency. Have you had experience where that has actually made the 30(b)(6) portion of the deposition problematic because of the distinction between testimony that's binding on the corporation as its representative and the rest of the testimony?

MR. CHALOS: I don't know that I've seen that be problematic. I think we specificity in the topics requested I think those issues are not as prominent, but I think what I see in practice is the defense lawyer, or the lawyer for the producing party, will say this is beyond the scope, you can answer in your individual capacity or something like that and it happens and its fine, and you know, we all know what the ground rules are.

MS. WITT: Well, then how do those issues get resolved as a practical matter on the back end? Is that then something that has to be presented to the court as part of --

MR. CHALOS: It tends not to, I mean, in part because ultimately the use of that transcript would be for a trial and as we all know most of those cases don't ultimately go to a trial, but the idea of being efficient by having an opportunity to ask a witness while he or she is there about their individual knowledge as well as what they are being designated to testify there, I think it's incredibly helpful, it's efficient, it saves everybody time and money and we can only prepare for that if we know who the witness is going to be.

PROF. MARCUS: Mr. Chalos.

MR. CHALOS: Yes.

PROF. MARCUS: Would that testimony in the individual capacity often be admissible against the company under Rule 801(d)(2) --

MR. CHALOS: I think --

PROF. MARCUS: -- regarding a matter within the person's scope of employment?

MR. CHALOS: It may be. It depends who the

witness is, I think. I think if it is made by a person and it is under the rules otherwise admissible, then yes. But, you know, I don't know that the requirement is that the witness be someone whose individual testimony would otherwise be admissible. Maybe, I think, is the short answer.

JUDGE ERICKSEN: Were you going to follow up on that?

JUDGE BOAL: If it may be --

MR. CHALOS: Mm-hmm.

JUDGE BOAL: -- would a requirement to disclose potentially change the calculus of the party that is responding to the deposition so that they would avoid having the 30(b)(6) witness say something that could be admissible as non-hearsay?

MR. CHALOS: Yeah.

JUDGE BOAL: That currently is not a factor, but as the responding person couldn't you take that into account?

MR. CHALOS: Yes. As a producing party I wouldn't be smart enough to figure that all out, but maybe I guess. But, then of course, would not shield -- I mean, what we're talking about is efficiency. If I want to take a witness's deposition about their

personal knowledge I have other tools to do that. I can compel that testimony other ways. So, it may shield that witness from having relevant testimony about topics outside of the scope of the 30(b)(6) notice but I'm still able to get witness's individual testimony on those topics through other means. So, I'm not sure if that -- I mean, for one day that may protect some information but in the long run I don't know if it gets anybody anywhere.

JUDGE BATES: I have one last question if you could give a brief answer to and that is would you be in favor or not in favor of a notice requirement, say a 30 day notice requirement in the rule?

MR. CHALOS: For the deposition notice itself?

JUDGE BATES: Yes.

MR. CHALOS: You know, I think anytime you add in a concrete date I think you are going to run into issues, but I don't think that we would be opposed to some notion that you have to give notice in a reasonable period of time for a meet and confer to occur and, you know, for the producing party to decide who their witness is going to be and prepare that witness. You know 30 days seems an awful long time,

and I don't know what the right number is, but in terms of some reasonable period of time between notice and deposition so that the parties can work through these issues, yeah, I think we'd be fine with that.

JUDGE BATES: All right.

MR. CHALOS: On both sides.

JUDGE BATES: Thank you, Mr. Chalos. Thank you very much.

MR. CHALOS: Okay. Thank you.

JUDGE BATES: Our next witness is Mary Novacheck.

MS. NOVACHECK: Good morning.

JUDGE BATES: Good morning.

MS. NOVACHECK: Do I need to push a button?

JUDGE BATES: You don't need to do anything as long as the green light is on the microphone.

MS. NOVACHECK: There we go. Thank you. Members of the Committee, my name is Mary Novacheck. I'm a partner with the law firm of Bowman and Brooke. We defend manufacturers nationally in product liability lawsuits. Often mass torts. Mass torts are bigger than MDLs, you've got an MDL in one state, or one federal court and then you will have a coordinated action in California, you'll have one off cases

throughout the country. I have had experience since I started practicing in 1987 with these witness. I've been very committed to them for the following reason. Rule 30(b)(6) takes a human toll on the person that is asked to testify. These are not lawyers. They did not go to law school to become civil litigators. They are engineers, they are educated, they work in a very high level of professionalism and they are repeatedly deposed time and time again.

I want to give you two concrete examples. When I first started practicing I assisted with the preparation of an automotive engineer who led the fuel system design department at one of Detroit's big three auto makers. He was a great witness, excellent leader at the company. He had a very scientific simple explanation for why the location of the fuel tank that the plaintiffs were arguing was better was simply not. It was more dangerous, scientifically invalid. So he was a problem for the other side. That deposition was not about what did he know, what did the company know, it was endurance. How much of an attack could he take? How many times could he be called a liar, a bad engineer, someone who put profits over safety. This is what these depositions become.

PROF. MARCUS: Excuse me --

MS. NOVACHECK: Yes.

PROF. MARCUS: It sounds like that witness you're talking about --

MS. NOVACHECK: Mm-hmm.

PROF. MARCUS: Would be a likely witness in the case anyhow, right?

MS. NOVACHECK: Yes, mm-hmm. Yes

PROF. MARCUS: So, all of the things you just mentioned could happen then.

MS. NOVACHECK: Yes, exactly. So, it's not enough to simply modify the current proposed amendment to simply require disclosure. We need more. We need a procedural avenue as defense counsel for protecting those witnesses.

PROF. MARCUS: So, what you're talking about is something that would apply to all depositions of defense witnesses?

MS. NOVACHECK: Yes. All depositions under the context of this rule, for this reason.

PROF. MARCUS: No, I mean all depositions of all the defense witnesses?

MS. NOVACHECK: I think it would be helpful if we had the following procedure in effect for all

depositions. Right now I need to get a protective order before the deposition in order to be able to instruct my witness to not answer an obviously abusive question and obviously irrelevant question. If I don't have a protective order in my pocket I run the risk of sanctions when I say I instruct you to not answer unless its privileged, right? So, the procedure that I need and I don't have right now is a timeframe within which it's reasonable for if we have true needs to define the scope. And I know the other side isn't going to agree with me on it. And they don't agree to give me time to get a protective order, I have to produce that witness and I take the risk --

JUDGE JORDAN: Well --

MS. NOVACHECK: Go ahead.

JUDGE JORDAN: You do have to produce that witness, but that's true enough in every litigation setting, right, when you said an obviously abusive question.

MS. NOVACHECK: Mm-hmm.

JUDGE JORDAN: Don't the rules provide for you to, in fact, say that's it we're stopping and I'm going to the court.

MS. NOVACHECK: I don't think so. I don't

think so.

JUDGE JORDAN: You don't think you can do that?

MS. NOVACHECK: I think there's a rule --

PROF. MARCUS: Doesn't the rules say that you can instruct the witness not to answer in order to enable you to apply to the court for relief?

MS. NOVACHECK: As a defense lawyer, it is very risky.

PROF. MARCUS: The rules say that.

MS. NOVACHECK: I agree with you, but the lawyers -- the judges who hear these disputes -- first of all, I don't like to bring discovery disputes in front of a judge. You guys don't like discovery disputes. You have the most difficult criminal dockets in the country and I sit there and I come up and I need to talk to you about my deposition --

JUDGE JORDAN: That's true, but you've posited your hypothetical with obvious abuse, so if there -- what makes your job hard? Your job is hard because you have to decide at what point is this obviously abusive and will a judge agree with me? That's not an easy job, but you do have a mechanism in the rules to stop abuse, don't you?

MS. NOVACHECK: What I don't have in the rules, and it's inconsistent in the district courts, is a procedure that says if I move for protective order, the deposition is off the calendar.

JUDGE JORDAN: And I think the response that we see in the papers is that's exactly what plaintiffs lawyers don't want because then that puts the tool in the hands of defense counsel to needlessly delay the progress of the suit, it becomes a tactical weapon. And I guess I'm wondering what is the defense side response to that to prevent it from, in fact, becoming what they fear it would be?

MS. NOVACHECK: I think the defense concern is that this rule is not like other rules. Other rules you have an opportunity to effectively object and narrow the scope through the rule. Here I don't have that.

JUDGE BATES: You say other rules. Do you mean other depositions under Rule 30 --

MS. NOVACHECK: 33, 4 --

JUDGE BATES: -- or do you mean rules?

MS. NOVACHECK: Yep, 33, 34, 35.

JUDGE BATES: What about keeping it to a comparison of depositions under Rule 30.

MS. NOVACHECK: Mm-hmm.

JUDGE BATES: Why an objection procedure -- which I take it is what you are arguing for.

MS. NOVACHECK: Yes.

JUDGE BATES: For 30(b)(6), but not for other Rule 30 depositions.

MS. NOVACHECK: Well the scope of --

JUDGE BATES: What's the special thing about 30(b)(6) that should warrant an objection procedure?

MS. NOVACHECK: I think it's this: We don't have to prepare those witnesses in a fact witness setting the way we need to in a corporate setting. Those people work many, many long hours and they take their away from their business role and they are asked to sit there and endure a very grueling examination. That's fine, this is a good rule. But I think in the fact witness setting there is more comfort for that witness if they say I don't know. In 30(b)(6) I tell my witnesses you may not say I don't know. You may say the corporation doesn't know, but even that is hard to say. They have to work hard. They receive threats all the time that they are not prepared.

I do want to tell you, and I know my time is up, but I did want to tell you I've seen people have

heart attacks, I've seen people leave their company because they constantly hear that they are careless, they are -- take profits over safety and they leave their companies. I've seen much more damage on the human side than we're talking about here. We're talking about what the lawyers have to do. When you go back and decide what to do next, please think about ways you can help these people meaningfully prepare in a commonsense approach. Thank you very much.

JUDGE BATES: Thank you, Ms. Novacheck. Next witness, Sherry Rozell.

MS. ROZELL: Good morning.

JUDGE BATES: Good morning.

MS. ROZELL: Thank you for the opportunity to speak with you today regarding the proposed amendment. My name is Sherry Rozell. I am a partner at the law firm of McAfee & Taft, with offices in Missouri and Oklahoma. I've been a litigator for over 30 years and I've spent my career, much of it in federal court, and I have extensive experience with Rule 30(b)(6) witnesses and preparing and defending Rule 30(b)(6) depositions.

I'd like to talk about two issues this morning: One is the significant issue regarding the

meet and confer requirement for the identity of corporate representatives and secondly I'd also like to address something that's not in the proposed Rule and that is the need for a specific notice and objection procedure, and that would really further the goals of Rule 1 to achieve prompt and efficient resolutions of dispute.

So, first with regard to the meet and confer requirement, um, you've heard from others I think in the Phoenix panel, but by injecting a meet and confer requirement regarding identity it creates a new discovery obligation that really diminishes the organization's right to choose who will be their company spokesperson, the face of the company at trial and who most accurately expresses the company knowledge on the topics that are at issue and who will provide that binding testimony on behalf of the organization. And the identity of the deponent is completely in the purview of the organization. It's not something that is currently required to be disclosed and courts have routinely held that it's actually irrelevant to the process.

MR. SELLERS: Excuse me.

MS. ROZELL: Yes.

MR. SELLERS: Ms. Rozell?

MS. ROZELL: Yes.

MR. SELLERS: If -- wouldn't you prefer to have the identity or the concern, any concerns, about the choice of the witness raised with you before the deposition rather than in the middle of a deposition, even if you choose to ignore them or don't agree with them?

MS. ROZELL: I actually have not ever had in my practice any pushback on the identity of a witness. It's not ever been a source of controversy. Now I have gotten into issues about the preparedness of the witness but never the identity so I don't find that in practice to be an issue.

JUDGE JORDAN: Do you --

JUDGE ROSENBERG: Do you identify -- yeah, I was going to ask the same question.

MS. ROZELL: Sometimes I do and sometimes I don't. It's really a case by case basis.

JUDGE JORDAN: Is there a practice though, do you find that more often than not you are letting people know in advance, even if it's just a couple days?

MS. ROZELL: It really depends. I wouldn't

say that more often I do or more often I don't. Most recently I just finished up a four corporate representative depositions. I did end up disclosing two days before the deposition the identities of the witness and the topics, but it was not --

JUDGE JORDAN: Did that disclosure create any difficulty? I mean, did something untoward happen because of it?

MS. ROZELL: In that particular case it didn't. Like I say, it's really a case-by-case basis and I think the thing that the committee needs to keep in mind is that providing a rigid rule, kind of a one size fits all rule, really can lead to some issues.

JUDGE BATES: What would be the reason, just as a generality, that you would use for not identifying the witness? When you make this case by case determination, why would you choose not to identify the witness?

MS. ROZELL: Well, there is a long process in identifying the right person and preparing them and we may not be comfortable until shortly before the deposition to provide the identity of the witness.

JUDGE BATES: Let's assume you get to that point that you know who the witness is. Why would you

decide not to divulge that?

MS. ROZELL: Well, it's really not an important issue as it relates to the deposition. The process is provided to provide the testimony on particular topics of a corporation and who it is is really irrelevant as many courts have held. And so --

JUDGE BATES: That's true in every case though. But go ahead.

MS. ROZELL: But I do want to make sure we are focusing on what the proposed rule is. It's not merely identifying the witness, but there is that critical meet and confer requirement that's included. And that's really the rule that we are analyzing, determining whether it's appropriate or not. And I think that the fact that the identity of the deponent, who is chosen, is completely within the purview of the organization. That concern was recognized by the Committee and the comments indicating that well the named organization ultimately has the right to choose, a discussion about the identity might later avoid disputes. I actually think it will increase disputes because it's unclear --

MS. TADLER: I'm sorry, can I ask you a question? You talked about this recent experience

that you had with four corporate deponents. Was that in response to a single 30(b)(6) notice that had a variety of topics and you had to make a determination that there would be multiple people to have to be put forward?

MS. ROZELL: Yes, that's correct.

MS. TADLER: Yes. So, why wouldn't it be the case that the meet and confer component would give you the opportunity given the number of topics to better assess whether the people you are identifying are the right people. Wouldn't that help to make the deposition, or series of depositions if you will, more efficient ultimately because you will have not only talked about the identity, but you will talk about who is going to speak to which topics that have been identified in that notice. Won't that streamline things?

MS. ROZELL: No, I don't think so. And I think actually what happened in that case is a great example of things that occur in practice. We had extensive meet and confers over the deposition topics. The topics were voluminous. There were some misunderstandings on both sides as to what the plaintiffs were requesting, what the organization was

willing to do so we spent a lot of time on the topics. Frankly, not once did the issue about the identity of the witness come up because the plaintiffs were interested in getting information about the topics, they weren't really interested in who it was that would be provided so long as they got the information that they requested.

MS. TADLER: So, in that instance the opposing counsel did not ask you in the course of the meet and confer the identities of the witnesses?

MS. ROZELL: No, they had not. And I typically don't get that request during the --

MS. TADLER: You typically do not?

MS. ROZELL: Not during the meet and confer process, no.

MS. TADLER: If you were asked in the course of the meet and confer process, would it be your practice to identify who those people were?

MS. ROZELL: No, it wouldn't be because we are essentially meet and conferring long before the deposition actually occurs and I can't really identify who the witnesses are until I understand what the topics are and the breadth and scope of those. So really I am not in the position during that early meet

and confer process to even talk about that because we haven't fully refined the topics or know who the appropriate deponents would be.

JUDGE BATES: Ms. Rozell, we've run out of time. You didn't even get to your second point, I guess, did you submit written materials? No, you didn't.

MS. ROZELL: I am going to by the deadline of the 15th and I would urge specific notice and objection procedure similar to Rule 35, or 45, I'm sorry.

JUDGE BATES: Thank you, Ms. Rozell. Next we will hear from Bruce Parker.

MR. PARKER: Good morning, Your Honor.

JUDGE BATES: Good morning.

MR. PARKER: Good morning and thank you for allowing me to talk today. My name is Bruce Parker. I'm a partner in the Venable law firm, practicing for 41 years, the last 30 or which have been almost exclusively in the drug and medical device litigation and that exclusively in the MDL setting and trial counsel for most of the so-called bellwethers in those MDL cases I've tried. I'm here today to talk about strongly against, and hopefully persuasively, the

mandate to meet and confer on the selection of my corporate designee.

The most important thing before we go into trial -- I can't say *the* -- one of the most important things before we go into trial is sitting down with my client and selecting who is going to be the face of the corporation. Frankly, I shouldn't have to. And I cannot comply with a mandate to meet and confer on that selection process in good faith without invading my mental impressions, my work product. I submitted a comment in December that discusses at some length the work product implications of this rule and I'll try not to repeat my comments today. But I cannot sit down with a plaintiff's counsel, in my world it's always a plaintiff asking, and explain why I chose A versus B or whether the other individuals that the plaintiffs thought might be more appropriate we didn't choose. I simply cannot do that without giving some advantage away and/or sharing thoughts that I've had with my client. I would encourage the members of the Committee to go back --

JUDGE JORDAN: Can I ask you a question, Mr. Parker?

MR. PARKER: Yes.

JUDGE JORDAN: First, is it not possible to have a meet and confer that involves simply identifying the witness and then responding if somebody says I don't think you understand we are trying to get this certain technical information, I'm not sure how the Vice President of X is going to be able to speak to the technical piece of this. Does that -- does responding to their question, even if it's just to say well, he or she'll be prepared on that. Is that invading your work product?

MR. PARKER: No, it's not invading, but I see no benefit, other than driving up cost of litigation, for me to have a discussion with plaintiff's counsel if they have given me a notice with reasonable particularity, I will know what they want to get at in a deposition.

And let me segue on that point. I read at the Phoenix hearing there were complaints about witnesses not being prepared, and I thought about that and I think that is somewhat disingenuous. There is a correlation in my experience between how well my witness is prepared and how long that deposition goes. A plaintiff's lawyer, again in my world, sometimes it's a defense lawyer, but in my world a plaintiff's

lawyer who if I have not done my job and brought forth a corporate designee who is not prepared, the plaintiff's lawyer goes before one of you in a Rule 37 and will try to paint my client, and me, in a way that's not favorable, but also and more importantly, goes to the jury with that deposition in hand and now paints the picture that the plaintiff wants in front of a jury. A defense lawyer in a corporate designee deposition would be foolish not to have a person prepared to address topics with reasonable particularity --

JUDGE JORDAN: How about --

MR. PARKER: -- in that setting.

JUDGE JORDAN: -- moving to the issue that you heard, if you read the Phoenix transcript and you've been seeing the questioning here, what about moving away from meet and confer to simply a requirement to disclose the identity some reasonable period in advance?

MR. PARKER: I think the only reason for doing that -- and Your Honor asked a question -- in my world drug and medical device, there isn't anybody that has taken a deposition of a corporate designee of a company who doesn't know that that company has given

a corporate designee deposition in that litigation previously. I do, on occasion -- remember my world is usually case management orders, so oftentimes this is ordered by the judge in the context, we live outside the civil rules to some extent in MDLs. I, if I have the option and I'm asked, I may share that if I think the plaintiff's attorney is professional from past experience and will deal with the issues as they are to be dealt with, namely the knowledge of the corporation. But if I know that plaintiff's attorney is one who likes to play games, and that deposition is going to turn into a personal questioning of that witness then I won't share that. I see no advantage to my client and my witness to get that beforehand.

JUDGE JORDAN: And if you were on the other side would you see an advantage in knowing it in advance so that if the witness had given four depositions previously you could be prepared to actually cross-examine the testimony questioning the answers you were getting in that deposition?

MR. PARKER: Oh, sure. If I were a plaintiff's lawyer I would like all the advantages I could possibly get, so sure.

JUDGE JORDAN: And then wouldn't that be

from then a, not an advocate's perspective, a perfectly fair and reasonable thing to have the other side know in advance that you, the defense, are going to put forward somebody who's been deposed in four other cases so that they can be understood when they are answering questions to be either consistent or inconsistent with what they've said before?

MR. PARKER: In my world, Your Honor, they know that already, because we live in a very confined drug and medical device, they know what the product is.

JUDGE JORDAN: That's your world, so if it's working in your world, why wouldn't it be fair for it to work in the rest of the world?

MR. PARKER: Well, I didn't say that it works in my world. Remember I said I don't give that name to lawyers that I know are going to game the system.

JUDGE BATES: Well, Mr. Parker --

MR. PARKER: -- and make this is personal attack.

JUDGE BATES: -- it sounds like you're talking about your world, of course we have to make rules for --

MR. PARKER: Of course, Your Honor.

JUDGE BATES: -- the whole world, not just your world. But, it's also true that it sounds like you want to retain, with respect to the identity of the witness, you want to retain some advantage for particular cases depending on your assessment of the case and the lawyer on the other side. Why shouldn't we want to even the playing field by just saying identify the witness some reasonable time in advance?

MR. PARKER: You know what --

JUDGE BATES: So we take away this tactical advantage that you're trying to keep in certain cases.

MR. PARKER: I don't think it's a tactical advantage if you're -- if the question is prior depositions, then fine. If I were faced with a rule with a case management order saying if I'm going to produce a corporate designee who has previously testified give them the transcripts. Okay, I'll give them the transcripts. That addresses the tactical advantage. It's the case where the witness has not been previously deposed and in some plaintiffs, I'm not speaking with a broad brush as to all, that becomes the focus -- and you're going to hear some stories today about what has happened in somebody's

depositions where the individuals have the ability to do the personal investigation. I think I'm out of time --

JUDGE BATES: You are.

MR. PARKER -- but I want to leave -- can I have one question? Please read your commentary to Rule 26(b)(3) and (b)(4) that were passed in 2010. The committee said we're making the changes -- and your to be commended because it's worked wonderfully in eight years -- that we're not going to allow discussions between counsel, plaintiff or defendant, and their experts because that's not what the focus should be. The focus should be on the issues. It's worked wonderfully and for all the reasons in that rule about protecting the work product privilege, that spirit, this rule goes against the grain of that thinking. Thank you.

JUDGE BATES: Thank you, Mr. Parker.

Next, Patrick Seyferth, please.

MR. SEYFERTH: Thank you. Good morning. My name is Patrick Seyferth. After 10 years in litigation practice I started a firm called Bush Seyferth Kethledge & Paige in Detroit. My partner, Ray Kethledge is got an elevation to the Court of

Appeals for the Sixth Circuit, our firm is now Bush Seyferth & Paige. We are outside of Detroit. We are a 60 lawyer firm, majority woman owned firm and the largest woman owned litigation firm in the state of Michigan. We do both individuals and companies heavy amount of automotive work because of what we do in Detroit. Myself, personally, I've defended well over a hundred 30(b)(6) depositions and taken many 30(b)(6) depositions.

I would echo a lot of the comments, and I haven't read all these transcripts from Arizona, but having, you know, read the rule itself there is harm in my view both prior to the deposition and during the deposition. And that harm prior to the deposition is caused by the internal inconsistency with the draft of the rule as written. I mean, the rule is the designation by the corporation where the burden is on the corporation to designate a witness. The flip side to that is that the corporation is bound by the testimony.

Now, if you read the rule as written, after the designation requirement by the organization it segues into the requesting party then having a seat at the table, at that -- and the commentary goes on to

say but the ultimate decision is the corporation. So, the internal inconsistency itself upsets a really careful balance that this Rule has provided in the 25 years that I've dealt with it and will create, if the rule is adopted as changed, just an inherent unfairness.

Because what you're allowing by the Rule, respectfully, would be my adversary to have a seat at the table and a pick with regard to my designated hitter and that's just not the way it works. The designee can bind the corporation, and there's been a lot of stories about the import of that with regard to witnesses, and those stories are true and these witnesses take these extremely serious. So that's point one.

Point two is there is a procedural defect within this Rule because by having a "meet and confer" requirement you are injecting the rule, respectfully, injects a conflict where none, you know, exists. It's a dispute.

PROF. MARCUS: So you are opposed to having any discussion of the topics?

MR. SEYFERTH: Well, the meet and confer requirement, that description -- and I'm only going by

the rule as written, respectfully, would inject, basically, a dispute process. And so it's not, in my view, an appropriate approach to it because there is a response which already exists which is, you know, a party can go to the court if there is an improper or inadequate deposition or the topics are inadequately prepared, it is in my view inviting a dispute where none exists.

JUDGE BATES: So, just to repeat the question --

MR. SEYFERTH: Sure.

JUDGE BATES: -- slightly differently. You're opposed both to a meet and confer with respect to the number and description of the topics and to a meet and confer with respect to the identity of the witness?

MR. SEYFERTH: Well, respectfully, the answer is yes, I do oppose both and I submit that on behalf of myself. I'm not here representing any car company, but respectfully, there should be a process if there is going to be a change to the rule which would mechanize a process for objections and if there is an issue with regard to the topics then that could be done. But by creating a rule and saying meet and

confer, especially for Your Honor, you know, then you're before the court on issues and disputes where none may exist.

JUDGE BATES: But we hear from most witnesses that there is informally a meet and confer that takes place, maybe not as to the identity of the witness, set that aside for the moment, but there is a discussion that takes place so why would this rule be inserting something that isn't already taking place?

MR. SEYFERTH: Well, I mean, I agree with a lot of the counsel that was up here sometimes that happens, sometimes it does not. Sometimes there is a identification of the witness, most times we do not. We typically will respond and object to if the scope is too broad redefine it and then have that issue before the court in advance of the deposition. But by requiring the meet and confer --

JUDGE BATES: But if it's too broad, isn't it better to have a meet and confer to discuss it rather than bringing it before the court?

MR. SEYFERTH: Well, respectfully, if it's too broad it's something that then the parties, you know, after the objection would be dealing with with regard to, you know, a motion practice, but why would

the rule, I guess, invite that. And the last thing I would just say --

MS. TADLER: I'm sorry, can I just ask a question?

MR. SEYFERTH: Sure.

MS. TADLER: Do you not appear before courts where judges have individual rules that require you in any event to meet and confer before some kind of discovery dispute is brought before them?

MR. SEYFERTH: Typically that is often the case before a discovery dispute is brought before you, but by the rule injecting meet and confer, you know, as part of it its suggestive that there is a discovery dispute. If the committee wants to come up with a different rule and mechanize a process whereby there is a response date within which you provide objections to that and then there could be a dialogue, you know, that would be something but a lot of the dialogue is discussing things around the rule as written. Nobody here is really --

JUDGE JORDAN: Let me make sure I understand what you're saying.

MR. SEYFERTH: Sure.

JUDGE JORDAN: You're -- are you saying that

its not so much a problem if there were a requirement to meet and confer, the problem is that if there were meet and confer there's not a structure in advance to deal with disputes?

MR. SEYFERTH: Well, respectfully, there would be a big problem if there was a meet and confer and there was a potential to upset the balance of designating the witness. If --

JUDGE JORDAN: I'm sorry --

MR. SEYFERTH: Right.

JUDGE JORDAN: -- leave the witness designation piece out of this. We've been talking, I thought, here for a minute about --

MR. SEYFERTH: Okay.

JUDGE JORDAN: -- about just the topics and scope and things --

MR. SEYFERTH: Sure.

JUDGE JORDAN: -- like that. Is your objection to meeting and conferring about that, that there's a lack of structure?

MR. SEYFERTH: Well, certainly if there were just the rule as written that would be a lack of a process and specific structure within which to handle that, so I believe if there is going to be a change

where there is a discussion and articulation of topics then that should be a mechanized approach as part of the other rules.

JUDGE BATES: I think -- I think speaking for a lot of judges, maybe not all judges, and certainly not all the judges sitting here, but their view is that things get worked out if the parties talk about them, if counsel talk about them. So, why isn't a meet and confer requirement a way to add efficiency and get things worked without having to bring them through a formal process to the magistrate judge or district judge?

MR. SEYFERTH: Well, as it relates to the identification, that part of it suggests --

JUDGE BATES: Forget the identification of the witness.

MR. SEYFERTH: But as it relates --

JUDGE BATES: I'm with Judge Jordan on that.

MR. SEYFERTH: As it relates to the topics itself, I believe that if you were going to do that the meet and confer should only be after a mechanized process is put forth and that process is played out and not the defective. Otherwise you are injecting and inviting a dispute that doesn't exist. In 30

years, or 25 years, I don't recall motions where we haven't properly prepared the witness and I just think this is a problem that doesn't actually exist. If it did, the happiest person in the room would be the plaintiffs lawyers because you would have a bunch of I don't knows and these depositions when used at trial were purging now are conflated when you get into individualized issues and then Facebook and all these other things, you know, are allowed to be discussed. So the rule invites a conflation of what its intent is to be, which is corporate knowledge, personal knowledge and these other things, the plaintiffs lawyer from Tennessee said they have a way to get at that. Thank you for your time.

JUDGE BATES: Thank you, Mr. Seyferth.

Next we'll hear from Sharon Caffrey.

MS. CAFFREY: Thank you. I'm Sharon Caffrey and I want to thank you on behalf of myself and my law firm, Duane Morris, for allowing us to speak to the committee today about the proposed changes. I am the co-chair of our trial practice group which is about 40 percent of an 800-person international law firm and we represent organizations as both plaintiffs and defendants. My particular practice is in the product

liability area where I tend to represent defendants more than working on the other side, but I do have occasion through indemnity claims to notice corporate designee depositions of other companies and third parties as well as defending them.

I would like to address the issue we've been talking about today, both the requirement to have a meet and confer about the topics and the identity of the witness and I think the best way for me to do this is to illustrate it through some examples. The -- I had a recent case in which we filed a motion to dismiss based on personal jurisdiction.

The plaintiff's counsel asked for a deposition to test the affidavit in support of our motion. The judge allowed the deposition and I then received a notice that went so far beyond testing the affidavit on personal jurisdiction that it required us to draft and prepare extensive objections to the notice. Based upon the fact that I had an order from the court telling me to give a deposition on the personal jurisdiction issues and I had filed objections, or served objections, on opposing counsel to the areas outside of personal jurisdiction we proceeded with the deposition.

We prepared our witness, proceeded with the deposition. The client was located in Florida, I'm in Philadelphia, it required a couple trips to prepare the witness to search for and obtain all the documents, to serve the documents, et cetera.

At the deposition -- oh, before the deposition I did meet and confer with plaintiff's counsel about the topics of the deposition and asked him to take the deposition pursuant to our objections and to not probe the areas outside of the scope of the notice as we agreed it was proper. Plaintiff's counsel agreed to limit his depositions to the areas that were not objected to and then at the deposition proceeded to depose my corporate designee on the areas outside of our agreement. We put all the objections on the record, proceeded with the deposition and at times I instructed the witness not to answer because plaintiff's counsel was probing areas that went into the company's relationship with other entities, foreign entities, and subsidiaries and unrelated companies.

After that deposition, plaintiff's counsel moved to compel another deposition because my client had -- my witness had not answered all of the

questions. This exemplifies the problem that we will have if there is a meet and confer without meaningful guidance as to whether or not we have to take objections to the court prior to the deposition or if we have to wait until after, whether we can tell our witness not to answer.

JUDGE JORDAN: I apologize, Ms. Caffrey. I'm not following --

MS. CAFFREY: Okay.

JUDGE JORDAN: -- why a meet and confer obligation, which you actually went through in the example you just gave is more -- makes it more likely that you will have a problem at the deposition.

MS. CAFFREY: The -- it's not the meet and confer obligation that I have the issue with, Your Honor, my request is that there is more meat to what has to happen, or more guidance.

JUDGE JORDAN: So you want structure?

MS. CAFFREY: I want structure. I want guidance.

JUDGE JORDAN: An objection structure?

MS. CAFFREY: An objection and a procedure for resolving objections because in this instance, you know, I'm now at three trips to Florida to meet with

and prepare a witness for a case that shouldn't be in my jurisdiction at all and ultimately we won on the motion to dismiss, but it was at a very high expense to a small company.

JUDGE BATES: And is there something unique about 30(b)(6) as opposed to other Rule 30 depositions?

MS. CAFFREY: Yes.

JUDGE BATES: Which there are many more that should support an objection procedure for 30(b)(6), but not for the rest of Rule 30?

MS. CAFFREY: Yes.

JUDGE BATES: What?

MS. CAFFREY: And that is in a Rule 30(b)(6) we get a notice for a corporate designee that's speaking on behalf of the company and it is, there is supposed to be a list of specific topics to be covered and when you sit down to prepare a witness for that it is quite cumbersome. You know, you are often going back looking for documents that are very old. You may or may not have them. They may or may not be in storage. It takes time, it's tedious in order to prepare the witness properly to respond to the notice so that you don't get the complaint that your witness

was unprepared.

Once you get -- you meet with your witness, you sit down and you prepare them on the topics you think that they are going to be asked questions on those topics, and they should be, and your opponent should think that you should be able to prepare your witness based on the available information at the corporation.

In a regular deposition under Rule 30, you are getting a deposition of somebody with personal knowledge. You know, yes they'll meet with counsel, they may go over documents, but it is their knowledge and their experience and their involvement in the product or their involvement in the contract negotiations, so they are speaking for themselves and their knowledge. They're not being prepared on the corporation's knowledge and so the meet and confer with regard -- and the specification of topics with regard to a 30(b)(6) is so critical because it's really expensive, it's really time consuming and it takes great effort to properly prepare a 30(b)(6) witness.

So I think we need guidance on how to handle it. You don't get a notice with specified topics for

a fact deposition. You get a notice of a deposition typically.

JUDGE BATES: What is it about the existing rule, not the proposed rule, with the existing rule that has made it so that these issues can't be resolved through protective orders and the process that does exist for all depositions?

MS. CAFFREY: I think that the rule as it is now just lacks guidance. From my perspective, you don't know whether you need to get the protective order before the deposition. You meet and confer -- if you meet and confer with your opposing counsel then you get a deposition notice that doesn't seem to fit the litigation or is too broad. You don't have any -- you think you have an agreement, there's no way to get an order from the agreement. If you have a counsel who doesn't stick to their agreement it's a problematic situation. We don't know whether we have the right to tell the witness not to answer when there are questions outside the scope of the notice, or personal question to the witness and that does happen on a lot of occasions.

So, you know, they are not there to speak for themselves, they are there to speak for the

corporation, their personal lifestyle, wealth, whatever is irrelevant, but that's the kind of questions you can get so I do think there needs to be some structure and some guidance as to when you file objections, whether you need to move on them before the deposition or whether you can simply instruct the witness not to answer outside the notice and then let the other party go to the court and explain why they need more information outside the notice that they gave. And then you might have to prepare a whole new witness in that instance.

JUDGE BATES: All right. Thank you, Ms. Caffrey.

MS. CAFFREY: Thanks.

JUDGE BATES: Next we'll hear from Terrence Zic.

MR. ZIC: Good morning.

JUDGE BATES: Good morning.

MR. ZIC: I'm Terrence Zic. Thank you for having me. I'm a partner at Whiteford Taylor & Preston. While I have not sat on a committee like this, I have chaired two trial courts nominating commissions so I appreciate the time the committee puts into its work.

I'm going to go a little off-script because I'd like to follow up on comments made by Ms. Rozell and Ms. Caffrey on a couple of particular topics. Typically in my practice what I see are notices that contain somewhere between 30 and 100 matters for examination. Sometimes there are that many document requests and sometimes there is one document request that says all documents relative to all of our matters for examination. In the last couple of months I received a deposition notice with 177 matters for examination and 175 document requests.

JUDGE BATES: What did you do in that case?

MR. ZIC: That case --

JUDGE BATES: Did you just go forward with the deposition?

MR. ZIC: That case we are still in the meet and confer process, Your Honor. But I do want to tell you about a case where we did kind of come to conclusion through a motion.

JUDGE BATES: And in the meet and confer process are you narrowing down the topics?

MR. ZIC: We are asking them to talk to us about it but the case was recently removed off of an expedited docket so it's been backburnered, but I

mention that because of the number of topics. So, in a case in federal court in Baltimore last year we were served late in the game, which is usually the case, late in the discovery process with over 50 matters for examination, many of which asked for decades of information, hundreds of product that the plaintiff did not come into contact with and some matters that we considered to be either attorney-client privileged, work product, or asked for confidential company information.

We dutifully sat down, wrote a very detailed meet and confer letter, had long conversations with the opposing side. It moved a little bit in terms of scope, but that was it. We had to go to motion, it was an all-day hearing. We were very successful in the order that we got, and then the case was remanded back to state court and counsel turned around and served the same notice that they did the first time all over again.

So I just want to add -- so that my little comment about how this works with identifying the witness, meeting and conferring about the identity of the witness, had that been part of that mix it would have made it that much more complicated, and quite

frankly, we can't even have a discussion with our client about who we are going to identify until all of those issues are resolved.

JUDGE JORDAN: Yeah, we've heard about the practicality problems on that. If -- speak to the issue of simply identifying the witness a couple of days in advance. No meet and confer, but your some relatively short period in advance of the deposition when you've had all the opportunity to do the things you need to do with your client, you pick the person, identifying the witness.

MR. ZIC: That has happened in my practice on rare occasion. It's been asked on rare occasion and some jurisdictions where we are obligated to do it of course we've done it. That's rare. I only know of one state where that's the case.

PROF. MARCUS: Which jurisdictions are those?

MR. ZIC: Sorry?

PROF. MARCUS: In which jurisdictions are you obligated to do that?

MR. ZIC: I think that was in Pennsylvania state court, but I'm not sure. And --

JUDGE ROSENBERG: Sounds like you said --

oh, I'm sorry.

MR. ZIC: I'm sorry?

JUDGE ROSENBERG: Well it sounds like you said just not on the identity issue but on the scope that you said it moved the needle a little so it sounds like the meet and confer in this recent example and then the one that you said was still in the process because it's been taken off the expedited that you are meeting and conferring about the scope of the deposition. And in this last instance you said when something didn't go right there was a motion filed. Who filed the motion and what kind of motion was it?

MR. ZIC: It was a motion that we filed. It was a motion for protective order.

JUDGE ROSENBERG: But it arose out of the meet and confer?

MR. ZIC: No, I think meet and confer on scope, on matters and on breadth is something that we regularly engage in. It's just that we very frequently run into loggerheads and, you know, every now and then we can, in terms of scope, reach an agreement I'm going to put a witness up on this, that and the other.

I do want to address, I've got half a minute

left --

JUDGE BATES: What's the harm, going back to Judge Jordan's question, what's the harm from identifying the witness a few days in advance? What harm do you see from that?

MR. ZIC: I don't think -- I've only been asked to do it a couple of times. The harm would be if in the experiences that I've heard of anecdotally would be if a witness has to be switched and then you are essentially being told by the other side that you have done a bait and switch or something like that. In the situations where we have done it, it hasn't been an issue.

JUDGE BATES: All right.

MR. ZIC: And I'm out of time. I was going to make another comment, but I'll let it go.

JUDGE BATES: Tell me what the comment is in case there are any questions. Don't tell me in too many words.

MR. ZIC: Sure. The issue of witnesses being unprepared, our witnesses, my witnesses have prepared themselves based on how they, and we, read the matters for examination. How I've seen it work out in practice in a deposition is it's a very broad

scope of a matter and then there is a very specific question that we couldn't have anticipated being asked based on the language in that and then they are saying to the witness well you didn't do that, you didn't do this, you didn't do that, you didn't look at this document, you didn't talk to this person but those kind of specifics are not in the scope of the matter. Otherwise, in my experience, witnesses are certainly very diligent about how they go about reading through notices, working with counsel in trying to do their adequate investigation. Thank you.

JUDGE BATES: Thank you very much, Mr. Zic.

Our next witness is Jill Jacobson.

MS. JACOBSON: Good morning and thank you all for having me. My name is Jill Jacobson. I'm the Vice President and General Counsel for Husqvarna. Husqvarna is a global manufacturer of outdoor power equipment, so we make chain saws and lawnmowers and trimmers and other things that you might use in your yard in addition to various construction equipment. I've got a perspective that none of the other witnesses, at least this morning have, and that is the perspective of the corporation and I want to address two matters today. First is the meet and confer

requirement regarding the identity of the corporate representative and then the second is the lack of requirement of limitation, presumptive limitation, on the number of topics to be discussed.

So the first one on the matter of the identity of the witness, I see a meet and confer requirement superfluous, or not meet and confer, the requirement that you identify the witness is superfluous because the witness is already identified. The witness is the corporation. That's the whole purpose of Rule 30(b)(6) is to depose the corporation as a witness. And so it doesn't matter if it's John Doe or Jane Smith or Charlie Brown who is testifying because it's the corporation --

JUDGE JORDAN: Wouldn't it matter --

MS. JACOBSON: Because it's the corporation that's testifying --

JUDGE JORDAN: Wouldn't it matter, Ms. Jacobson, if Charlie Brown had testified a couple times before on the same matter?

MS. JACOBSON: No, because Charlie Brown is the corporation and the corporation has testified before, absolutely, and so Charlie Brown can be cross-examined with John Doe's testimony and with Jane

Smith's testimony because they are all testifying on behalf -- for the corporation. They are the corporation.

JUDGE JORDAN: Should the plaintiff not have the opportunity to know if the representative put forth by Husqvarna has gone on record before so they can be prepared to test that witness's knowledge?

MS. JACOBSON: The problem with the whole premise, Your Honor, is that it conflates Rule 30(b)(1) with Rule 30(b)(6).

JUDGE JORDAN: How so?

MS. JACOBSON: The plaintiff's counsel, the opposing counsel, can prepare equally as well by reading the deposition testimony of the corporation previously as they could if they were reading the deposition testimony of Charlie Brown previously. It just doesn't matter. It's completely irrelevant. And by injecting an identity requirement, you then bring in the notion that it matters who the individual is, who is testifying. You bring that notion in and then that creates just the temptation if not the actual fact of --

JUDGE BATES: I understand that on sort of an abstract level.

MS. JACOBSON: -- of individual --

JUDGE BATES: I understand that on an abstract level, but I don't understand it on a practical taking the deposition level. If you know that this individual, Ms. Jones, has actually testified for the corporation three previous times on these subjects you would frame your questions differently than if you knew that Mr. Smith actually had testified two previously times for the corporation. Yes, you're right, it's all the corporation but taking the deposition would be much more efficient and different if it were the same witness who had been the corporation on prior occasions.

MS. JACOBSON: Why?

JUDGE BATES: Why shouldn't plaintiff's counsel or the noticing counsel know that?

MS. JACOBSON: But why? Why would it be different? If it's always the corporation. If the corporation is always the witness and whoever is testifying on behalf of the corporation going to be cross-examined with every single statement that's ever been made by anybody previously, why does it make a difference?

JUDGE JORDAN: Don't you think it would matter to be able to say to the witness on this date this is the answer you gave to the question I've just asked, they appear to be in consistent, as opposed to saying on this date somebody else said this which would allow a witness to say well I don't know what they were thinking. There is a material difference between having a witness confronted with their own words than having a witness confronted with somebody else's words, is there not?

MS. JACOBSON: Not when that witness is the corporation, no. When it's the corporation, it's the corporation and I, as an attorney or my outside counsel, will have to prepare, whoever is getting ready to testify, will have to prepare that witness with all the other depositions that have been given by the corporation.

JUDGE BATES: Give us the other side of it -- excuse me. Just give us the other side of it. You're telling us there's no advantage. What's the disadvantage to identifying the witness a few days in advance of the deposition. What's the harm from it?

MS. JACOBSON: The harm in that is exactly what we're seeing played out here today is that it

injects the notion of an individual person, the notion that it is important who the individual is --

JUDGE BATES: But so many --

MS. JACOBSON: -- in terms of the corporation.

JUDGE BATES: So many counsel stand up in front of us and say that's what we do, that's our practice. It's good practice to tell the other side who the witness is going to be. So, what is it injecting?

MS. JACOBSON: Sure, but it injects a formal, it injects the authority of the rule into the notion that this is a corporation who is testifying, not an individual person. So, it by adding the notion of an individual into the fact that it is actually the corporation who is testifying you're putting an official stamp of approval on this idea that it's the individual person --

JUDGE JORDAN: The mere --

MS. JACOBSON: -- what the individual has said isn't that important.

JUDGE JORDAN: There mere identification of the name, you believe, makes it, turns it somehow into an individual deposition?

MS. JACOBSON: Not the fact of identifying. The fact that the requirement to identify an individual is in the rule turns it, conflates it, with 30(b)(1). Again, it gives it sort of an official stamp of approval that's not there now.

JUDGE BATES: Professor Marcus did you have a question?

PROF. MARCUS: Well, I think -- brief follow up. Some people tell us that on occasion companies designate more than one individual with -- different individuals addressing different topics. Am I right to understand that you still think there is no value to, no legitimate value for the other side to know which topics witness number one is going to be addressing?

MS. JACOBSON: I'm not -- yes. There's no value. And again, I'm not -- it's because the witness is the corporation. And to, again, to inject a requirement that deals with an individual into the rule opens the -- it sort of, you know, allows or just creates the impression that the individual matters.

JUDGE ROSENBERG: What if there was language in the committee note that made that point? That the rule acknowledges that the witness is the corporation

but the meet and conferral regarding the identity is really in furtherance of avoiding problems at the deposition, allowing parties to fully prepare, making things go smoothly. I mean, in a nutshell, that really is what meet and confer is about.

MS. JACOBSON: Because you don't need the identity, the identification of a witness in order to properly prepare, in order to be efficient, in order for things to go smoothly you don't need the identification of an individual.

JUDGE ROSENBERG: But --

MS. JACOBSON: The witness has already been identified, it's the corporation.

JUDGE BATES: Anything else from Ms. Jacobson? Thank you very much, Ms. Jacobson. We appreciate it.

MS. JACOBSON: Thank you all.

JUDGE BATES: Before we take a break, one last witness and that will be Sterling Kidd.

MR. KIDD: Good morning. My name is Sterling Kidd. I'm a shareholder with Baker Donelson in Jackson, Mississippi. Baker Donelson's got about 750 attorneys who I uphold before coming here. I've also spoken with many of my in-house clients about

this proposed rule change and I come to speak in opposition to the meet and conferral requirement, as to the identity of the witness and also to speak in opposition to the proposed compromise of simply identifying the witness a certain number of days in advance.

Before I get too far into this, though, I want to stress that -- in my practice I represent plaintiffs and defendants and so I notice 30(b)(6) depositions and I also defend 30(b)(6) depositions so I've seen this from both sides of the coin.

In terms of conferring about the identity of the witness I want to start with Rule 1, which says that the rules are designed to be just. And with due respect to this August committee you guys work very hard and I recognize that, but I would submit that requiring a corporation to confer with the other side about who is going to speak for them is not just. In fact, it's fundamentally at odds with our American justice system which says I get to choose who speaks for me, I get to choose my lawyer, I get to choose who speaks for me in court and this rule is in conflict with that.

And I want to jump -- I'm glad one of the

panelists, or one of the Committee members, I'm sorry, asked about can the comment, and the idea that the comment cures this. I would submit that in practice, practitioners ignore the comments and whether that's right or wrong, and frankly maybe I was a bad law clerk and maybe my judge should have fired me, but as a law clerk if an advocate the best argument they could give was from a comment rather than from a case I would disregard it. I mean, when an associate gave me a cite to a comment I'd say go find a case that says this. The comment is not primary authority, similar to what Mr. Behrens said --

JUDGE BATES: You're destroying all of our egos.

(Laughter.)

MR. KIDD: Yes, and I apologize but I mean similar to what Mr. Behrens said when we started off this morning, there is an inherent conflict there and I don't think putting in the comment cures it. I think it just needs to just be taken out.

And now, but I want to get to what the committee's questions this morning seemed to be focused on, which is rather than conferring about who could speak for the corporation telling the person on

the other side who is going to speak for the corporation in advance. That has a number of problems. And I think the first problem is it still implies that the other side gets a say. Why else would you tell them unless they get a say? And then, two, more -- go ahead I'm sorry, Judge.

JUDGE JORDAN: Well, I'm just having a hard time with the logic of that. It doesn't imply they have a say at all, it just tells them who you are going to be bringing forth. If there's no meet and confer requirement, it's just the disclosure requirement so that what is the problem with the disclosure as you've heard Judge Bates ask?

JUDGE BATES: It seems to me it's the opposite --

JUDGE JORDAN: What's the harm?

JUDGE BATES: It's the opposite of having a say because it's already decided who the witness will be.

MR. KIDD: Well, so to respond to the specific questions first then I'll follow up Judge Jordan because I've got some other points I want to make other than this one, but to the point that I just made, Judge, the -- I think it implies they have a say

because if they don't like it they can say I don't like that witness and go run to the judge and say judge, they're putting the wrong person up, please help me, please give me some relief prior to the deposition. That's why I think it implies they still have a say.

But in terms of other concerns, Judge, first of all I represent -- I'm a practitioner in Mississippi which means I get to occasionally represent companies that are either small and/or are large but infrequent litigators which means they don't have a 30(b)(6) sort of army ready to testify, they don't have people that normally testify and so it's a very difficult decision as to who will be designated.

And sometimes that's not -- it takes a long time in the process. I have had situations, particularly with small companies, who don't have time and resources to dedicate to these depositions like larger companies might. When we're sitting in a conference room beginning at 8:00 until -- 8 a.m. or earlier and all day and we're hashing out is Jim or Bob going to be the designee on this topic and we don't know until 5:00. And that's just the reality that some companies cannot stop everything they're

doing because of a litigated matter.

Along the same lines, even if you are a small company even if we get something worked out in advance --

JUDGE JORDAN: Can I --

MR. KIDD: Go ahead, Judge.

JUDGE JORDAN: -- just ask you a practical question. Is that the exception or the rule? In other words, imagine a rule that said witness identification two days in advance. Do you think it would be common to be in a circumstance where two days before we just don't know or would it be the exception?

MR. KIDD: Well, to be fair, Your Honor, I think it would be the exception, but I think the rules have to apply, be written, to work for all cases to the extent possible. And in addition to that, you know, in Mississippi, for instance, and I think there are other local rules that are similar to this in the Southern District of Mississippi it's not enough to, you know, if you had to change the designee for some reason, it's not enough to just tell them and move on. I mean, you have to -- if there is any kind of sort of problem with the deposition from the responding party

you have to have a court order in your hand protecting you or you are subject to sanctions.

That's what the local rules in the Southern District of Mississippi and Northern District of Mississippi say. And then I know I'm out of time so just briefly I will say the biggest concern that came up with my colleagues is the research, the issue of research and turning it into an individual deposition and on that point I would really just adopt the comments made by Husqvarna which I think explain the issue very well.

JUDGE BATES: Thank you very much, Mr. Kidd. At this point we're going to take a brief break. It will be brief. 10 minutes. It's 10:30 by my watch, so we will resume at 10:40.

(A break was had, after which the proceedings resumed.)

JUDGE BATES: We will begin again. I have an announcement, if you will, caution. We do have people who are participating on the telephone, members of the Committee and they are having a hard time hearing everything, so two things: Number one, the witnesses please do not turn the microphone off, leave the microphone alone. A green light on the microphone

stand means it's on, please don't touch it. And for those asking questions please move the microphones close to you asking the question making sure the microphone is on and that will help our telephonic participants hear everything.

With that, we're ready to continue and our next will be Andrew Cooke.

MR. COOKE: Good morning.

JUDGE BATES: Good morning.

MR. COOKE: My name is Andy Cooke. I'm a partner at Flaherty Sensabaugh Bonasso in a firm of 60 trial attorneys practicing in the state and federal courts in West Virginia. We represent individuals, small businesses, large corporations typically defending suit, but sometimes as plaintiffs. I estimate I have prepared for and taken or defended approximately 75 30(b)(6) depositions over about a 25-year career. I appreciate the opportunity to share my perspective here today and I thank the advisory committee for requesting input from practitioners and the public at large.

The proposed amendment is a missed opportunity, in my opinion, to improve a useful rule. The rule, unfortunately, lacks structure and I'd like

to give you a real world and practical example in a minor case to illustrate what is involved in responding to a typical 30(b)(6) notice. Coincidently when the committee announced it was evaluating Rule 30(b)(6) I was in the midst of responding to two 30(b)(6) notices, each containing greater than 60 topic areas with corresponding document production requests. Receiving a notice of 50-plus topics is typical in my practice. In fact, it is rare that I receive a brief focused 30(b)(6) notice of say 10, 15 topics.

PROF. MARCUS: Can I ask you just a clarification question because notice time has come up. Am I right to guess that if a Rule 34 request accompanies the 30(b)(6) notice then the 30-day time frame from Rule 34 would apply at least to that part?

MR. COOKE: That has been my practice and that is my interpretation. And that has been how that worked in this particular case. So the case -- my clients were a large retailer and a small manufacturer was indebted to that retailer. Again, I say it's a minor case because there was some question about whether the damages in the case actually met a controversy.

So here's what happened after the notice was received. I arranged and participated in multiple lengthy telephone conversations with each client about responding to the topics. There were numerous follow-up calls about who the possible witnesses should be and what documents and what research was necessary. For each company it was really impossible to identify one person who could respond to all of the notices. At least within their job description, so they would have had to have research to prepare appropriately and talk to other people. This was a contaminated, alleged contaminated, product issue, but there were distribution and supply chain issues and those sorts of things for two different types of companies, so it was hard to have one person.

During about what turned out to be about a 60-day process, I made two trips outside of West Virginia, traveled to two different cities to determine whether I had the write witnesses and whether we could educate the witnesses we wanted to identify to be able to address the topics. I also met and conferred informally with Plaintiff's counsel and in that setting we were able to make progress on logistic issues, on timing, where the deposition would

occur. They were actually noticed for West Virginia not for where my clients were located.

And so we were unable to -- we met and conferred about the number of topics and scope but we were unable to reach agreement, so I was faced with what do I do, do I move for a protective order? Do we try to just serve objections? The district courts in West Virginia give different guidance on whether it would be premature to file a protective order before the deposition and then there are sanctions orders where a responding party attempting to rely only on objections. We elected because 75 percent of the notice were relevant topics, we elected to serve objections which I prepared and the deposition went forward. Both depositions lasted less than three hours and the topics that were covered were really about between 10 and 20 topics, so my clients had spent all of this money and all of the time, thousands of dollars and days of time preparing, overpreparing, when this notice could have just been focused. And so my concern about the proposed amendment is it doesn't even -- the lack of structure prevents any real, meaningful solution to --

JUDGE BATES: What are you suggesting should

be in the rule to address the problem that you've just described in that particular case?

MR. COOKE: In my comments --

JUDGE BATES: Because it seems like the meet and confer does part way address that.

MR. COOKE: Meet and confer is appropriate but from a practical standpoint it rarely is successful on scope and number of topics. That has been my experience.

JUDGE BATES: So what are you suggesting?

MR. COOKE: Presumptive limits, number one. And an objection procedure.

JUDGE BATES: We've heard from people at a range of cases, we have mass tort cases, big pharmaceutical cases, all the way down to smaller cases that you've just described, or even smaller than that. How -- what's a presumptive limit for all those cases? 10?

MR. COOKE: In my comment I suggest 10. And I think that would be appropriate. And the reason why I say that --

JUDGE BATES: But it's not going to fit for a large category of the cases.

MR. COOKE: Well, I would -- in my comment I

say presumptive limits without leave of court. And so certainly in a large case through the Rule 16 process that's a topic that could be addressed and could be either agreed upon or the court could be requested -- that's easy. That's how the presumptive limits work with Rule -- you know, with interrogatories, and it works well. And me, when I propound interrogatories now since that amendment, I don't waste interrogatories. I'm careful about how many I make and how carefully I draft them.

JUDGE BATES: But the problem with that is that usually gets taken care of in a conference with the court that is a scheduled conference with the court right at the outset of the case in terms of the number of interrogatories. The judge can raise it. The parties can raise it. It gets resolved. But 30(b)(6), there isn't a conference attached to the 30(b)(6).

MR. COOKE: There can be. I mean, there's no reason why that can't be an appropriate topic for a Rule 16 conference.

JUDGE BATES: We hear that it would be too early.

MR. COOKE: I --

JUDGE BATES: You can't really address 30(b)(6) at the early scheduling conferences.

MR. COOKE: I don't believe that's true, in my experience.

JUDGE JORDAN: How is that -- explain to us how that would work because we have been hearing, as Judge Bates just noted, that it's often the case, not always, but often the case that these are depositions that come late in the case after other things have been developed and there isn't some already preexisting conference with the court. How would requiring this up front at the Rule 16 conference work in practicality.

MR. COOKE: I think it would be a list of one of the topics. I haven't suggested it be required, it could be on the list of one of the topics that could be used. But I think in product litigation, particularly in my case, the plaintiff knew when they drafted the complaint what they needed to prove and so they knew what questions they would want to ask to get the corporation's evidence on those issues. And so that could be an iterative process as well, but it's a bigger problem when you receive a 30(b)(6) at the end of discovery and that creates much

more problem than having one that is easily served within the early part of litigation.

MR. SELLERS: Mr. Cooke?

MR. COOKE: Yes, sir.

MR. SELLERS: A question about the presumptive number of topics that you are recommending. Wouldn't that create an incentive for the designating party to have broad topics rather than the defined narrow topics that will give you more guidance?

MR. COOKE: I don't believe that has been the experience with the presumptive when its interrogatories. I believe that practitioners respond to the guidance from the committee, from the rule, and they are more careful when drafting and I believe they don't waste interrogatories. And I tell my young associates don't waste an interrogatory. So we may not serve the full allotment in the first set.

JUDGE BATES: All right. Any other question for Mr. Cooke?

(No response.)

MR. COOKE: Thank you.

JUDGE BATES: Thank you very much, Mr. Cooke.

Our next witness is Jessica Kennedy.

MS. KENNEDY: Good morning.

JUDGE BATES: Good morning.

MS. KENNEDY: My name is Jessica Kennedy and I'm a partner in McDonald Toole Wiggins in Orlando, Florida. I first want to thank the Committee for allowing us to be here and for all of their hard work.

I get the honor of representing companies both in Florida and nationwide in a number of different contexts, including pattern litigation. And there is two areas that I would like to cover today. The first of those is my concerns with the proposed rule to meet and confer as to the identity of the witness and also the benefit and need of a presumptive limit on the number of deposition topics.

We've heard a number of concerns that may come up with meeting and conferring as to the identity of the witness but the one thing that I don't think has been fully vetted is what that meet and confer process would look like.

If I identified Jane Smith as my witness, what logical conferring would come next? Why Jane? Why not Tom who has been deposed in another case. What experience has Jane had? How many depositions

has she already provided? Who were the other potential witnesses? What logical flowing questions would come from a meet and confer process that would not invade on my attorney work product, my confidential client communications and would be tangential to the topics at issue and would relate to the witness personally.

My second point that I would like to discuss this morning is the need for a presumptive limit and I'm glad there was a number of questions on this. At its core, when coupled with the already present rule of serving a notice with reasonable particularity it would, I believe, seek to accomplish the goal that this committee is trying to do, and that's to streamline the 30(b)(6) process to make sure the witness is adequately prepared and to avoid motion practice.

JUDGE JORDAN: Could you --

MS. KENNEDY: It's all --

JUDGE JORDAN: Could you please respond to the question that was asked of the previous witness which is why doesn't that just give an incentive rather than giving targeted and specific topic designations to give very broad ones?

MS. KENNEDY: Thank you. I don't think that that's been the case as it was previously mentioned both in interrogatories and in fact does the opposite. If you issue a time limit on something it teaches you to narrow and be focused on the discovery in which you need.

JUDGE JORDAN: Isn't an interrogatory, though, fundamentally different because you're going to get the written answer you are going to get and if you want something more you're going to have to confer and fight about it. Whereas, with the topic designated in a 30(b)(6) deposition notice that's just the platform from which the questions launch.

MS. KENNEDY: Understood. So, in my practice I have found that I'm better able and equipped to prepare my witnesses when I have fewer topics and I think that also relates to the breadth of them. So if I -- and I do often meet and confer as to the notion of the notice from the beginning, so if I get a notice that has 10 very broad topics I want to meet and confer with opposing counsel and ask them what it is that they are truly looking for. If I get a notice with 263 topics, and I brought some copies for the committee today, of some of the examples of

these notices. It's such a burdensome process to go through each of those and to really ask, you know, what is it that you're really after? You've served me 263 topics, what do you actually need for this case?

JUDGE BATES: What do you think the presumptive limit should be?

MS. KENNEDY: I believe that it should be 10 with a showing of good faith, or a showing of good cause they could ask for more.

JUDGE BATES: It just seems to me from my experience that a presumptive limit of 10 would lead to an attempt to change that limit in virtually every case and what's been described with 30(b)(6) depositions occurring anywhere during the process of the pretrial proceedings is the necessity to go to a judge to change that presumptive limit in virtually every case.

MS. KENNEDY: Your Honor, we don't see that practice occurring in interrogatories and I don't think that it's my practice --

JUDGE BATES: I understand it's not true in interrogatories, but it seems to me that from what you're describing with respect to the notices and the kinds of cases that we know we deal with it is

inevitably going to be true that in most cases there's going to be an attempt to get more than 10 topics.

MS. KENNEDY: We try in my practice to try to reach an agreement as to the number of topics at the Rule 16 conference and I think that by the time you get there both parties, the plaintiff or opposing counsel, whoever has filed the action should know the basis of their cause of action. They should know what they need to prove. And if they don't know what they need to prove then we should question why they filed.

JUDGE BATES: Are you successful in doing that at the Rule 16 conference?

MS. KENNEDY: Sometimes, Your Honor. Sometimes we are able to reach an agreement. Candidly it's not often 10, but it is something that is more manageable that we feel like we can reach an agreement on.

JUDGE BATES: You still would have the opportunity to do that, even without a presumptive limit.

MS. KENNEDY: Yes, Your Honor, but I would say that it at least encourages the parties to have this conversation early.

You know I noticed upon reading the

transcript from Phoenix that there was some conversations about the lack of really verbose notices -- I'm noticing I'm just now out of time -- very verbose and voluminous notices and so I thought that I would bring a couple copies today and I'll leave these for the panel should they be interested, but I just want to highlight the number of topics on the first five, and there is about two or three dozen in here, 205 topics, 152 topics, 117 topics with subparts, 68 topics and my favorite was a witness to be designated to talk about 263 allegations contained within the complaint in addition to any actions that current, former, employees of a subsidiary or agents may have done in any way related to those 263 allegations.

JUDGE BATES: Is there any reason you couldn't deal with that through a protective order?

MS. KENNEDY: Yes, Your Honor, you could. But why -- if the point of why we are here today is to reduce motion practice wouldn't that seek to reduce motion practice?

JUDGE JORDAN: I wonder if it just doesn't increase practice by doing exactly what Judge Bates said which is instead of having protective orders come up occasionally, having frequent requests for

conferences with the court to address the need for more topics.

MS. KENNEDY: I think many of those conversations should they arise would come after a 30(b)(6) deposition. They serve their 10 topics, they take their deposition and they say listen there is more information that I think they need -- that I think I need, but I don't think we should be having any conversations about increasing the number of topics from a presumptive limit until that presumptive limit deposition has occurred. By that time, both parties should really have a good understanding of what this case is about.

PROF. MARCUS: So you're asking us to adopt a rule that says there can be no expansion of the number of topics until after there has been sort of a first try 30(b)(6) deposition?

MS. KENNEDY: I would say that would be in the best practice, yes. I mean --

JUDGE BATES: It wouldn't be the most efficient because you would have two depositions of the same witness, potentially.

MS. KENNEDY: It depends on who the company decides and what the topics are. So if you have the

first set of deposition topics on a particular product and how the product was designed, engineered or manufactured and then at some point you realize, you know what, I need to narrow in on this particular issue or this new issue has seemed to come to light. Again, I do go back to I think before we file lawsuits we should have a good understanding about what the lawsuit is about.

PROF. MARCUS: You'll get agreement from everyone on that.

JUDGE BATES: Mr. Sellers, did you have a question?

MR. SELLERS: No. It's been asked.

JUDGE BATES: Ms. Kennedy -- well, okay. Go ahead.

MS. WITT: Just very quickly, in general at what stage of the cases were the notices that you've brought? Were they in the middle or were they all near the end of discovery?

MS. KENNEDY: So some of them that I was personally familiar with and personally worked on they were toward the end of discovery. Some of these I have located by doing a search on Lexis for 30(b)(6) and voluminous notice and I encourage everyone to do

that search because one thing that is notable is that you'll see a spike in the case law in the last ten years. And I think that shows that there is something that we should consider revisiting on the number of voluminous -- or the issue of voluminous notice.

JUDGE BATES: Do you know -- last question. Do you know how many of those notices of over 200 topics were in either class actions of MDL proceedings?

MS. KENNEDY: Many of them, I mean you can see on the face of the style -- and I've done some research upon finding them which takes some effort, you have to find the motion for protective order and then try to find the notice on PACER, but most of them are coming from regular just products cases, there are very few, I don't actually recall any that came out of an MDL.

JUDGE BATES: All right. Thank you, Ms. Kennedy.

MS. KENNEDY: Thank you.

JUDGE BATES: Next witness is Keith Altman.

MR. ALTMAN: Hi, my name is Keith Altman. I'd like to thank the committee for having me here today. I am from Southfield, Michigan. I'm with the

firm Excolo Law and 1-800-LAW-FIRM. I'm also president for the Don Quixote Club Litigation Society because most of the litigations I engage in are these difficult complex cases. For example you may have heard of the case against Google, Facebook and Twitter for providing material support to ISIS, any of the various terrorist attacks, those are my cases. I do complex 1983 Actions. Most of these -- and I also do pharmaceutical cases where technical information is very critical.

JUDGE BATES: Well, I hope you don't view this Committee to be the windmill that you're tilting.

MR. ALTMAN: Nope, just tough cases.

In any event, I think the meet and confer requirement is extremely important, just as a general proposition. I would like to tell you a little story about why. I was an astrophysics major in school. I really took up space as opposed to others. My solid-state physics professor got married during the semester and he told us about this incredible problem he was having which was that he wanted to have a really big wedding and his fiancé wanted to have a really small wedding, which is the opposite of what you would expect. The problem is that the biggest

wedding he could think of was 50 people and the smallest wedding she could think of was 150 people. So what you have here is that people's perceptions and where they are coming from they are often missing each other. And when a party says I know what they want, a lot of times they don't really know what they want they are thinking, they are assuming that they understand what they want. And that's why I think the meet and confer processes are very hard.

Because let's come back to what is a 30(b)(6) deposition really for, which nobody has discussed here. It's really very much a tool to help narrow the issues and to focus other discovery requests because as a requesting party, we're shooting in the dark. I mean, I know the basics for my case, I've done pharmaceutical cases, I know kind of how a pharmaceutical company works, but I don't know how this company works. So 30(b)(6) is the device for me to try to narrow the issues so I can find the right people so I can understand how they keep their databases, et cetera.

And so it is a very important device for that purpose and so when I'm sitting there drafting demands, I'm doing the best that I can and we can all

thank -- the last speaker said there's been an increase over the last ten years of all of this. Well, I think we can thank Turkhall (phonetic) for that. You know we know have a requirement that we now have to draft these incredibly long complex complaints. My terrorism complaints typically are 120 to 150 pages. Why? Because we have to cover all of these issues. Well, that spills into the 30(b)(6) process where now I need to have 30(b)(6) requests that go along so I can support the complaint and all the allegations in the complaint. And so I think that's part of the reason for the increase.

As far as numbers go, this goes along with the mismatch here. I think numbers are not a good idea because I don't think you can really specify a presumptive limit. I think trying to do so is going to come up with the exceptions every single time. It's going to mean as one of the panelists said I'm going to ask for a broader category so I can meet my numbers instead of being focused and --

JUDGE JORDAN: Why would it -- why would it be the case that, assume it wasn't 10 it was some larger threshold. Why isn't anchoring the number of topics at a number 25, 30, 40, whatever a sensible

thing so that negotiations can begin around that and people can have an idea of what might require resort to the court if they can't agree?

MR. ALTMAN: Because I think you have that process in here now. Let's say you pick any arbitrary -- pick any number that you want, you're trying to pick a rule for the masses, you know for everybody. I think you're going to set up situations where it's almost invariable that you are going to need more of a number. There's a big difference between taking interrogatories and the 30(b)(6) deposition. That's interactive. I'm there, I'm talking to a person. And one of the things I want to add is --

JUDGE JORDAN: Well, stick with me. If the complaint that we hear and hear repeatedly from people who have a defense side perspective on this is the system is being abused because there is no limit and the only recourse is go to the court for a protective order which burns credibility with the court and is a high-risk enterprise. What's wrong with taking that seriously and saying well maybe some presumptive limit will ameliorate that problem and not create a significant problem on the plaintiff's side. Help us think through that.

MR. ALTMAN: For the same reason that 50 versus 150. I could take 25 topics and make a nightmare for the other side. I might take 25 topics and I only need five, I might make a nightmare for the other side. The point is, the meet and confer can take care of that. It's the way it's always worked. We can sit down and talk to each other and be reasonable and say well this person doesn't exist -- like for example, maybe the way that a topic is written I ask for everything from let's say 2000 to 2017. There's an employee who left in 2002. And so now instead of being able to talk to one person I really need to talk to two people, but by talking to me and saying hey, you know, do you really need those previous two years? I can take an assessment and say maybe I don't really need those two years because now it lowers the burden.

JUDGE JORDAN: You're speaking about counsel speaking to each other sensibly and in good faith and coming to an agreement. Part of the challenge here that we are dealing with, the argument being made that without some limits in the rule itself as presumption, we don't have -- we have serious issues with people not being able to agree sensibly the way you're just

describing.

MR. ALTMAN: I don't think the number is going to make the difference. I think it's going to be up to the parties and the willingness on the parties to take meet and confer and cooperation seriously. Putting a number isn't going to change that.

PROF. MARCUS: So if it said 10, that really wouldn't make a difference?

MR. ALTMAN: If it says 10 it now puts a burden on me that every time I think I need 10 when do I deal with it? I just think 10 is not the right number. I think the --

JUDGE BATES: What is the right number?

MR. ALTMAN: The right number is what is appropriate for that particular case. That's the right number. I can't tell you what it is because very case is so different. If you're dealing with a complex pharmaceutical case and a mass tort the number of topics that may be appropriate maybe 100 and if you're dealing with a 1983, you know, Action in a prison where you are suing the prison it might be five.

What I'm saying is there is a presumption

amongst all of us we're supposed to act reasonably. I don't think you can codify or rule to require people to act reasonably. If they are not going to be reasonable whatever rule you're going to put down, for example, if you put down 10 and I'm not going to be reasonable 100 percent of the time I'm going to petition the court for more. I'm just going to do it because I'm not being reasonable because I want more than 10 even if I only need six. On the other side, if 20 is really appropriate in this case and the other side doesn't want to be reasonable they are going to object and say no, they only get 10.

So what I'm saying is I don't know how this panel can force people to sit and talk. You know, you can say that you must sit and talk, but if you don't do it in good faith, if you don't do it reasonably it doesn't matter what the rule is. I think we have to start getting people to have meaningful, to put teeth into the Rule 16 conferences, the Rule 26 conferences to say that you go into these things with good faith. You bring the right people to the table.

Somebody talked about, you know, you want to find out about the databases. Really, if you're going to ask a topic about databases you really need to

bring somebody in that has some technical knowledge about databases. It's not reasonable. Because one of the things that a corporation is not an ephemeral entity. A corporation is made up of people. And when the company picks a person to testify on its behalf, typically they are doing it because this person has been involved in the company. It would be incredibly unusual to take a blank slate, somebody who knows nothing about the business, the company, get them educated on the topics and bring them in. So the reality is is anybody that's testimony almost always has, for lack of a better term, baggage. They have knowledge. They know about this corporation and it's personal. The corporation didn't give it to them.

So this whole naïve thing about identification it's critically important to identify the cause of this very reason. If this person has been deposed multiple times before for this particular topic because the corporation has found them to be the person, it's important that you know that. It's important that you get to ask the appropriate questions and if they are not going to bring the person, they get the choice --

JUDGE BATES: All right. Mr. Altman, we're

going to have to cut you off.

MR. ALTMAN: Okay.

JUDGE BATES: Thank you very much for coming. I appreciate it.

MR. ALTMAN: Thank you for your time.

JUDGE BATES: Our next witness, Alex Dahl.

MR. DAHL: I thank the Committee for taking into account the views of the Lawyers for Civil Justice throughout this process and during my testimony today.

The Committee has made two key observations and asked one very important question. Observation one, 30(b)(6) is the source of recurring complaints over overlong or ambiguously worded lists of matters for examination on the one hand and unprepared witnesses on the other. Observation two, despite the frequency of those complaints from lawyers the courts see relatively few motions on this topic. So the Committee is asking what can we do as rule writers to help lawyers work out these problems under 30(b)(6) without the unintended consequence of bringing more of these cases to courts for resolution.

LCJ has proposed a number of ideas and I reiterate all of them but I would like to focus on one

because I think it is the most obvious tool in the rule writers' toolbox for this problem. Presumptive limits. The question has been asked wouldn't a presumptive limit result in broader topics and I suggest to you that experience is almost universally the opposite. Page limits are used to help lawyers focus on the important issues. Time limits in appellate arguments are instituted for the same reason. And time limits in trials have the same effect of focusing on what's important. When he was President Woodrow Wilson was asked how, he was a famous orator, as you know, was asked how long does it take you to write a speech and he said well, if it's a 10 minute speech it takes me two weeks. If it's a half an hour speech it takes me one week. If I can talk as long as I want it requires no preparation at all, I am ready now. This is the problem with an unlimited number of topics in 30(b)(6) depositions.

Now, let's talk about the toolbox. Presumptive limits are well accepted in other categories under the civil rules. This committee spent a lot of time looking at presumptive limits during the consideration of what became the 2015 discovery amendment. And what it found is that the

existing presumptive limits were appropriate.

JUDGE BATES: If there is a value in presumptive limits, what would you suggest that the presumptive limit in Rule 30(b)(6) should be?

MR. DAHL: We have proposed 10.

JUDGE BATES: Don't you think that would result in numerous conferences with the court to get an exception to the presumptive limit of 10 in broad categories of cases?

MR. DAHL: There may be a better number, Your Honor. The wrong number is unlimited. That is the wrong number for the reason that you are talking about a tool -- what this committee wants to do is help lawyers resolve these issues without coming to the court unnecessarily and a presumptive limit on the number of topics has that affect. It will create the conference that the proposal tries to institute by fiat, just have a conference. A presumptive limit will create exactly what you're trying to do with that mandate by incentivizing the lawyers to --

JUDGE BATES: But if the rule --

MR. DAHL: -- make a resolution.

JUDGE BATES: If the rule requires the conference anyway what do we care whether a

presumptive limit requires the conference --

MR. DAHL: Because the conference --

JUDGE BATES: -- because the conference is going to occur anyway.

MR. DAHL: Because the conference can go like this. You've sent me 160 topics what do you really want out of this deposition? The answer is all of it.

JUDGE JORDAN: And --

MR. DAHL: Where does that go?

JUDGE JORDAN: And what if the case actually warrants 160?

MR. DAHL: That's why it's a presumptive limit.

JUDGE JORDAN: Right.

MR. DAHL: By definition.

JUDGE JORDAN: So the question is what efficiency is gained in the system by asserting a presumptive limit, which it sounds like from what you are saying would necessarily have to be picked arbitrarily because there is no way to know what the right number is except the position of your organization is there has to be some number. How do we pick that number without it being utterly

arbitrary, and since it's utterly arbitrary how do we know we are not creating more inefficiency in the system rather than reducing inefficiency?

MR. DAHL: Unlimited is the wrong number. Ten might be the right number. Twenty-five works for interrogatories. I don't know what the number is, but it's not unlimited. And keep in mind that the purpose that you are looking at that for is because you want to help lawyers resolve the issue and the issue is the broad and poorly defined topics on the one side and the preparation of the witness on the other. That's what the Committee is trying to solve.

JUDGE BATES: From your experience and with the lawyers and corporations that are part of your organization, if a deposition notice that lists over 100 topics is received, how often does that deposition actually occur based on over 100 topics?

MR. DAHL: Anecdotally what I hear is seldom. And that's one of the problems with the notice --

JUDGE BATES: That's because it's worked out through discussions, right?

MR. DAHL: Well not always, no, Your Honor. What happens is that the companies are under a duty to

prepare for 160 topics and sometimes they walk in the deposition is about three topics because the notice isn't used to focus the deposition. The deposition is used as a trial tactic to keep the other side busy, shall I say.

MR. SELLERS: Mr. Dahl?

MR. DAHL: And --

MR. SELLERS: I'm sorry, go ahead.

MR. DAHL: Um --

MR. SELLERS: It seems like you're presenting us a choice on the one hand the party noticing the deposition either has a presumptive limit and if the meet and confer doesn't resolve the differences that party has to apply to the court. On the other hand you have the party producing the witness if there are no presumptive limits you're saying that party is going to have to move for protective order. So, on either end the question is which party bears the burden of going to the court in the event there is no resolution at meet and confer. I'm curious why you think that the burden of going to the court ought to be placed presumptively on the noticing party.

MR. DAHL: My observation -- the Committee's

observation is that lawyers tend to work these issues out under 30(b)(6) and the question for the rule writers is: What is in the rule writer's toolbox to help lawyers have that discussion and make it work?

And the answer is that the most available, tested, proven, accepted answer is presumptive limits. That's what makes lawyers have that conversation and have it meaningful. This Committee has observed people don't come to the courts that frequently to talk about these issues, they work it out. This is a way that helps them work it out. I predict that this will not result in people coming to the court for protective order, but rather avoiding that because it gives the framework.

I know I'm out of time but I want to make just two quick points.

JUDGE BATES: But it wouldn't be a protective order as Mr. Sellers points out. The presumptive limit would put the burden on the noticing party to have to go to court to get an exception to the presumptive limit. Why is that a good idea?

MR. DAHL: Presumptive limits are a tool writer's tool to give lawyers the ability to work that out. That is what the presumptive limit is for --

MS. TADLER: But --

MR. DAHL: -- and that's how it works.

MS. TADLER: But you've already told us that in most cases the issues tend to be worked out so you are really talking about a rule for those people who are in essence bad actors, or are unreasonable, they are unable, or incapable, or unwilling to work it out. Why should we make a rule exclusively for bad actors as opposed to the fact that what I understand from you is that most instances do work it out because they understand their responsibilities?

MR. DAHL: Presumptive limits are not a penalty, they are a tool for getting lawyers to -- help lawyers work out the essence of the 30(b)(6) deposition, the essence of the problem that lawyers complain about, inadequate notice of what the deposition is about, inadequate prepared witnesses, narrowing, just like a page limit, narrowing the focus of that deposition is what makes that conversation happen and make it meaningful. That's why to do it.

A quick point just because I brought up the --

JUDGE BATES: It's got to be very quick.

MR. DAHL: It will be.

Committee's history. The reasons why the Committee did not proceed with presumptive limits in the 2015 amendments after proposing them is three things:

Written discovery is more cost efficient and effective than other kinds of discovery like depositions. That's why they decided not to add new presumptive limits on written discovery.

Secondly, other changes in the rules proportionality and early case management were thought to take care of the presumptive limit issue on written discovery. This Committee does not seem very interested early case management as a solution to 30(b)(6).

And proportionality has had no meaningful effect on this rule yet. One hundred and sixty topic deposition, an hour per topic, is one month of time. There's no proportionality in them.

Thank you very much for considering.

MR. BATES: Thank you, Mr. Dahl. And thank the Lawyers for Civil Justice for their comments as well. Our next witness is Michael Slack.

MR. SLACK: Good morning. I'm Mike Slack. I'm from Austin, Texas. My firm Slack Davis Sanger

does aviation work for plaintiffs all over the country and occasionally internationally.

I'll just state I like the current rule. I notice that none of my colleagues on the defense bar in the aviation practice are here. I think the rule has worked well for us and I cannot overstate the importance of collegiality --

PROF. MARCUS: Excuse me. Do you --

MR. SLACK: -- and communications.

PROF. MARCUS: Do you often have far more than 20 topics --

MR. SLACK: Sometimes.

PROF. MARCUS: -- in a 30(b)(6)?

MR. SLACK: Yes, sometimes. But let me tell you, I always start out with a letter to opposing counsel. And if they don't get that letter at some point after written discovery has transpired they'll call me, Slack, where's your letter? Where's your 30(b)(6)? And I send that letter and almost 100 percent of the time, depends on which lawyer inherits it at the firm, but I know who to go to to move things along, we have a conversation. I would prefer to depose one witness on two topics than two witnesses on one topic.

Now, think about that, back to presumptive limit discussion. You do get into problems when you have multiple witnesses occupying the same topic space and then you have the practical problem in the deposition of where does that boundary exist? So I want to refine my subject matter so that my opposing counsel and -- and I think there's a beneficial effect for opposing counsel to have this conversation -- so that we go into that deposition with a clear understanding of what it is we're trying to accomplish.

JUDGE JORDAN: So meet and confer is good. We understand. But could you help us understand the plaintiff's side of this with regard to presumptive limits which the last few witnesses have been talked to. Why isn't it indeed helpful to have a number even if it has to be picked arbitrarily to be sort of a center of gravity around which people can start to have a discussion so that it isn't an unbounded universe where somebody who wants to can just dump 160 topics on somebody in a case and make that the anchor point?

MR. SLACK: Yeah, well to start with I think these examples of 100 plus topics those are about as

real as snowballs in Dallas in July, okay?

JUDGE JORDAN: Well, there's some snowballs right next to you.

(Laughter.)

MR. SLACK: I understand, but by the time you get to the deposition -- by the time you get to the deposition I just have not seen that in nature, Your Honor. I just have not seen that happen, okay?

Now, does a presumptive limits start a conversation about narrowing? I guess you could make that statement. I'm not going to disagree with that but finding that number is difficult because if we went beyond five minutes and you abstracted from me, either over a cocktail or just standing around chatting a number, it would probably be good for merits on an aviation case generically within my experience.

Now, I leave here and one of my colleagues back there that does pharmaceutical cases calls me and gives me a nastygram, well what do you mean 25 or 30, okay, because that's my experience and I'm dealing with a relatively small bar in the aviation realm. And so you are getting an answer that contextually is in my practice area.

So, that's my difficulty when we say plaintiff's bar, there are a lot of practice areas that I can feel them in the back of the room now going where is Slack going with this, but I don't want to be the person that establishes a number that may work for me in 99 percent of my cases before I have to say can we excuse that number on this case. But it creates problems back there. So, it is a real problem. And the point that was made about overly broad topic areas is the immediate instinct that lawyers will resort to to solve the problem.

JUDGE ROSENBERG: Can I ask a question? You said you send this letter out, this well-known letter. Do you do that before you send your notice out?

MR. SLACK: Yes.

JUDGE ROSENBERG: Okay. So you letter, meet --

MR. SLACK: Letter.

JUDGE ROSENBERG: -- and confer and then notice?

MR. SLACK: Yes.

JUDGE ROSENBERG: Do you find the notice then becomes more tailored and limited?

MR. SLACK: It does.

JUDGE ROSENBERG: So do you think a meet and conferral before, is there something magical about a meet and conferral before the notice goes out?

MR. SLACK: Well, we just do that routinely. One reason we do is so we identify witnesses that we may also be deposing individually, non-30(b)(6) and have that conversation, too, like I also want to depose that guy individually, or that lady, and do we do them then or do we do them another time?

And particularly on international deposition, getting this sorted out if I'm going to France to take deposition getting this sorted out on the front end is a big deal. You don't want to have a train wreck over there after expending all that time and energy and having 15 lawyers in the room and there's a chicken fight breaks out over the subject matters.

So, I just -- I don't understand the investment of effort in topic areas and a conversation almost 100 percent of the time I will get the names of the witnesses about seven days before. I mean, I used to joke with my colleagues on the other side, I said you know who they are they've been in the woodshed for four days, my goodness, tell me at least when they go

to the woodshed who you're taking. So, I think that the communication piece, collegiality piece, both of those are very important and our letter is simply just a heads up, we're getting ready to start having the discussion about something that is going to evolve into a notice.

JUDGE ROSENBERG: And does that discussion lead to a limitation in your opinion?

MR. SLACK: Yes, it has.

JUDGE ROSENBERG: A narrowing of the notice?

MR. SLACK: Yeah, and I've got a partner and sometimes he and I disagree if we're going on the trip together and I say look, you know, I am after a good product. I'm after as much specificity as I can get. The overbreadth becomes a problem sometimes and so, you know, at the end of the day you have a certain amount of time to get a certain quality work product and that's important, and why should I beat up my opposing counsel with some kind of game over the subject matters that are really pertinent to that case?

JUDGE BATES: Thank you, Mr. Slack. You've used your time well.

Next witness will be Terri Reiskin.

MS. REISKIN: Thank you, Your Honor. Good morning. My name is Terri Reiskin. I'm a partner in the firm of Dykema Gossett. I'm in our D.C. office and I'm the head of our Products Liability Class Actions and Professional Liability Practice Group. I submitted a comment on behalf of our firm, just a couple of weeks ago and I appreciate the opportunity to address the committee to follow up on that.

My practice is a defense practice. I primarily represent corporations in products liability and class actions in courts all over the country and I have for more than 30 years. The class action practice was alluded to earlier, I think, presents some unique problems, many of which have been touched on here and I wanted to share --

PROF. MARCUS: You would include MDL practice along with that?

MS. REISKIN: Yes.

PROF. MARCUS: And you think a presumptive limit of 10 or something like 10 would be a good choice for those kinds of cases?

MS. REISKIN: I think a presumptive limit is a good idea. I'm not here to say whether it should be 10 or 20 or 30. I'm very confident, and I would urge

you to say that we can all agree it shouldn't be a hundred. It shouldn't be 150. It shouldn't be 200. It should be a number that is a reasonable number. And I'm a little confused at why there is any concern about that. We've already seen --

JUDGE JORDAN: Well, because reasonable presumes that you have some basis for reasoning and when you ask us to do something in the abstract, what is our basis for reasoning and saying that number is reasonable. What we hear from your friends on the plaintiff's side is every case is different and in effect picking an arbitrary number isn't helpful, it's only shifting the burden from the producing party to the requesting party.

What's wrong with that logic and why is picking a number better than having no number and letting it be worked out case by case?

MS. REISKIN: I entirely agree with Mr. Dahl, first, that having a number helps the discussion. It makes the meet and confer more efficient because there's a target out there that everyone is working toward and an idea of what a court might find unreasonable if it were to have to go to the court. But I would say, I don't understand why

there's any concern about how this would operate because here's how it operates with the 10 fact witness presumptive limit.

That applies to all kinds of cases, large and small, and what happens is at the start of the case the parties get together and they talk about is that a reasonable number in our case? So that's specific to that case. And I have that discussion in almost every case I'm involved in and usually if it's a big case, if it's an MDL it depends on what the scope of it is. MDL doesn't necessarily mean that you need 150 topics. I mean, an MDL is really just a bunch of cases thrown together. The issues are all the same. So, you know, we have that discussion at the outset.

JUDGE ERICKSEN: So I wonder --

MS. REISKIN: And then we agree and then we go to the court and say in this case we need 30.

JUDGE ERICKSEN: Okay.

MS. REISKIN: Or whatever it is.

JUDGE ERICKSEN: In your opinion does the inclusion of the last paragraph of the draft committee note help you at all in getting -- in having assurance that the court is going to be receptive to an early

discussion about at least the concept of a general number of appropriate topics in an individual case? Because so far there hasn't been any reference to the 26(f) conference talking about the 30(b)(6) procedural issues, what kind of 30(b)(6) we would be looking for here. And so, at least now, that concept is introduced in the committee note but not in -- it's introduced in a way that a court can say look there is authority for doing this, it's not inappropriate. So my question to you is would you anticipate that you would be helped at all by that reference, understanding that it doesn't go as far as you might want?

MS. REISKIN: I don't think that it's terribly helpful, frankly. I mean, I think what's happening is that 30(b)(6) depositions are being used as an end run around the 10 fact witness limit. So, okay I only have 10 fact witnesses or whatever you are able to agree on and get the court to sign onto at the beginning of the case and then what you get is a request for way more topics that are reasonable, because in my case often the plaintiffs know who's been deposed in other cases. They want those people but they don't want to use up their 10 for those,

that's why disclosing the identity of the witness, a requirement to disclose the identity of the witness is a problem because that gives plaintiffs another opportunity to do that end run around the presumptive limit on the fact witnesses.

So, you know, there are other problems here that are also not being addressed. For example, multiple notices to the same organization. Rule 30(a)(2) requires leave of court to depose a party more than once. And yet, I see all the time plaintiffs in class actions, in particular, and sometimes in MDLs they want to do this first round of depositions where they are addressing process or identity or databases and then they want to do another round so I get multiple notices, multiple 30(b)(6) notices, each with many topics. There's no clarity on why that's permitted. There's no clarity on how the seven hour limit applies in a 30(b)(6) context. These are problems that aren't being addressed but are real ones that apply to practitioners every day.

JUDGE BATES: But aren't they being addressed through discussions between counsel and not requiring court resolution in most instances?

MS. REISKIN: They are certainly the topic

of discussions among counsel. I have them in almost every single case and sometimes we agree to disagree. Sometimes we decide to let a deposition go forward and we see if it causes a problem and we have to go to the court. There is a lot of disincentive to go to the court and that results in just swallowing these unfairnesses and these burdens and the court may not hear about them if they, you know -- I'm not going to go to the court and say they want 10 hours instead of seven on one deposition. We're going to try to work that out obviously.

PROF. MARCUS: So what Mr. Sellers mentioned a moment ago if I recall correctly concerning who bears the onus of going to court is really a big deal from your perspective, and you'd like the other side to bear that burden?

MS. REISKIN: No, it's not a question of who goes to court it's what is the process that we all need to follow. I mean I typically, I will give written objections to deposition notices and then I have a discussion among myself, my client, my colleagues do we have to file a motion for protective order before the deposition? With some plaintiffs I don't feel comfortable not filing a motion for

protective order. Do we wait and see how it goes and we see if they argue with us? You know, there's no clear pathway, that's the problem with the rule.

JUDGE BATES: But this seems to be an explanation for why presumptive limits and these rigid requirements don't work because each case is different as you've just described.

MS. REISKIN: Not at all. I think the problem is that it is terribly inefficient that I have to in every single case argue about the scope, I have to argue about the numbers, I have to argue about how many notices you get. I mean, you're not seeing the inefficiencies. They are all on my level and they don't get to you. If I had limits, if I had rules we would know how to proceed. We would have a conversation, sure.

JUDGE JORDAN: A presumptive limit by itself would solve these problems?

MS. REISKIN: It wouldn't solve all the problems, there are many other problems, but it would help --

JUDGE JORDAN: But it --

MS. REISKIN: -- considerably.

JUDGE DORDAN: But it -- would it -- in the

end is it not doing, just moving who has got the burden to go to the court if you can't agree?

MS. REISKIN: No, not at all.

JUDGE JORDAN: Really?

MS. REISKIN: No, because if you have that conversation early in the case, if it's a case that justifies more than the presumptive limit we would either agree at that point or we would get the court involved at that point when the court is already addressing presumptive limits on numbers of fact depositions, numbers of interrogatories, then we have a guidepost. Everyone is operating from that guidepost applicable to that case from the start. That would be terribly helpful.

MS. TADLER: But you're already generally negotiating with your counterpart, as you said, in the cases that you are involved in at least, right, in the MDLs, class actions, et cetera that generally speaking you do work it out? You have discussion about it, those are reasonable discussions. You may decide that you're going to allow for some extra hours or maybe you're going to end up with -- would it be fair to say sometimes you get a notice for a 30(b)(6) and it may have, I don't know, 50 topics and they end up being

narrowed by virtue of your back and forth meet and confer with your colleague?

MS. REISKIN: Sometimes, and sometimes we go to court. It really just depends. But, you know, the problem of the overbreadth of the notice and the scope issues are that in the deposition itself I've been in depositions where I've had to object to every other question on grounds of scope. That's ridiculous. I mean --

JUDGE BATES: That is ridiculous, Ms. Reiskin, and hopefully you won't have to do that too often, but I'm not sure we have heard anything that would cure that problem but thank you very much for your testimony.

MS. REISKIN: Thank you for hearing from me.

JUDGE BATES: We appreciate it. And that brings us to Susannah Chester-Schindler as our next witness.

MS. CHESTER-SCHINDLER: Good morning.

JUDGE BATES: Good morning.

MS. CHESTER-SCHINDLER: My name is Susannah Chester. I work at the law firm of Waters & Kraus. We principally practice in product liability with a focus on asbestos litigation and other catastrophic

injuries. As a preliminary matter I would just encourage everyone to look at the commentary of my colleagues on the asbestos bar. They have taken the time to submit comments, I know some of them are preparing comments that will be submitted by the deadline. To that end, I think that the meet and confer requirement that is currently under consideration is extremely important, it's well-founded and it's in keeping with the current spirit of disclosure under the Federal Rules of Civil Procedure.

I want to briefly start out with an issue that was raised by my colleagues on the defense bar which is we don't have a framework for addressing objections, issues that come up about how the deposition will be conducted and the scope. So first of all, I think that is something that can be addressed in the Rule 26 conference. Not the substantive issues, but how do we bring any disagreements between the parties on the scope to the attention of the court?

And by way of example I recently conducted a Rule 26(f) conference in the United States District Court for Minnesota and the court actually has a template. There are three boxes that you can select

from, have an informal discussion with the court, in other words call and ask for an informal conference with the court, go immediately to motions practice or there's a disagreement between the parties on how to do this and as a result if you check that box that will be address during that conference. So, in other words, you can utilize that rule to put into place a -- - excuse me, I have a cold and I'm dealing with that -- - to put into place a framework for dealing with objections and how do we raise these, do we need to seek a motion for protection --

JUDGE JORDAN: And that --

MS. CHESTER-SCHINDLER: -- or is it incumbent --

JUDGE JORDAN: That seems to be --

MS. CHESTER-SCHINDLER: Yes.

JUDGE JORDAN: -- ma'am, what the defense bar is asking for is for structure. If your experience there with the District Court of Minnesota was positive because they added structure, why wouldn't it be beneficial more generally to the litigators across the country to give some more structure, that is a Rule 45 style mechanism for objection or some presumptive limit so that there is

more structure in the rule than just saying meet and confer?

MS. CHESTER-SCHINDLER: I think because it varies from court to court on how they want to handle it and I think it should be the discretion of the court on how to address those issues. It may not necessarily be a one size fits all. Which brings me to --

JUDGE BATES: Why is it better to leave it in the discretion of the court, because after all that's what the national rule-making process is all about.

MS. CHESTER-SCHINDLER: Sure.

JUDGE BATES: Whether a national rule is better than leaving it to the discretion of the local courts. Why is it better to leave it to the discretion of each district court?

MS. CHESTER-SCHINDLER: Well, I think we need to hone in on what we're leaving to the discretion of the court and what can be addressed by the national rule-making policy which is the defendants are concerned about there is no framework for addressing objections or discovery disputes. We don't know whether we file a motion to compel, on the

plaintiff's side, or a motion for protection. And so that is something that the district court can address. It may be that neither one is necessary and at the instance of the District Court of Minnesota there is the ability to simply have an informal conference. The meet and confer component of the rule under consideration is an excellent avenue for frankly avoiding those disputes entirely.

To that end --

MR. GARDNER: Can I ask you a question about that?

MS. CHESTER-SCHINDLER: Sure.

MR. GARDNER: Why isn't the existing meet and confer requirements in the motion for protective order and the motion to compel already accomplishing what you're suggesting the proposal would accomplish?

MS. CHESTER-SCHINDLER: Candidly, in my experience they are addressing that issue. My practice is comparable to my colleague who spoke previously. When I do a Rule 30(b)(6) notice I don't simply send the notice. I prepare a letter. I list the topics that I need to speak to someone about and I send it to counsel and then I call them and we have a meet and confer conference. I ask the identity of the

witness. That helps me for logistical purposes and as a practitioner in the discrete area of asbestos litigation it helps me identify --

JUDGE JORDAN: Do you --

MS. CHESTER-SCHINDLER: -- whether or not I even need to take the deposition.

JUDGE JORDAN: Do you typically get that information?

MS. CHESTER-SCHINDLER: Yes.

JUDGE JORDAN: The witness identification?

MS. CHESTER-SCHINDLER: Yes.

JUDGE JORDAN: And how far in advance do you usually get that?

MS. CHESTER-SCHINDLER: It varies from case to case but typically I get it in the meet and confer and I see -- it's peculiar to me that there is this concern over identifying the witness. In my experience I have given the name of the witness and it allows me to tailor my foundational questions to that witness's background.

JUDGE JORDAN: Are there repeat witnesses in the asbestos realm that you think might make the experience you are having somewhat unique or, that is are there people showing up in asbestos litigation on

a regular basis that make the 30(b)(6) identification of a witness less problematic than it might be for other cases?

MS. CHESTER-SCHINDLER: Absolutely. That is certainly the case.

MS. TADLER: Do you think -- Judge Ericksen earlier spoke about the component of the committee note referencing Rule 26(f). Is that something that you are supportive of or you think requires more teeth, less teeth? It sounds like you are meeting and conferring and resolving those issues, that's my first question. My second question is, is it in your experience the case where you identify these topics in a letter and then perhaps either often or at least time to time you end up not having to take a 30(b)(6) at all because there is some other means to get the information that you are looking for.

MS. CHESTER-SCHINDLER: Speaking to your first question, I think that the Rule 26(f) conference is a forum for identifying a framework for bringing objections before the court or disputes before the court. But it is difficult to get into substantive discussions at that point because it is just too early in the litigation to know the scope of your

depositions. Whether or not if you, for example, have an extremely large corporation with a very technical way of maintaining documents you may need preliminary 30(b)(6)s on that issue and then proceed on to different substantive issues.

With respect to your next question, I rarely find I do not need a 30(b)(6) deposition at all. What I do find -- and again this is discrete to the area of asbestos litigation since I understand that came up in the Phoenix hearing to a degree.

MS. TADLER: I appreciate that clarity.

MS. CHESTER-SCHINDLER: -- is that if it is a witness I have seen before I can -- in some cases I can agree not to take the deposition, we can agree to use prior transcripts and we do that through the meet and confer process, which is why it is a beneficial addition to the rule. If that is not the case, and it isn't always because there is some witnesses who I know from deposing them before simply cannot speak to, for example, what was supplied in Plaquemine's Parish, Louisiana.

I know that that witness has historically not been able to address regional supply chain issues. And so I may raise that with counsel. It remains the

organizations right to designate the person to speak to that, and if they tell me we are going to designate this person and this person will be educated on that topic then we are in a good position, you know, we can move forward. And I've alerted them to the fact that this is something I will be on the lookout for if you send a know nothing witness, which does happen.

I would encourage the Committee to look at the commentary of Ms. Lindsey Cheek. She had a case in the Western District of Louisiana where a --

JUDGE BATES: I'm not sure we have time to go into --

MS. CHESTER-SCHINDLER: Sure.

JUDGE BATES: -- another case.

MS. CHESTER-SCHINDLER: Oh, no, I would just encourage you to look at the comment.

JUDGE BATES: All right.

MS. CHESTER-SCHINDLER: In any event --

JUDGE BATES: Thank you, Ms. Chester. I think you've exhausted your time. I'm afraid --

MS. CHESTER-SCHINDLER: Thank you.

JUDGE BATES: -- we're going to have to move on to the next witness. Thank you very much.

MS. CHESTER-SCHINDLER: Thank you.

JUDGE BATES: Our next witness is Virginia Bondurant Price.

MS. PRICE: Hi, good morning.

JUDGE BATES: Good morning.

MS. PRICE: Thank you so much for having me. I'm Virginia Bondurant Price from McGuire Woods. McGuire Woods is over a thousand lawyers, international firm. We both defend and take 30(b)(6) depositions all over the country, both in U.S. District Courts and state courts. Again, thank you for having me.

I want to focus the committee back on the proposed rule change that appears in the red writing within the proposal. And it states "must confer in good faith about the number and description of the matters for examination and the identity of each person the organization will designate to testify." So I want to break that down just a little bit and talk about my concerns about that specific proposal. The first part about conferring on the number and description of the matters for examination. You've heard from almost every single practitioner that has testified today that that happens routinely. That's my practice, that's everybody's practice that I've

ever practiced law with that meet and confers --

PROF. MARCUS: When that happens, does it begin with one side saying absolutely you can't have more than 10, or does it proceed through the listed topics and evaluate them and come up with an overall number that makes sense in light of what the topics are?

MS. PRICE: Closer to the latter, and the reason for that is because we don't have a presumptive number right now that limits the number.

PROF. MARCUS: But if there were then your position in your side might often be I won't talk about anything beyond number 10 on your list?

MS. PRICE: Well, I don't know that that is a fair characterization of how a good faith meet and confer might go. If there is a presumptive number on topics I think what would more likely happen just like it happens with Rule 16 and Rule 26 at conferences now is that you would have an open dialogue with the plaintiff's attorney, or defense attorney, about do we need just like we do with interrogatories. Does other side anticipate needing additional interrogatories? Does either side anticipate needing additional fact witnesses where each side right now has a presumptive

limit of 10. I think that that conversation happening early in the case and alerting the court during a Rule 16 conference that this case may be a little bit different and may require more than the presumptive limit and having an open dialogue would be, I think, a lot better than what we have right now where there is an unlimited number.

So I do think that the meet and confer process is an important one as for topic and scope, but it's not the correct band-aid in this situation. I think that additional steps need to be taken within the 30(b)(6) rule to help litigants in motion practice and in these very overbroad notices --

JUDGE JORDAN: Can you --

MS. PRICE: -- we are receiving.

JUDGE JORDAN: Can you explain why you think a presumptive limit would actually -- you just said it would be a lot better, but you describe effective meet and confer happening in the great majority of the cases. If it's happening effectively and tailoring the number to the case as it is, what's the advantage of having a number set other than to give responding parties a number that they can focus on and say you don't get more or you are too far outside that?

MS. PRICE: Sure. I think -- and if I gave the impression that meet and confers are completely effective, they are not. I've been before court on protective orders trying to limit the scope and the number of topics that have been presented on a notice to my clients and --

JUDGE JORDAN: I'm not suggesting that you suggested that they are always effective, but I had the impression from what you were saying that they are generally effective. Did I misunderstand that?

MS. PRICE: Yes, Your Honor. What I would say about that is I don't think -- I think they have an effective component. I don't think that they are an effective fix to the situation that we have where we have a lot of plaintiff's attorneys that serve these large, as one of my colleagues presented with these binders, these large notices that it's incredibly time consuming for our clients to respond to.

JUDGE JORDAN: What's your experience with how often that happens? A percentage if you can give it of cases in which you've got a 30(b)(6) notice. How many times do you get something where you go oh my gosh, it's 160, this is outlandish?

MS. PRICE: More often than not. More often than not. So I would urge -- I think a meet and confer with topic and scope is appropriate as the proposal has. A meet and confer for identity of witness is not appropriate. It ventures into territory where it is implying to the plaintiff's counsel that there is something to confer about over the identity of the witness.

JUDGE ERICKSEN: Could I ask you a question about that?

MS. PRICE: Yes, ma'am.

JUDGE ERICKSEN: We've heard that sometimes it's necessary to have more than one corporate representative testify. Would you have any objection to inclusion in the matters to be discussed then, like the number of people that will be testifying and the portion of the 30(b)(6) notice that that person will testify about? So, not the human being identity necessarily, but at least if there are, say, four people who are responding to a single 30(b)(6) notice that the subpoenaing party will have an idea okay, like in the morning I'm going to be talking to somebody about these topics.

MS. PRICE: Your Honor, I think the most

critical piece of my testimony today is that I don't think there should be a meet and confer as to identity of the witness. My practice and the practice of my colleagues as I'm sure you've heard today varies widely, right? Some people give the identity of the witness, some people give what you were suggesting, we're going to have two witnesses, the person that is going to testify on Tuesday is going to cover topics 1, 3, 7, whatever. The person that is going to testify on Friday is going to cover topics X, Y and Z.

JUDGE ERICKSEN: I just can't imagine a problem with requiring that.

MS. PRICE: And to be frank with you, you know, if I were on the other side that was taking the deposition that's information that I would like to know, okay when I walk into this deposition am I going to be covering all of the topics or am I going to be covering ten of the topics? I think the problem that comes from having a rule that mandates that the identity of the witness be disclosed to the other party is that it doesn't account for things that could happen, that could go wrong. And there is some opposing counsel that are very reasonable to deal with and we say we've been preparing this witness to

testify on these topics and it looks like at the 12th hour we're going to have to substitute in someone to testify on these two topics and we're now going to have to go to a different city and do a different deposition. Some --

JUDGE BATES: Well, no rule is going to account for all contingencies, but would the rule be, the 30(b)(6) be worse if it required identification of the witness of reasonable time, several days in advance of the deposition occurring? Would it be worse?

MS. PRICE: What I'll say, Your Honor, is that it would be a whole lot worse if it required a meet and confer over the identity of the witness.

JUDGE BATES: That's not the question I'm asking, though.

MS. PRICE: To answer your question, I don't know that it would necessarily be worse if parties were required to identify the witness X amount of days before as long as there was some understanding that things can come up in litigation that are outside the party's control.

JUDGE BATES: All right.

MS. PRICE: Thank you so much.

JUDGE BATES: Thank you very much, Ms. Bondurant Price and now Donald Slavik.

MR. SLAVIK: Good morning. Thank you for allowing me to appear before you. My name is Don Slavik. I practice personal injury and product liability on the plaintiff's side throughout the nation. I practice in 40 states. I've taken 30(b)(6) depositions at least multiple hundreds of times. I've taken eight of them in the last three weeks.

I'm also a professional engineer and my mantra is efficiency. I don't get paid by the hour I get paid by the result. I don't want to spend an extra minute taking a deposition. I don't want to take an extra deposition I don't need to. I want to get this done as quickly as possible to get the best result for my client at the least expense and the least amount of time, so efficiency, efficiency, efficiency. Knowing who the witness is helps me be efficient because then I can know is that person someone who has testified before, do I need to ask those questions again? Have they given their deposition someplace else and maybe I can skip the deposition. Meet and conferring I do in every case.

JUDGE JORDAN: Do you confer on the identity

of the witness?

MR. SLAVIK: I always ask. Do I always get it? No.

JUDGE JORDAN: Right. When you say confer, you may ask for the identity but is there some discussion, do opposing counsel freely engage with you and say let's chat about who we want to have?

MR. SLAVIK: I'll -- what I do is I call them up and say who will you be producing, maybe I can figure out whether I need to take this deposition. Is it going to be Mr. Shabadahan (phonetic)? I've taken him five other times, I know what he's going to say. I've litigated against at least nine of the other firms that are here in cases and I know many of the people in these firms so we get along because we have these meet and confers, it's called being civil, it's being professional. And that's how we make it efficient.

JUDGE JORDAN: One of the challenges we've got is hearing from the defense side that not everybody is civil and dealing in good faith in these things and it's of concern that identifying the witness allows the deposition to move from 30(b)(6) topics to individualized attack the witness kind of

discussion. How do you respond to that concern?

MR. SLAVIK: First of all, I don't do it. I haven't seen it done in my practice of people I work with, and I've worked with my own firm now, worked with two other major products liability firms representing plaintiffs over my 38 years and I've worked with co-counsel.

When a 30(b)(6) goes out it's addressing certain subjects and that's the intention of the deposition to get information on that subject, not to take a personal attack against the witness or wander into areas, so I don't see it. Are there -- you know, can you write a rule to take into account the odd situations, the outliers? You can't. You're doing it to make the most efficient rule. And if there is problems that's what protective orders are for, that's what conferences with the judge are.

One of my best cases right now I have -- we have a conference with the magistrate judge every 60 days, just 15 minutes on the phone. Is there a problem? Do we need to take care of this? how are you going with the dates? Do we need to move anything? And we get the case moving along and it's on a schedule.

JUDGE JORDAN: If you don't get the witness identification because they decline to give it to you, is there -- how has that negatively affected the case, in some meaningful way?

MR. SLAVIK: It means I'm going to take longer in that deposition to find out who this person is, what department they are in, where they are going, what they learned as to opposed to if I know that they've already done this, I've read their deposition from the past, I know that they have this knowledge, I don't have to go into the background. I save time. My last eight depositions I just took I had the name of each person in advance. I did less than two hours for almost all of them. One took three hours, and that one was 47 topics.

The law -- the consequences will step in here. If you limit the number of topics to like 10, or even 20, they are going to have to be broad. When I get those 47 topics, those are specific, almost questions, that they prepared the witness for. When I click through them, we were done with that deposition in less than three hours, had the answers, it was taken care of. It's much more efficient --

JUDGE ERICKSEN: Mr. Slavik, what problems

do you see in your practice with the rule as it's currently written?

MR. SLAVIK: I see very few problems, actually. I mean, the problems I see, I like to see -- I'd like to know the witness but meet and conferring I think is done with any professional, someone that is professional and civil, putting in a rule simply reminds people that is something that we all do whether its motion practice in individual courts or whether it's in this situation.

JUDGE ERICKSEN: Right. But going into this whole process we heard desperate cries for help from lawyers who practice all over the country. And if you had a desperate cry for help before this process began, what would it be? What is needed to change in the rule, if anything, from your perspective?

MR. SLAVIK: What would be needed to change? Simply that the lawyers should work together to get their disputes resolved in advance so not having to bring the court in whether a protective order or trying to overcome some presumptive limits.

JUDGE ERICKSEN: Mm-hmm. Okay. And if I could just ask one more question. You said that

you've taken 30(b)(6)s in 40 different states. Does that include state courts?

MR. SLAVIK: I've taken them in state courts, yes.

JUDGE ERICKSEN: Okay. And do you have an estimate for how common it is for state court rules to require the organization to come up with the most appropriate witness?

MR. SLAVIK: PMKs, PMQs, PMKs like --

JUDGE ERICKSEN: Right.

MR. SLAVIK: -- in California. California specifically requires it. Other states I haven't seen that. Most of the states seem to follow the federal rules which allows a designation of the person whoever the corporation wishes.

JUDGE BATES: Thank you very much, Mr. Slavik.

MR. SLAVIK: Thank you.

JUDGE BATES: Next witness, Toyja Kelley. I hope I got your first name correct.

MR. KELLEY: I was hoping I was going to get to say good morning, but it's good afternoon now. I'm Toyja Kelley. I'm a partner in the litigation department of Saul, Ewing Arnstein & Lehr where I have

a commercial litigation practice in state and federal court. In nearly 20 years of private practice I've had the good fortune to represent many large corporations and small companies in complex civil litigation.

The nature of my practice I frequently find myself on both sides of the "v" in civil litigation, but today I'm here in my capacity as the current President of DRI-The Voice of the Defense Bar. As many of you I'm sure knows, DRI is the 20,000-member international association of attorneys who represent companies and individuals in civil litigation.

Ten years ago DRI created the Center for Law and Public Policy which through scholarship legal expertise provides a voice to the defense bar of issues, substantive issues, constitutional issues and the integrity of the civil justice system issues in civil litigation. I say all that just to put my comments this afternoon in perspective.

DRI, like many of the witnesses you've heard from today, recognize there are a number of issues with 30(b)(6) depositions and I'm here to talk about the proposed amendment and why it should not be adopted. I'll start with the meet and confer

requirement. Like a number of attorneys, I occasionally have meet and confer, talk about various issues with respect to 30(b)(6) depositions. Sometimes I do in advance of those depositions let opposing side know who my witnesses are going to be, but that's a very strategic decision. There is strategic reasons why I do it, there is strategic reasons that I don't do it.

The problem that I think with the rule as it is proposed right now, particularly with respect to the meet and confer portion of it is that when you -- that proposal in the contents of also trying to maintain the notion that is the organization's choice for who they choose to put up in the deposition it creates the illusion that the other side has some say.

In the situations where I have not identified a witness in advance it's largely because I know in doing so is going to create a problem and in situations where I have I do it because --

JUDGE BATES: What problem?

JUDGE JORDAN: Yeah, thank you. What's the -- what's the problem?

MR. KELLEY: I'm sorry?

JUDGE BATES: What problem would it create?

MR. KELLEY: The problems that I typically see or the problems that I've heard from DRI members and members in my own firm, and I've got a recent example of this, is when identify a witness in advance oftentimes you get into the scope of the deposition shifts from the issues that are really at issue in the case and turns on sort of personal issues with respect to that particular witness.

JUDGE JORDAN: Can you get specific there? You say you had a recent example because we've heard this before and I'm having a hard time understanding exactly what people are getting at. How is it altering the deposition in a meaningful way?

MR. KELLEY: So, I mean these depositions as you all have noted have -- typically occur sort of in the middle or towards the end of discovery, so there's been a lot of information that's been passed. You know, the other side has seen a lot of documents. You know, they have some sense, or they think they have some sense of who a corporate representative might be and when you confirm their understandings typically you don't see any problems if I tell you that Jane Smith is going to be the corporate representative, that's who they were thinking about. In my personal

experience the depositions tend to go relatively smoothly.

There are other issues that pop up. In situations where it's not Jane Smith and it's Tom, that's where you run into problems and then what the deposition becomes is, is why didn't you, you know, why Tom and not Jane?

And you know a lot of my colleagues who have stood up here today, when you practice in litigation like pharmaceutical you are seeing the same people over and over again, I think there are plenty of issues but you tend not to see those issues because they are familiar with the parties and you know I represent some smaller companies where the other side are not generally familiar, that's where the problems come in. You know, you've got to take hours to prep these folks, you've got to dig into their personal backgrounds in a way that you really ought not to have to do if they are, in fact, speaking for the company and not in their individual capacities.

JUDGE ROSENBERG: Couldn't you object? I mean, isn't that a basis to object if the attorney finds that it's not within the scope, like anything else?

MR. KELLEY: Absolutely, but I think comprehensively the problem that DRI has with the proposed rule is that it really requires a more comprehensive framework than what's laid out in the proposed rules and we've identified some of them in our written statement. I think in a vacuum meet and confer sounds good, but if there is no framework to ultimately deal with a conflict, I don't think it's as effective as the committee would like it to be.

JUDGE ROSENBERG: So you don't object but you think it'd go further like as it's written?

MR. KELLEY: I'm sorry, I didn't hear the question.

JUDGE ROSENBERG: You don't object to what's written now, but you just think it should go further?

MR. KELLEY: No. I -- oh, I'm sorry the current --

JUDGE ROSENBERG: The proposed rule.

MR. KELLEY: -- the proposed amendment? No, we think as proposed right now should not go forward at all. I think -- I think it should -- I mean, quite frankly, I think you should go back to the drawing board and create a more comprehensive fix for the issues that have seemed to address the committee.

JUDGE ERICKSEN: So as you know, 30(b)(6) hasn't been touched since it was created and I think it might be long in that. So, would inserting a meet and confer requirement, whether there is the identity of the witness or not, at least be a step in formalizing, for example, the improvements in proportionality, in bringing some of the modernization that has gone on with other rules into the 30(b)(6), but to do it to start with in a very modest way? I mean, the rule, it's just been sitting there completely on its own untouched since the beginning. So, could you live with something smaller if you can't get right now the whole structure that you're looking for?

MR. KELLEY: If we're going to fix it, we ought to fix it. I mean, I think that the DRI's position and I think that's what we lay out in our papers.

JUDGE BATES: All right. Thank you very much.

MR. KELLEY: Thank you.

PROF. MARCUS: I'm sorry.

JUDGE BATES: Go ahead.

PROF. MARCUS: Just a request.

MR. KELLEY: Sure.

PROF. MARCUS: DRI has been very helpful over the years. Something occurred to me that might address that I don't think the submission we got from you does, are there any states that presently have a numerical limit for their analogs the 30(b)(6)? I don't remember anyone telling us so, and I'd be interested to know. I'm not expecting you to know that off the top of your head.

MR. KELLEY: I don't know it off the top of my head, but I guarantee you I will get someone to work on it.

JUDGE BATES: Thank you, Mr. Kelley.

And now Patrick Regan.

MR. REGAN: Good afternoon. My name is Patrick Regan. I have a 10-person plaintiffs civil litigation firm about five minutes from here.

In terms of giving the committee a little bit of background information for any questions they may want to ask, during my nearly 40 years of practice I have probably taken over 500 30(b)(6) depositions under either the federal rules or their virtually identical state court counterparts. And as I indicated in my written submissions, in less than 25

of those cases, so less than five percent of the cases, has there ever been an issue that has required the court's intervention.

Reasonable people act reasonably. I think that's one of the messages you've heard from both the plaintiff's and defense bar today and that is reasonable people will work this out. I have never --

JUDGE JORDAN: Mr. Regan?

MR. REGAN: Yes?

JUDGE JORDAN: If that's true then should we leave the rule untouched?

MR. REGAN: I personally don't mind putting into the rule the issue of meet and confer, but I will tell you like many of the other witnesses, virtually all of them, I think, I do it in every case.

To me, walking into a deposition not knowing who the witness is going to be, first of all has never happened. Never. And if it did, it would take me much longer to get up to speed. If I'm better prepared I will be more efficient. That's -- efficiency is a word that you heard just a few minutes ago from one of the prior speakers. So, I've never walked in without knowing who the identity was.

JUDGE JORDAN: And has -- how do you answer

the concern that it shifts the focus away from the actual discussion points that ought to be the subject of a 30(b)(6) and allows dipping into personal issues with the deponent improperly?

MR. REGAN: Your Honor, the only thing I can say in response to that is that is not an issue that I have had, okay, and I haven't seen it. Many of my cases involve multiple corporate entities so there are -- I'm not the only one taking the 30(b)(6) depositions. My adversaries are taking similar depositions of their co-defendants or third party defendants and I don't see that as an issue. The -- it just hasn't been an issue.

And that brings us to the presumptive limits. I mean the two things I wanted to talk about today were the meet and confer, which I always do, it's always been my practice in my law firm and the presumptive limits. The presumptive limits as you heard, it's very difficult to legislate for every case. I don't do -- all my clients are individuals. They are one and dones, hopefully it's the only time they need a lawyer in their life, so I don't have experience with class actions of MDLs, but I can say that those are a separate category and the judge

that's assigned to monitor those cases can very easily deal with whether they need 125 or 225 or 25 topics in that, but the run of the mill cases, the run of the mill cases, some of my cases clearly 10 would be fine and some 50.

So, it's not -- what will happen is this. Presumptive limits will inevitably significantly increase the need for judicial intervention. There's a reason that there are so few reported decisions about discovery disputes over 30(b)(6) depositions. So the cry about the abuse of 30(b)(6) is not borne out in the motions practice that Judge Bates and all of the rest of the courts see. They are not being litigated because lawyers work those out.

JUDGE JORDAN: Well, what we're hearing is they are being worked out in the sense that the defense bar is bearing the burden of it. They don't get brought to the court's attention because the clients are just being told, in effect, you know, tough it up because we can't afford to go to the court on this, but that there are real abuses in the system. I understand that, you know, you sound like you are working with people and behaving the way a good lawyer ought to, but if it's accurate what we're hearing from

the defense bar, what would be the downside of having some anchor number in the rule as a starting point for discussion to make sure things don't get out of hand with 150 topic deposition notices?

MR. REGAN: Okay. The problem is that we're -- I mean, we heard several witnesses say, well, I don't know what the number is, it might be 10, it might be 20. I mean, 10, you know, apparently that was the number that was decided upon before many of the witnesses came in here today that 10 was where they were going to anchor around and hope for that to be a little bit of an anchor around the number. I don't think it's reasonable on that. I don't think that it is needed. There would be a greater motions practice right now if this were a problem. I really believe that. And, you know, I just think that when you start to legislate for the lunatic fringe as opposed to the 95 percent of lawyers who are reasonable and cooperate with each other and are professional and civil, I just think you are going to create a bigger burden. It will inevitably increase the need for judicial intervention.

JUDGE ERICKSEN: We tried to get the lunatic fringe in here, but --

(Laughter.)

JUDGE ERICKSEN: You said something that reminded me of something I can't put my finger on, but you talked about when there are multiple parties on a single side. And I seem to recall that there is an earlier, like from the 90's advisory committee note that says that when there are multiple parties on a single side they are expected to confer with each other about who the witness will be. And you said that you have these multiple party cases and so does that -- does that happen?

MR. REGAN: Your Honor, what I was referring to is the situation where not only where I'm taking a 30(b)(6) of a defendant in my case, but co-defendants are also taking 30(b)(6) depositions, and the point I was trying to make is I don't see those lawyers abusing the system with hundreds of topics. So, it's not only my practice in taking it, but its also I haven't seen it, those snowballs don't exist in reality. They just don't.

JUDGE BATES: Thank you, Mr. Regan.

MR. REGAN: Thank you.

JUDGE BATES: We appreciate you coming in.

Next we'll hear from Mike Weston.

MR. WESTON: Good afternoon. I am Mike. I am a lunatic from Iowa.

(Laughter.)

JUDGE BATES: But are you on the fringe?

MR. WESTON: Tell me in five minutes.

My name is Mike Weston. I'm a lawyer with the law firm Lederer Weston Craig. We practice predominately in the state of Iowa. You've flown over us and we've waved at you when you did.

I'm in my 39th year of practice. I have probably participated in defending and taking between 60 and 75 30(b)(6) depositions during the course of my career and our state court rule parrots Rule 30(b)(6). Almost all of the notice for 30(b)(6) depositions, even in the cases that I defend which would be product cases brought because of diversity or insurance bad faith cases are accompanied by 30 to 100 discrete topics for the deponent to address and a similar number of documents requested. I am the past President of DRI so I adopt and appreciate what Mr. Kelley said in the papers that they have provided. I'm the President-elect of LCJ so I appreciate what Mr. Dahl told you in the papers that we have presented.

One of the movies that I was struck with over the years was the great movie When Harry Met Sally, if you recall Billy Crystal's character in that case always read the last page of the novel first in case he died before he finished the novel. So, in the interest of time I'm going to skip to the end of the novel and tell you the five things that I would do with Rule 30(b)(6) and do it immediately.

First, I would set a presumptive limit on topics. LCJ has suggested 10. I personally don't know if that's the right number, but the bar and the bench has lived with presumptive limits for years. Presumptive limits of interrogatories, presumptive limits in the number of depositions, presumptive time limits for deposition. It is the rules that do not have limits that are abused. I know we're not talking about Rule 36 today, but there are an unlimited number of requests be served and it's not unusual in some of the more complex cases that I defend to receive 200 or 300 requests for admissions with accompanying documents. Thousands of documents. The difference between Rule 36 and Rule 30(b)(6) is that there is a complete framework for the resolution of disputes that arise under Rule 36. There are none for Rule

30(b)(6).

And so for a --

JUDGE JORDAN: When you say there's no framework, what prevents thoughtful counsel who receives an abusive set of topic designations from first talking to opposing counsel and barring satisfactory resolution of it going to the court and getting a protective order. Why isn't that sufficient?

MR. WESTON: Because the courts don't want to hear it. There's no record. Courts want to make discovery rulings and substantive law rulings based on a record.

If I have a 30(b)(6) notice with 100 topics and a statement in an affidavit to the court that we've met and conferred and we think in my motion that these are abusive, the court will say I haven't heard anyone testify. I don't have the time to deal with all of the issues that may have arisen in other discovery and that's why I think so few motions are brought under the 30(b)(6) because there is no record for the court. And as an officer of the court, and also a steward of my client's resources, I have to think about the amount of money to spend to fight that

battle. So --

JUDGE JORDAN: So the issue becomes if you set a presumptive limit who bears the burden of going to court, right? If you don't set a presumptive limit its on the defense. If you do set a presumptive limit then you have the same issue happening on the plaintiff's side, right? Or the requesting side?

MR. WESTON: Consistent with all the other rules where there are presumptive limits. It is the person who wants relief who bears the burden. And so if there were presumptive limits it would be the burden of the person who wants relief to go to the court with good cause.

JUDGE JORDAN: Right. Precisely. So, why -- what is it that makes it better, fairer for the system, not for defendants, but for the system. Better and fairer for the system to pick a number which will necessarily be an arbitrary number and say that is the number and if it's outside that number the burden is on the plaintiff, no matter how sensible their request may be, to bear the expense and cost to go to court?

MR. WESTON: Because it sets an expectation for the use of that resource as a tool in all cases.

It is an expectation about how the case will be discovered and tried is what your role is all about. And with presumptive limits we know going in that absent an agreement -- and I work on some complex cases where we decide, for example, you have an asbestos practitioner here. When we have asbestos cases that are in our Iowa federal courts and in our Iowa state courts we agree to global interrogatories that number 50, 60, 70 from all the defendants to the plaintiff. They have a certain number for us. Each party gets discrete numbers, but it's all based upon the framework that the rule starts with a presumptive limit.

JUDGE BOAL: And Mr. Weston I've been struck by yours and other's testimony that these issues are not frequently litigated, so maybe I've done something wrong. But as a magistrate judge I do have free motion practice on this, and perhaps that's particular to me, maybe I invite it, but the typical motions that I see have to do with the particularity of the topics and the preparedness of the witnesses. So why wouldn't the propose rule as drafted help deal with those issues?

MR. WESTON: Well, first of all, the meet

and confer rule of Rule 30(b)(6) doesn't lead to any conduct by the court. It's not a gateway to motion practice. It's not tied to any other rule. It's a play nice in the sandbox. Now, we all expect that that's what it will lead to, but that's not in the Rule. Second of all, I think the court in Iowa has divided in the two kinds of motions, pre and post deposition. The deposition with regard to the number of topics could be brought in advance of the deposition. It seldom is. I probably think of a handful of times that I have and it was on the fringe where it really asked for things that weren't even at issue in the case. The vast majority have to do with preparedness of the witness.

One of the things I do in my practice, for example, is if you, Judge, would send me a 30(b)(6) and there is 75 topics I will serve on you what looks like a responsive pleading and I will say to you, Judge, so you have it in writing to create a record, here are the 15, 18, 20 or 30 that we have no objections about but here are the others that we do and have concerns about. That way my opponent knows that when we are at the deposition we have problems with these particular topics. Then after the

deposition is taken I know that I'm at risk that if a motion to compel is brought that I might have to produce the witness again if I'm wrong, but I don't think it is sanctionable what I've done and the other side is aware of what I've done. Is there another question?

MR. SELLERS: I have a question.

MR. WESTON: Yes.

MR. SELLERS: You made a reference to Rule 36 admissions but you said there is something in the Rule that actually, unlike Rule 30(b)(6), seems to incorporate some dispute resolution mechanism. Am I -- did I misunderstand?

MR. WESTON: You misunderstood. It hasn't -- well it has an entire framework for how objections are to be made, what is not objectionable, when matters can be taken to the court. It has a 30 time limit.

MR. SELLERS: Well, I mean, Rule 30 doesn't have any -- with respect to either 30(b)(1) or 30(b)(6) has any rule with respect to that correct?

MR. WESTON: Yes.

MR. SELLERS: So I'm wondering if what you're thinking about is some kind of very specific

framework where you have 30 days to make objections, here's how you make objections --

MR. WESTON: Yes.

MR. SELLERS: -- like Rule 36. Are you proposing the same thing for the other forms of deposition?

MR. WESTON: That's point two. Well, not for other forms of deposition but for 30(b)(6) that there be a specific timeframe for response.

MR. SELLERS: And why would you not do it for the other kind of depositions?

MR. WESTON: Because there's a time limit on the depositions. The time limit is seven hours. Provides a limit. And those are fact witnesses, typically, or it could be mixed facts or expert witnesses, but there are time limits.

MR. SELLERS: Isn't there a limit on the duration of the testimony of a witness in 30(b)(6)?

MR. WESTON: Yes, typically there is, however when we do talk about the depositions and we talk about complying with what are reasonable requests, oftentimes we have to produce more than witness. In fact, I can't think of an instance in the last five years where I haven't produced more than one

witness and therefore the seven hours kind of goes out the window because it has to.

MR. SELLERS: One last question. And when you confront multiple witnesses do you ever use a meet and confer process to discuss how long to allocate time for witness in a deposition?

MR. WESTON: No. That's not something we get into. The whole notion of identifying a witness to me is invasive attorney-client privilege and it's something we don't routinely do in Iowa.

JUDGE BATES: Isn't most of the structure for resolving issues with respect to that come up under Rule 36 or Rule 34, Rule 33 deals more with the sufficiency of the response. Now has there been sufficient response? We don't have that in the deposition setting. You can't have a structure for resolving that before the deposition takes place.

MR. WESTON: No, but you can have in place the kinds of things -- you always have the scope of discovery issue in any form of discovery under the rules.

JUDGE BATES: That may be.

MR. WESTON: But what is lacking is the certainty as to the number of topics that need to be

prepared for and how those relate to the case. Now we get unlimited amounts that we fight about and argue about, the breadth. And even in the simplest case we get 50, 60, 70 topics for the witness to respond to.

JUDGE BATES: All right. Thank you very much.

MR. WESTON: Thank you, Judge. Thank you for your time.

JUDGE BATES: Our next witness, Christine Webber. And this is our last witness before we break for lunch.

MS. WEBBER: Good afternoon, Your Honor, and I do recognize that I am standing between everybody and lunch so I'll try and keep things moving along.

My name is Christine Webber. I'm a partner with Cohen Milstein here in Washington, D.C. Our practice is nationwide and for over 25 years I've been representing plaintiffs in class collective actions and employment and civilized matters. And I'm here today on behalf of the National Employment Lawyers Association and I'm currently the co-chair of their Class Action Committee.

The issue of 30(b)(6) depositions is near and dear to my heart because 30(b)(6) depositions are

generally the most important depositions other than experts that I will take in my cases. Corporations, the employers that we sue generally have the vast majority of evidence in our cases.

JUDGE BATES: For employment cases, particularly individual employment cases I think we've heard before that the 30(b)(6) deposition often occurs right at the outset of discovery as opposed to what we've been hearing from other witnesses here today.

MS. WEBBER: That is absolutely correct. It is often the first deposition that we notice. As I said, corporations have most of the evidence and 30(b)(6) depositions are the most effective tool we have to get access to that evidence. And so placing unnecessary limitations on our use of Rule 30(b)(6) will really hamstring individuals in their ability to prove up their cases.

It's the plaintiffs that have the burden of proof when it comes to summary judgment, we have the burden when it comes to getting a class certified and when the proof that we need is in the hands of corporations we really need the power of Rule 30(b)(6) to get that evidence to meet our burdens.

JUDGE JORDAN: Is there a number of topics

generally, a range of topics, that you find you are typically needing to ask in these class action cases?

MS. WEBBER: The number really varies and it really varies on how you count it. So, for example, I had one case that became an MDL, there was like eight locations, test locations and corporate and I would have said I had 10 to 15 topics that I asked in my 30(b)(6), which was actually fewer than usual, the defendants would probably tell you I had a hundred because it was 10 or 15 topics for each of the eight plant locations and a few additional -- those topics plus some additional for corporate and they would count those each separately and tell you there's this crazy lawyer in Washington, D.C. who wants to take 100 30(b)(6) depositions. I would say I have only 10 or 12 topics.

So, the numbers can, you know, depends on how you are counting them. If I have fewer topics they tend to be more broadly defined. If I have a higher number of topics they tend to get more specific. I don't think that that the number is really the way to achieve a great efficiency. I think that, you know, the meet and confer process is helpful. I think meet and confer process that

includes identification of who that 30(b)(6) designee is going to be is really important in order to maximize efficiency.

MS. SEITZ: Could I ask you one question. Could you just follow up a minute? Could you just talk a little bit about why it's important to you in the context of the kind of cases you handle --

MS. WEBBER: Absolutely.

MS. SEITZ: -- to have that information?

MS. WEBBER: Absolutely. First off, although the witness is testifying on behalf of the corporation and they theoretically should be familiar with therefore all of the documents the corporation has produced, I often find witnesses say oh gee I don't remember seeing that policy unless I happen to have the copy that was attached to the email that went to that witness by name.

Now, in my cases I'm usually getting, you know, dozens of copies of versions of essentially the same document, I want to bring with me to deposition those documents that have the name of the witness on it to make sure that I am best able to refresh their recollection if they have a lapse in memory. Now, I heard repeatedly both this morning and reviewing the

Phoenix testimony defense bar saying that it is the corporation that's testifying, it's not the person and the personal knowledge of that individual is irrelevant because they are testifying based on corporate knowledge, but the knowledge of that person is one aspect of the corporation's knowledge. I mean, I don't think I've ever had a 30(b)(6) designee who was not an employee of the corporation who is designating them and who is not generally, you know, at a management level of that corporation and their knowledge is corporate knowledge.

JUDGE JORDAN: Well isn't that --

MS. WEBBER: So the idea that it's irrelevant --

JUDGE JORDAN: Well, isn't that actually making the case that the defense bar is pressing on us is that to the extent you start inquiring about their personal knowledge and that's not within the, or that's on the margins or outside of what they were expecting in the 30(b)(6) topic that you've -- we've created a problem by requiring the identification of a witness. We haven't solved one, we've created it by saying this is the person and now you have a whole bunch of stuff you want to ask that person as opposed

to confining yourself to the topics that were in the 30(b)(6) notice.

MS. WEBBER: When I talk about their personal knowledge, I mean their personal knowledge on the topics which are the subject of the 30(b)(6) deposition, not on other matters.

JUDGE JORDAN: Right. But what I understand them to be saying, this is what I'm trying to get you to meet head on. They're saying as soon as you start doing that you start -- you may perceive yourself as being within the 30(b)(6) notice topics, but you start delving into the personal knowledge and you start necessarily moving away. I get their argument to be sort of an undertow argument. What's wrong with that concern? Why is that unfounded?

MS. WEBBER: I'm going to ask whether I know the name in advance or not, and I'm saying 90 percent of the time I'm given the name in advance, but whether I do or not have that name I'm going to ask that witness the same questions about their personal knowledge of the 30(b)(6) topics and whether I know the name in advance or not, there's going to be some questions that defense counsel will think are too far outside the topic scope and they'll object as outside

the scope, and they'll make their record and presumably won't be binding for the company if it was truly outside the scope. But knowing the name in advance doesn't affect how often those issues come up of whether a question as tended outside the scope.

JUDGE BATES: Is this because you feel that it's relevant to ask a witness who has testified that the corporation's experience and position is X, it's relevant to ask the witness whether their personal experience within the corporation is consistent with X?

MS. WEBBER: Yes. I think that is certainly one example. Another example I'm thinking of is the company says we have a policy of posting all positions, all promotions, so that people could apply. If the designated witness is in a position in HR or something else where they might know how often exceptions have been made to that rule --

JUDGE BATES: Right.

MS. WEBBER: I absolutely think that I can say I understand that's the policy, I want to find out, you know, when are exceptions to that policy made.

JUDGE BATES: Let --

MS. WEBBER: And that's, you know, within the scope of my notes.

JUDGE BATES: Let me ask you a question on a totally different topic. Do you think it would be advantageous to add to Rules 26(f) and 16(b) requirements that 30(b)(6) depositions be discussed?

MS. WEBBER: I think the meet and confer belongs with the 30(b)(6) notice itself rather than in the preliminary rules because I think we can't have a very detailed discussion of the 30(b)(6) until we get a little bit into discovery and we start getting documents. So I think probably that 26(f) is a little premature and it would not be a very productive discussion at that point in time. But often we talk in very broad terms there and really get into the meat of it when we're ready to do a 30(b)(6) notice.

And if I might just add one thing?

JUDGE BATES: Briefly, please.

MS. WEBBER: I appreciate that. As I said, I have been generally told the identity of the witness in 30(b)(6) depositions, you know, a week or more in advance, and never had an issue with that. I have now heard a lot of cries to take this out of the rule and then a lot of defense lawyers saying well they don't

always share that information. I'm concerned that having put forward this proposal if the committee then chooses not to adopt the proposal that all the defense lawyers who have been so cooperative with me over the years in sharing that will now take the position, hey, the committee just told us we don't have to share that information with you. So I would suggest if that's the path that the committee goes down you would consider adding the advisory committee notes some language to the effect that is not the intention of the committee and that Rule 1 spirit of cooperation is still applicable.

JUDGE BATES: Thank you, Ms. Webber, and that you for your testimony but you will note that the proposed rule that is out for consideration actually doesn't include a requirement that the identity of the witness be disclosed in advance. That's not actually in the proposal.

MS. WEBBER: Well, by meet and confer about the identity, I had read it that way. Sorry.

JUDGE BATES: All right. Thank you. And thank you all for the very helpful testimony this morning. We're going to break for lunch. We will resume at 1:30 and we have to resume at 1:30 because

we have people participating by telephone who will be testifying at that time so enjoy the almost hour we have before we resume.

(Whereupon, at 12:35 p.m., the hearing was recessed for lunch, to reconvene at 1:30 p.m. later the same day.)

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A F T E R N O O N S E S S I O N

(1:30 p.m.)

JUDGE BATES: We're resuming the hearing. This is our second public hearing on proposed changes to Rule 30(b)(6) of the Civil Rules, and we're going to start with a group of witnesses who are participating by phone. They will not have the green, yellow, and red light before them, so I may have to interrupt, and I apologize in advance for that, but I will be trying to limit the time, as we have with all witnesses, to five minutes of testimony.

We're going to start with Julie Yap. Is she on the phone?

MS. YAP: Yes, I'm here.

JUDGE BATES: Ms. Yap, please proceed.

MS. YAP: Thank you. My name is Julie Yap. I'm a partner at Seyfarth Shaw. I'm located in the Sacramento, California office. And I want to thank the Committee for their time in looking at this rule and for hearing the testimony today.

Seyfarth Shaw has submitted full comments, written comments, to the committee, and so I will focus today's topics on primarily two pieces. And as some background, I also -- my practice focus is

primarily on class action and representative action matters in the employment context, both in civil rights as well as wage and hour compliance.

And I would echo the opposition to the meet and confer requirement regarding the identification of the witness, and I would echo but I don't want to repeat the comments of the witnesses today, but I do want to elaborate and provide an example of how, in some cases, even identification alone does not promote efficiency at the deposition, but it can actually create harm and prejudice.

For example, it is my practice, particularly where there are a number of witnesses, in order to promote efficiency, to provide either -- well, both the topics that each witness will be testifying to and the names of those witnesses. A recent example, I provided those names and the identities two days before, and in the deposition as it went forward, instead of focusing purely on the designated topics, opposing counsel spent hours on topics that were outside the scope of the designated topics that related to perhaps personal knowledge of the witnesses.

And while there were objections, obviously,

made as to the scope, and to create the record that it was not testimony on behalf of the corporation, it is difficult to instruct the witness not to answer without the risk of sanctions or discovery abuse allegations that would later come before the judge, in particular as prior testimony and witnesses have said, there may be a very different view of whether this is within the scope of the witness.

JUDGE BATES: Ms. Yap, Ms. Yap, could I interrupt with a question?

MS. YAP: I'm sorry.

JUDGE BATES: It sounds like that's a situation that you experienced even without any requirement in the rule to identify the witness, that you experienced the deposing party going off on these personal issues, shall we say. So I take it that that happens occasionally anyway.

MS. YAP: It happens where I would identify the witness, and I think it creates questions of whether -- again, I would still maintain the practice, because I want the testimony to be efficient. But if there are multiple witnesses, I would definitely say here, there will be a witness for these topics, and this topic.

But the fact that I disclosed the witnesses ahead of time meant that there were entire lines of questions before those witnesses that had nothing to do with the deposition testimony and appeared to be clearly prepared based upon the disclosure of the identity.

JUDGE BATES: In most instances, do you face a problem like that from having disclosed the identity of the witness?

MS. YAP: It will vary. You know, I generally -- I hope it doesn't. It's like it's a varying degree. I would say this is a fairly egregious example of that, but it is a problem with, I think, mandating disclosure of the witness.

And I think the secondary piece of that is not only a source of wasted time, but this was a deposition notice that had, between topics and subtopics, over 77 topics for the witness, and it took the company hours and days to prepare for this, and multiple trips to a neighboring state.

And it's not only the waste of the time not spent on those topics, but also that the witness was not prepared to testify about the organizational structure issues, or the other pieces of their

individual job responsibilities that then they were then deposed for, you know, one to two hours about those pieces. And I think that creates a real problem with respect to your prior questions relating to what is the harm in potential identification, and I think that's a real example of that.

And I do see the point, and I think the other point I wanted to make is if we're really trying to counter the issues relating to preparedness, I would echo that I think the better way to ensure preparedness is presumptive limits on topics and time, because part of the reason where witnesses may not be prepared is where we get 77 topics, and so a corporation is trying to prepare on all 77 of those topics, which sometimes may be very broad, and it becomes sometimes impossible to do so.

If we had targeted, whether it's 10 or 15 or 20, a limited number of topics, it would enable us to ensure that the witnesses are really prepared on the targeted issues that they're being expected to testify about.

JUDGE BATES: All right. Anything further, Ms. Yap?

MS. YAP: The rest, I believe, is set forth

in more detail in our written submission.

JUDGE BATES: Fine. Thank you very much. We appreciate your testimony.

We'll hear next, again telephonically, from Richard Benenson.

MR. BENENSON: Thank you, and good afternoon. My name is Rich Benenson. I appreciate the opportunity to testify this afternoon in response to the request for comment on the proposed amendment to Federal Rule of Civil Procedure 30(b)(6). Let me take a quick moment to also thank the committee for its efforts and, in particular, express some appreciation for the flexibility around the telephonic testimony, so thank you for that.

My testimony today is going to draw on nearly 25 years of experience, primarily in the class action defense context, primarily in antitrust and consumer protection litigation. I'd also include the year working for a federal magistrate judge, the Honorable William Connelly at the District of Maryland, where I did see a fair amount of litigation over discovery issues. My stint also includes my role as our department chair where I oversaw about 70 litigation professionals and saw a variety of

challenges, often around litigation.

Today I'd like to really be efficient with my time, understanding that a lot of ground has already been covered. I'll focus on two points, if I could. First, I will join with some of my defense bar colleagues in opposing the proposed amendment mandating to confer about the identity of each person the organization will designate to testify.

As an initial matter, I think it creates more problems than it solves, and the detour, I think, created is likely to generate far more mayhem than it creates efficiencies. It's pretty well understood, I think, in practice and in case law that the noticing party has no right to demand any input from the opposing party in the responding organization's process, and the responding organization has the sole right to choose.

I would submit this is one of the few areas in the 30(b)(6) context where I have not experienced a lot of dispute. It seems to be working well, or at least well enough, and not surprisingly, because there are already some bells and whistles built into the process, you know, there's a responsibility to designate folks that have reasonable knowledge, and

there are ramifications, of course, for the failure to do so.

It was interesting to me that one of the questions asked by the committee around this process is, you know, when does this topic come up, and I think it's worth observing that, in my experience, the topic comes up really in only two contexts. One I think is very productive and efficient, and the other not so much.

So in my practice, where it comes up often is where there's an overlap between the fact witness and a corporate representative, and my practice and my experience is that those conversations are productive, and they're happening organically under the current rules, and there's a lot of good and efficiency associated with those conversations.

Conversely, and this is a small minority of times, it comes up for more nefarious reasons associated with seeking "Apex" depositions or for harassment purposes. And my concern with the rule is that it will do nothing to facilitate further conversation around efficiencies and overlap, because I think those are naturally occurring already, and will do a lot to facilitate the more problematic

conversations designed to harass particular individuals or management or leadership folks, and to land at a specific result in terms of who is going to be designated.

So the rule is pretty clear as it works now. My take on the proposed amendments is there's no change intended for that, so this mandate about conferring on identity does seem to me to be a detour that is unwarranted and likely to create more harm than good.

JUDGE BATES: And do you have the same --

MR. BENENSON: Yes, sir.

JUDGE BATES: Do you have the same view with respect to --

MR. BENENSON: Go ahead, I apologize.

JUDGE BATES: I know it's difficult when we're dealing telephonically, but do you have the same view with respect to any requirement to disclose the identity a few days before the deposition occurs?

MR. BENENSON: I do have concerns about that advance disclosure requirement. Again, it happens often in practice, and often when it does happen in practice, it's designed to create some efficiencies. But like other practitioners before me today, you

know, I've had several, many, lots of corporate representatives, you know, subject to this barrage of personal fact testimony and questions as a result of that advance disclosure.

And to be more granular about it, what happens is the moment you disclose that, whoever the representative is going to be, you know, opposing counsel will work the database and find all the email with that person, and typically will ask about that in a fact witness capacity, regardless of whether it relates to or was within the scope of reasonable topics designated for that corporate representative.

And this tension and this abuse, in my perspective, creates far more challenges than it solves and often leads to myriad challenges down the road regarding the scope of testimony that's binding to the corporation, whether this person needs to reappear as a fact witness later on at another time.

I notice I'm about at my time. I don't see the red light, but --

(Laughter.)

JUDGE BATES: But you foresaw it very accurately. It is on. I'll give you the chance to make one last comment.

MR. BENENSON: One last comment. We see plenty of other problematic areas associated with the rule that I think could and should be addressed, and in particular, I would echo some of the prior comments about a clear procedure for objecting to notice, establishing scope, a process that's designed to be like Rule 34, like Rule 26, like Rule 45. In my opinion, more insight, more guidance on process and scope would lead to more meaningful meet and confers and more meaningful discovery motions, if that was warranted and necessary.

Finally, I'd just like to say thank you again for the opportunity to do this and for the committee's efforts on what I consider to be an important topic.

JUDGE BATES: Thank you, Mr. Benenson. Thank you for your testimony.

We'll turn next to Chad Lieberman, who's also on the phone. Mr. Lieberman?

MR. LIEBERMAN: Yes. Good afternoon. I want to thank you all for this opportunity to speak with you and especially telephonically. I appreciate the convenience of that as well.

My background is not necessarily as in-depth

as others. I've been an attorney for the last 13 years. My practice involves all sorts of litigation and trial work on behalf of both plaintiffs and defendants. Currently my practice is primarily defense oriented, and my caseload extends through the country, with a client base that gets into Japan, Canada, and Europe as well. I have had significant experience with respect to 30(b)(6) depositions, both presenting witnesses as well as taking those depositions.

And so first I want to start off by saying I do support the inclusion of a mandatory conferral as proposed in the rule change, and in my professional experience, conferral always occurs, and lawyers regularly confer about the scope and timing of 30(b)(6) witnesses, and so I can tell you all my prior conferrals have been iterative in nature, and more often than not, they do resolve the parties' disputes. But there are times when they don't, and most of the time it has to do with the scope of the 30(b)(6) deposition.

And when I talk about scope, I'm talking about both the quantitative as well as the qualitative nature of the deposition, meaning both the number of

topics as well as the subjective nature of the topics themselves. And so while the proposed amendment does require a conferral, which is a good step, I don't actually think that's far enough. I do believe that you need a presumptive limit on both the number of topics as well as just the overall scope for a 30(b)(6) deposition.

While Rule 30(b)(6) already requires that the topics be identified with, quote, "reasonable particularity," a presumptive limit of perhaps 15 topics would require the requesting party to narrow the scope of the deposition to the issues which are truly relevant in each individual case.

And I've heard the testimony before. I've reviewed the testimony from the prior hearing, I believe in Arizona, and I can say overly broad requests are always going to occur, but I believe that a limitation will actually help focus the parties to narrow the issues, thus lessening expenses, streamlining disagreements, and facilitating a faster resolution.

And like other rules that we find within the code, this rule could be -- this rule and presumptive limit could be modified through stipulation or court

order, such as under Rule 33.

JUDGE BATES: Excuse me.

MR. LIEBERMAN: Flowing therein --

JUDGE BATES: Can I ask a question?

MR. LIEBERMAN: Oh, yes, sir.

JUDGE BATES: Excuse me. On what basis do you pick 15?

MR. LIEBERMAN: Fifteen, to me -- in my experience, 15 topics has been relatively consistent in terms of the number of actual topics needed to facilitate a 30(b)(6) deposition. I am both accustomed to getting 30(b)(6) notices that extend well beyond 15 and those well under 15. However, in my professional judgment, I would estimate that 15 specific topics can be accomplished to get what you need in a given case.

Granted, in some larger class action cases, I would assume that there's other topics that may need to go beyond that, and in that sense that's why I believe a simple presumptive limit set at 15 would enable the parties to either go above or beyond it based upon a stipulation.

JUDGE BATES: Please go ahead.

MR. LIEBERMAN: Thank you. Beyond that, I

would say that a conferral itself doesn't always resolve the issues, and there currently exists no uniform framework for the notice, objection, and resolution of issues related to the proposed scope of a 30(b)(6) deposition, and I can tell you, lawyers and clients crave this framework. I hear very often that judges hate discovery disputes, but I can assure you that lawyers do as well, and I don't believe that Rule 37 adequately addresses the issues that come up during this initial process, for two reasons.

First, Rule 37 is tailored to issues concerning discovery disputes of disclosure requirements, and more specifically, they have to do with violations that occurred in the past, meaning that there is a complaint regarding the adequacy of the disclosure or response, whereas a Rule 30(b)(6) notice requires the deposition to occur in the future, which is why most lawyers have utilized protective orders for most of those issues.

However, protective orders themselves are somewhat incomplete as a process for us to address these issues, because we don't actually have a presumptive limit in which to form a base argument. So much of the protective order argument, in my

experience, has been actually about defining what a 30(b)(6) deposition even is --

PROF. MARCUS: Mr. --

MR. LIEBERMAN: -- in any given case.

PROF. MARCUS: Mr. Lieberman, question. Am I right to understand that you would interpret a numerical limit in the rule as being the basis for an argument to the judge that there should be a protective order because the other side has exceeded that limit and that's the function of having a numerical limit?

MR. LIEBERMAN: That is a function, yes. Yes, I do believe that is a function, as it is with other similar presumptive limits codified in the rule itself. Obviously, in any given case, you'd have good faith bases or even just general agreements between counsel in terms of extending those limits, and there's always reasons to do so. But without a baseline, I feel that there are difficulties in actually presenting these issues to the courts, thus resulting in a wide range of views and court orders on the subject.

PROF. MARCUS: So it's all -- but just to follow up and be clear, so your view is if the rule

included a number like 15, that would be a direction to judges to grant a motion whenever someone has gone beyond 15, unless there's some kind of special justification, right?

MR. LIEBERMAN: My only hedge is on the word "direct." I would say it would provide guidance as a presumptive limit, that without good cause or other reason for the number to be extended, it would provide the judge at least a baseline in which to establish what was and what was not appropriate in a given case.

JUDGE BATES: Mr. Lieberman, the red light is on. If you have a final comment, we'll hear it.

MR. LIEBERMAN: My final comment is simply I do echo the testimony of others who have testified today regarding the nature of a conferral about the identity of the witness. I do believe that should be the unilateral right of the responding party.

JUDGE BATES: Thank you very much, Mr. Lieberman.

MR. LIEBERMAN: Greatly appreciate it. Thank you.

JUDGE BATES: You're welcome.

The next witness, Michael Nelson, hopefully is on the phone as well. Mr. Nelson?

MR. NELSON: Yes, thank you. Yes, my name is Michael Nelson, and I had already submitted written commentary along with my partner, Thomas Byrne, so I'm going to not repeat that, but actually I do want to go right to a point Mr. Lieberman just made. I can't imagine 15 topics in a 30(b)(6) notice in most cases is necessary or manageable, especially given the seven-hour time limitation. Put that aside, though. But I think that seems like part of the problem of what some of these 30(b)(6) notice depositions turn into.

Going to the proposed rule change, first off, it says "must confer in good faith." I want to suggest to you that every one of these rules requires good faith, so I'm not sure we need that phrase "good faith" in there. But then we're -- I think everybody, of course, is focusing in on -- is this concept of the identity. It doesn't -- the rule, the proposed rule, doesn't say what we are to do besides identify, and we can certainly imagine if it was being conferred upon by the parties, it would be more than just John Doe and Jane Doe. It would be who is this person, what do they know, what areas are they going to testify about, and you begin the deposition in the middle of the meet

and confer process.

I do agree with the comments that have been made earlier that most times, meet and confers are done in these situations anyway. But we don't really need it in a rule, and I would think any time that one party feels a need to meet and confer, they usually will notify the other side to do that, and then a conversation takes place, and perhaps a meeting.

So as we look at Rule 30, I think there's a need for a lot of other fixing, and these changes seem to be superfluous and unnecessary and could create a lot of confusion and a lot of cause for you did not identify the right person, or maybe you identified somebody first and now you've identified someone else, and getting into those tennis matches of litigation issues.

I would tell you that when I prepare witnesses in 30(b)(6) scenarios, quite frequently you think you have the right person, especially when you get into really complicated technical issues such as legacy systems and where data's archived, and as you start to work with this person, all of a sudden it becomes apparent that you need to talk with someone else, and that other person ends up being the better

person to submit to the testimony on behalf of the corporation.

So I think this identity part is generally done anyway. It doesn't need to be in a rule and could lead to a lot of confusion and, sometimes will happen, I suspect, a lot of acrimony.

JUDGE BATES: All right. Anything further, Mr. Nelson?

MR. NELSON: Those were my comments. I would encourage the Committee to keep doing its fine work as it's done in the past, and congratulate you on the work you've done so far. Good luck.

JUDGE BATES: Well, thank you very much, Mr. Nelson, and thank you for your testimony. We appreciate it.

Next, another Michael, Michael Neff. Are you on the phone?

MR. NEFF: Yes, sir.

JUDGE BATES: Mr. Neff, please.

MR. NEFF: Thank you. Yes, my name is Michael Neff. I'm an attorney in Atlanta, Georgia. I am a shareholder in a four-lawyer plaintiffs' firm. All we do is plaintiffs' cases. We do not do class action cases, but we do do significant litigation,

catastrophic injury and death, in topics like premises liability, negligent security cases, things along those lines.

And let me speak as a small business owner. We have four lawyers and numerous administrative people, and nobody cares more about the efficiency of this process than a small business owner that is fronting expenses, and paying overhead, and waiting years, typically, for resolution of cases.

For significant litigation that goes into six, seven, and eight figures in terms of what damages are, we're frequently waiting three, five, and last year I resolved a case that took 10 years. So no one wants the efficiency more than the plaintiffs' counsel that is representing real people, because every dollar we front is something that we frequently wait years if we ever get to recover them.

Within the context of 30(b)(6), the identification of the witnesses in advance of the deposition is crucial for the efficiency of the process. I recall Ms. Yap from Seyfarth Shaw talking about how it is not helpful to identify in advance because it creates diversions. To the contrary, respectfully, identifying witnesses in advance allows

us to be more prepared and allows us to save time, because the rules allow for not only a 30(b)(6) deposition but also an individual deposition.

The most inefficient process would be to identify the witness when you walk into the conference room and then waste time trying to figure out what the individual background and experience is of that corporate designee, and then later come back on another day to take that individual's individual deposition, wasting court reporter time, wasting travel time, and wasting attorney time.

JUDGE ERICKSEN: Mr. --

MR. NEFF: Much more efficient --

JUDGE ERICKSEN: Mr. Neff?

MR. NEFF: -- is to give --

JUDGE ERICKSEN: Mr. Neff? Right.

MR. NEFF: Yes, ma'am.

JUDGE ERICKSEN: How much in advance of the deposition would you have to have the identity of the witness in order to take a joint deposition as you're discussing? If, you know --

MR. NEFF: Well, it depends. I don't think there's a one rule satisfies all. It depends on what's going on for the plaintiff's lawyer. I would

say 10 days to two weeks should be a good period of time to allow the plaintiff's lawyer to do some research. One of the other lawyers talked about checking out individual documents in a database, which does occur.

It can help the plaintiff's lawyer be prepared in the event that the 30(b)(6) designee is a recipient of email or other key documents that can refresh recollections, that can impeach positions. So having the opportunity to get that background information done first does streamline and make more efficient the process, so much so that sometimes you can get a case done in one 30(b)(6) deposition.

JUDGE BATES: Please continue.

MR. NEFF: All right. Thank you. So let's see. I don't think that there should be a limitation on the number of topics. Topics can frequently be worked out or depositions be limited to a certain number of topics per deponent.

I'm taking a deposition in two weeks related to the I.T. knowledge and electronic document knowledge of an organization based on making sure that we have all other similar instances, and one of the problems with limiting the number of topics as a

plaintiffs' counsel, I don't know the defense organization, and if I use the wrong term, then I frequently come up empty and have to change the terms, as I'm learning in depositions, to get the right information.

Frequently, unfortunately, word games get played in responding to written discovery and in responding to oral questions, and it takes some process of elimination and learning of a foreign corporation to understand how they keep information, where they keep information, and who has the information.

PROF. MARCUS: Can you explain --

MR. NEFF: Thus this process --

PROF. MARCUS: Excuse me.

MR. NEFF: -- sometimes requires some flexibility and some time in order to get to the right people and ask the right questions. But the process as it is currently written does work in significant litigation. It is effective. And frankly, I feel from a tactical position some of the defense counsel recognize how effective it has been for the plaintiffs and want to change it in part to help protect their clients.

And while advocacy is something that we can all appreciate, it should not get in the way of justice, especially efficient justice under Federal Rule number one. I would recommend the committee please keep the rule as it is. I've been using it for nearly the 25 years that I've been practicing, and it is the most important tool procedurally in the plaintiff lawyer arsenal in order to get justice in significant cases involving corporate defendants.

PROF. MARCUS: So you are opposing this amendment.

MR. NEFF: I do not want required conferrals, because in good faith we will frequently have it, and a lot of lawyers will create waste, frankly, with that. I don't want to have any changes that limit the number of topics or the number of depositions that can get taken. As the rule is currently constructed, it is working for plaintiffs' lawyers.

JUDGE BATES: All right. Thank you very much, Mr. Neff. We appreciate your testimony.

MR. NEFF: Thank you very much.

JUDGE BATES: We'll hear next from Thomas Regan, who is on the phone. Mr. Regan?

MR. REGAN: Yes, thank you. I am the newly listed, as of last week, litigation department leader at LeClairRyan, an Am Law 200 firm. The litigation practice here runs the gamut from high-value litigation and mass tort and class action litigation in commercial tort context, to more run-of-the-mill matters, and I have drawn the information that was in my written comment and for my comments today from my colleagues here at the firm.

Many of those that the committee has heard from today and back in January in Arizona deal with class and mass actions involving hundreds or thousands of plaintiffs, experienced practitioners on both sides, and often significant intelligence on the part of the noticing party regarding the various potential witnesses who could be presented.

While we handle those actions at this firm, we also handle the more run-of-the-mill matters, as I said, that typically involve one or two plaintiffs, where the noticing counsel sometimes has experience in federal court and sometimes does not. I would like to focus my comments on those matters, because my experience and that of my partners is similar to what you have heard when we are dealing with counsel of the

caliber that you have heard from.

Less experienced and more difficult practitioners are not the outliers that has been the experience of Pat Regan and some of the other lawyers -- no relation, by the way -- and some of the others who testified this morning. Indeed, the joke was made that the lunatic fringe was invited but nobody showed up, which illustrates a point.

For every one of our testifying attorneys today, regardless of which side of the V they normally occupy, there are multiple of that number for whom federal practice is not the norm, and for some, they only find themselves in federal court when their cases are removed.

With those practitioners that are less active in federal court, where the attorney is unfamiliar with the company representatives who might be produced, it's our view that the identity of the witness invites little more than an investigation into the witness personally and professionally and the questions that might follow on, which are largely irrelevant to the 30(b)(6) proceeding.

My colleagues and I have encountered questions regarding the personal life of the witness,

the house that the witness lives in, complete with pictures, what kinds of cars they drive, and even an inquiry into a DWI arrest years prior to the deposition.

JUDGE JORDAN: Mr. Regan?

MR. REGAN: While all of these -- I'm sorry.

JUDGE JORDAN: Mr. Regan, can I interrupt you and get a question in here? When that happened, did you object?

MR. REGAN: Absolutely. All of those were objectionable.

JUDGE JORDAN: And did you --

MR. REGAN: And none of them were answered, as far as I know.

JUDGE JORDAN: Then what is --

MR. REGAN: But it drives home --

JUDGE JORDAN: What's the problem if you've got the capacity to do that? If the downside risk is people get out of hand, and you can object and you can stop the getting out of hand, but there's an upside potential in having witness identification, because it may lead to certain efficiencies with structuring combined 30(b)(6) and 30(b)(1) deposition, why not allow some witness identification a few days in

advance?

MR. REGAN: Well, I think the response to that is that the efficiencies that you're pointing to are largely, again, only dealing with counsel of the caliber of the people who are testifying here today. It is those counsel who are intending to use the 30(b)(6) witness for what it is, which is to be the voice of a legal person that does not have a voice of its own and to find out what the corporation knows and what the corporation's position is.

That is my experience when dealing with very experienced attorneys, whether experienced in federal court or not, and when dealing with the better attorneys that occupy the plaintiffs' bar. That has not been my experience, and it has not been the experience of my colleagues, when it comes to the less experienced practitioners who are the ones who are not of that same caliber.

PROF. MARCUS: A question, and I gather also that you think a rule that tells those less experienced lawyers they must confer would be harmful?

MR. REGAN: No, I don't have a problem with the meet and confer issue. As a matter of fact, we do, most of us -- as a matter of fact, all of my

colleagues that I spoke to do conduct a meet and confer with regard to 30(b)(6). Several of my colleagues and I myself do not typically give the identity of the witness in that meet and confer, and when pressed on the issue would normally fall back on the premise that the 30(b)(6) notice is to give a human voice to the corporation, so it really doesn't matter who the witness is.

My caveat to that is when the notice requires multiple witnesses that will be required to respond, I have indicated to my adversary that there will be multiple witnesses, and I have broken out the topics that each is presented to discuss, without divulging the name, because it was not required.

JUDGE BATES: Other questions for Mr. Regan?

(No response.)

JUDGE BATES: Thank you very much, Mr. Regan. We appreciate your testimony.

MR. REGAN: Thank you very much to the committee.

JUDGE BATES: Next up, Jonathan Redgrave, also on the telephone. Mr. Redgrave?

MR. REDGRAVE: Good afternoon, everyone, and I appreciate the opportunity to appear and provide

some brief comments on the rule. I've been involved in civil litigation of all varieties and shapes for about the past 28 years. In looking at this issue, I think the advisory committee properly noted two main drivers for the formulation that has been put forth in the rule, and that's, first, that there are four subjugated to overbroad requests that get crossed off in 30(b)(6) notices, and on the other side there are inadequately prepared witnesses, and both of these are problems as to which I have encountered in my practice over the years.

As far as the rule itself, the rule does come out of the gate with a laudable notion in terms of the amendment of conferral, and I don't think that anyone is really arguing that in best practices, conferral on the subjects, on the issues that want to be raised at the 30(b)(6), I mean, what you want the witness to speak to, is a good thing to try and avoid any controversy and to have witnesses that are well prepared.

But unfortunately, when you have a conferral in the rule and then there's no solution to that when there is a dispute, I think that's the problem in what we've seen. And my experience has been that if you

don't have an opportunity to have some sort of judicial involvement to resolve it short of a motion to quash, you're faced with a very difficult issue about whether you're going to actually make that motion, as opposed to a different motion to limit or qualify what the testimony is going to be. And I think the rule could go further and should go further.

Now, with that, I will say that the issue of the identification of the witness in the current formulation is going after the wrong problem, or maybe it's the wrong solution to the problem that's been identified. Adequacy of the witness is not going to be changed by who the person is. They're either adequately prepared or they're not.

And I think some of the people have noted that they want pre-notification of who the witness is so they can be efficient. That's a different issue altogether than the one I understood to be the driver, and that is can the witness be -- was the witness adequately prepared.

Another comment I have is that the rule, I think, could go further in terms of fleshing out some of the problems that others over the last two years have noted in terms of some the problems presented by

Rule 30(b)(6) depositions on ancient documents or old issues where documents might be more remiss and from a best practices perspective in cases where it's worked very well with people on both sides, we've come up with creative solutions like a writing in lieu of a witness, or what we call a "WILOW," and that actually works well because the other side -- they say they need some testimony from the company or something that they could use in the case, and the company, rather than trying to find a witness and try to prepare a witness on something that no one really has knowledge of, they can do it in a much more efficient way that serves the purpose and allows the case to proceed.

PROF. MARCUS: Could it -- could that --

MR. REDGRAVE: So I think if the rule --

PROF. MARCUS: Jonathan?

MR. REDGRAVE: -- could be reformulated to -- I'm sorry.

PROF. MARCUS: Jonathan, Rick Marcus here. Thank you again for your comments.

MR. REDGRAVE: Hi, Rick.

PROF. MARCUS: Could the sort of thing you just described be a result of the conference that this rule mandates? And that's part one. Part two is if

judicial oversight would be a good thing, does that mean that requiring a conference is a bad thing?

MR. REDGRAVE: No, a conference is a good thing, and I don't want you to take anything away from what I'm saying to say a conference is not a good thing, at least as to the topic and the subject of what you're going to, because that addresses the adequacy as well as the scope issue, was the issue properly framed in the 30(b)(6).

My caveat to this is I do not think we should be conferring about the, quote, "identity" of the witness. If you're really talking about somebody who can speak to some sort of subject, well, that's been covered in the topic question. Saying it's Bob or Sally or something like that gets into a whole collateral issue.

So I think the issue about whether there's judicial involvement and having a better objection process, a better resolution process for the Court to be involved in I think is a different thing that I think the rule could and should address in a different formulation.

But I think in terms of a conferral, I'm not opposed to it. I think best practices really teaches

people that conferral can get to these solutions, that's including the creative line (phonetic), that we've used.

JUDGE BATES: Mr. Redgrave, in your experience, is the identity of the witness who will testify usually disclosed some reasonable period in advance?

MR. REDGRAVE: It's a mixed bag, I'll say. I know in state courts, there are some courts who specifically say a reasonable time before the deposition you need to disclose. Some of our larger cases have been piped into the case management orders, and some of them, people just show up. And again, I've been on both sides of this.

The disclosure of the identity for efficiency, you know, for someone to prepare, that's one thing. I think -- so my experience is -- I'll also add this to the experience, because this is important. When we've been looking at preparing depositions, I've found out, you know, getting into a month of prep with someone, they really can't carry the water, so to speak, on all the issues, and I need to find someone else, or I've had a witness that, quite frankly, when they got through the prep, they

went to their doctor and they really couldn't do it. It was too stressful for them and so I had to find someone else.

If I had conferred -- and it gets into all these issues that I think are collateral to the main point, did the company put up an adequately prepared the witness. Will they meet their legal duty under the rule to put up someone? And really, the issue on the conferral should be what are the subjects, what are the issues that need to be spoken to, are they adequately explained, are they appropriate, are they relevant, all the -- are they proportional, all the proper Rule 26 factors that feed into this.

PROF. MARCUS: Well, I think you mentioned that in some places, maybe some state courts, advance identification is required. Has that produced results in the places where it's required?

MR. REDGRAVE: As far as I understand, in those experiences, they produced the result -- if you have disclosed the name, and the other side, if they wanted to take a personal deposition -- one, they've been able to do that, or at least they've been able to find any other information about the witness they thought that was appropriate.

Again, it didn't need to -- objections is kind of difficult in a fact deposition, but when you're going on and on about collateral issues, I think a party that's deposing a witness is doing that at the risk of annoying the judge, and they're also burning their time.

JUDGE BATES: Mr. Redgrave, we need to --

MR. REDGRAVE: Now, as far as disclosure of a name -- but again, I think that's very different than meeting and conferring in advance, trying to get into some sort of encyclopedic knowledge of all the employees at the company about who's the best person and why, and since the advisory committee note actually says, in its current formulation, that ultimately goes to the producing party, then it doesn't really make much sense to be conferring about identity if you're really responsible. And again, that's different from what you are actually going to point out in terms of a disclosure type rule.

JUDGE BATES: Mr. Redgrave, we need to thank you very much for your testimony and move on to the next witness, and I thank you.

MR. REDGRAVE: Thank you very much. I appreciate the opportunity.

JUDGE BATES: We'll return now to witnesses who are here, and the first witness will be Hassan Zavareei.

MR. ZAVAREEI: Good afternoon. I am Hassan Zavareei. I was a defense attorney at Gibson Dunn & Crutcher for seven years before I started my own law firm, where I've been practicing for the past 16 years. We have an office in Oakland, California and an office here in Washington, D.C. We do predominantly qui tam work and class action litigation, and I have had an opportunity on both sides of the "v" to both take and defend 30(b)(6) depositions in state and federal courts all across the country.

I appreciate your work with respect to Rule 30(b)(6), and I think that some of the changes that you are working on are potentially advantageous. I think that the perspective that I have starting off as a defense attorney really helped inform my work as a plaintiffs' attorney and I think has been, in large part, the key to a lot of the successes that I and my firm have achieved on the plaintiffs' side.

In particular, you know, as we all know, litigation is an adversarial process. We are tasked

with working zealously to represent our clients and to do everything we can to win our positions. And with respect to discovery in particular, when you're on the defense side, if there is bad evidence, if there's evidence that harms your position, it is your job to do everything you can within the rules and within the bounds of ethics to keep that information from the other side. And as a plaintiffs' lawyer, it's your job to do everything you can to pry that evidence out of the defense. There's nothing wrong with that. That's how the system was set up.

But what the rules do is they set a framework for how this process is supposed to work, and every time you fiddle with the rules, you potentially shift the playing field. And I would suggest that that's exactly what many of the defense lawyers who've come before you today have been suggesting.

In particular, by suggesting that there should be some sort of presumptive limit to the number of topics that can be discussed at a 30(b)(6) deposition, what they're trying to do is hamstring plaintiffs' lawyers in their effort to get to the truth, which is what our job is. It's understandable.

That's what they --

JUDGE JORDAN: Let me ask you a question, if I might.

MR. ZAVAREEI: Yes.

JUDGE JORDAN: Mr. Zavareei, you -- in your written submission, you say you're opposing conferring regarding the numbers of matters of examination. Why are you opposed to a discussion about -- or a conferral about the number of topics and the scope of topics, the kind of topics? Why is that a problem? Why is that not exactly what should be happening?

MR. ZAVAREEI: Because I think what you should be conferring about are the topics themselves, not the number of topics. I think talking about the number is a red herring. What you need to be talking about is are the topics that you've designated overly broad, are they confusing, are they unclear, are you going on a frolic and detour, so that --

JUDGE JORDAN: Won't you have to get into some understanding of the number or -- as you're talking about scope, if you're saying we're going to bring somebody in, and you say I -- you know, the more specific you get, the more likely you are to get somebody who's properly prepared, right?

MR. ZAVAREEI: I respectfully disagree with that, Your Honor. I think that -- with respect to numbers, I think as a defense lawyer, the more topics I have, the better off I am, because the better I can prepare my client and my witness for a deposition. So if there's an arbitrary number --

JUDGE JORDAN: None of them seem to be saying that.

JUDGE BATES: Yeah, that doesn't seem to be the view of the defense bar.

MR. ZAVAREEI: Well, because I think what they're -- I understand that, but in actual fact, when I get in depositions and I've given, you know, a broad list of topics that covers everything that I want to do but doesn't get to specifics, and then I start to drill down into the specifics, I hear objections that I'm going outside the scope. And so the idea that having a large number of topics is disadvantageous I think is actually not true.

I think what it does is it gives them an advantage because it gives them an opportunity to cut you off at the knees. That's why they're complaining. It's not because --

JUDGE BATES: Well, assume just for a

moment, for discussion purposes, that a list of topics of 160 is not desirable from the defense perspective, and you have two binders next to you that purport to include examples of such things. Wouldn't either, or both, a presumptive limit or the requirement to confer on the number of topics help to address that? And without those, what would take care of the problem of 160 topics?

MR. ZAVAREEI: Well, I haven't seen what's in the binders, so I can't really speak to that.

JUDGE BATES: Well, just assume that that's what's in them. That's what's been represented to us.

MR. ZAVAREEI: Okay. I understand that. I've never seen a deposition notice that has two binders, and I've doing this for 23 years, so if that's happened -- and this brings up another point, which -- some of the lawyers were saying that oh, they never go to the courts with these disputes. I mean, most of the defense lawyers I litigate against are not wilting violets. If there is a problem, they will go to the Court and they will raise these disputes. If I served an abusive set of topics like this, I would expect to get dragged in front of the judge, who would take care of the problem.

So I think it's important that we have the meet and confer standard. I think that's valuable. I don't think meeting and conferring with respect to the topic is necessary, but again, I don't think it's harmful. I think --

PROF. MARCUS: Do you mean with respect to --

MR. ZAVAREEI: I'm sorry.

PROF. MARCUS: -- an abstract number?

MR. ZAVAREEI: I'm sorry. Yes, I'm sorry, with respect to the number. Thank you. With respect to the presumptive limits on the numbers, again, I just -- I don't think that that's going to be helpful to either side. It's going to be disadvantageous to the goals of the rules, which is to bring forth the truth and to allow the parties to discover the facts in the case.

JUDGE BATES: Any final comment?

MR. ZAVAREEI: No.

JUDGE BATES: Fine.

MR. ZAVAREEI: Thank you.

JUDGE BATES: Thank you very much. We appreciate your testimony.

We'll move to the next witness, William

Conroy.

MR. CONROY: Good afternoon. I'm Bill Conroy. I first want to thank everyone for having me here today and thank the Committee for your time. It's been a long day, a lot of time and effort put into a very important issue that affects all of us in this room and around the country.

By way of background, I'm from Philadelphia. I'm a partner in the firm of Campbell Conroy & O'Neil. We're a boutique law firm. We specialize in trying catastrophic injury cases. This is what I've been doing for the past 35 years around the country. I serve as both national and regional counsel for some of the largest companies in this country. I've had a very deep background dealing with 30(b)(6) depositions.

And I'll be very frank with you. My experience overall has been very positive. Very positive. I deal with professionals at many levels, but I'll also tell you there's been some times where there's been -- things have come off the tracks, and I'm concerned that some of the proposed changes that I'll talk about in a minute may make the problem worse for us. And I say that respectfully, because this

committee is well intended, but I'm here to share with you some of the things that I have experienced.

You know, I believe that conferral is good. When I get a deposition notice, and it has 50 or 75 topics in it, I'm on the phone with opposing counsel about it. We're going to talk it through. We're going to try and get it resolved. I believe conferral is good. I want to avoid at all costs filing discovery motions or motions for a protective order.

I want to focus my comments specifically on two parts of the proposed amendment. The first deals with the requirement that counsel meet and confer regarding the identity of the person to be designated. I think that's a bad idea. I think it's a bad idea. And the reason is because what is it that we're to talk about? Once we get into who the person is, the questions start following, "Well, why is that person being deposed? What's their background?"

JUDGE JORDAN: Would you agree that conferral is appropriate as to the number of witnesses, and if there are to be more than one witness to address a 30(b)(6) deposition notice that there ought to be some sort of designation that I'll have two -- at a minimum, I'll have two witnesses

there, one will be dealing with topics one, two, and three, the other with four, five, and six?

MR. CONROY: Absolutely, Your Honor. I think that's a great way to do it, and frankly, that's how I do it, because I think that allows for an efficient use of the person taking the deposition to understand there's more than one person coming. But my concern is once we're required to start identifying -- to discuss who the person will be, now we're getting into issues about what the process might be. Not all the time, but it's there.

And the other thing, I spend a lot of time in a courtroom. The other thing is how are these 30(b)(6) depositions being used?

JUDGE JORDAN: Can I ask --

MR. CONROY: I know when I -- Yes, Your Honor.

JUDGE JORDAN: -- another thing? Do you typically identify the witness in your practice?

MR. CONROY: I do not. There are occasions when I do, but I typically do not.

JUDGE JORDAN: Why not?

MR. CONROY: Because I've had experience with some lawyers, Your Honor, where when I've done it

in the past, it led to a lot of mischief. I would show up at a deposition for that person, and they have gone back. They've got transcripts from that person from other cases. They're getting bogged down in issues that really aren't part of what the actual person's there to testify about.

JUDGE BATES: You mean transcripts of the witness testifying about some other subjects?

MR. CONROY: Oh, yeah. That happens, Judge. I mean, it's shocking to me that it happens, but I'm here to tell you it has happened.

JUDGE BATES: But putting yourselves in the shoes of the noticing lawyer, shouldn't that lawyer be able to at least look at earlier depositions of the witness to see if the witness testified on the same subjects and to ask questions relating to that? Maybe not to ask questions about other subjects, but why shouldn't the lawyer be --

MR. CONROY: Because I think --

JUDGE BATES: -- enabled to do that?

MR. CONROY: Because I think, Judge, that goes more to them as a fact witness, as opposed to them being there as a corporate witness speaking as to the knowledge of the corporation.

JUDGE BATES: Well, it may or may not, but there may be examples where they testified previously as a corporate witness.

MR. CONROY: Well, to that extent, Judge, what I've seen in my own practice is it's been abused. I'm not seeing a situation where it's being done properly. And what happens is we get mired down in these 30(b)(6) depositions with testimony they've given in the past, and often we spend a lot of time at trial sorting out what is actually the fact testimony versus what they were actually there to testify for about at the trial. So it adds one more layer of complication for us.

JUDGE ERICKSEN: So does --

MS. TADLER: So in your --

MR. CONROY: That's the problem I have.

MS. TADLER: Sorry.

JUDGE ERICKSEN: Does part of --

JUDGE BATES: Go ahead.

JUDGE ERICKSEN: We've heard that one of the problems with a 30(b)(6) is that there's not really an opportunity to instruct a witness not to answer, that that comes at very high risk. And then we've also heard when questions are obviously outside the

30(b)(6), you know, pictures of the guy's house or the car, or something like that, that you just object and instruct not to answer.

So is there a clear line in your mind if the other side -- if you're defending, and the other side has that information, and they start asking questions that, in your mind, blur, is it clear to you when you can and when you can't instruct the witness not to answer?

MR. CONROY: Judge, there really is no clear line, and the problem is I may make a judgment call on that, and depending, frankly, on the court that I'm before, they may look at it in a certain -- under a certain filter and a different judge on yet a different filter. And we don't know where that line is.

JUDGE BATES: And that gray line exists in regular Rule 30 depositions as well.

MR. CONROY: It does, Your Honor, yes. But you know, it's a fact that I've been in situations where really peripheral things are brought up about previously identified witnesses. And we're wasting our time in this deposition on this.

MS. TADLER: So, I'm sorry, I want to go

back to the point that Judge Bates was talking to you about earlier. To the extent that there is a corporate representative that tends to be a repeat corporate representative witness, in your experience are those prior transcripts shared to give context to the noticing party?

MR. CONROY: I've had situations where the person we're going to put up for a deposition -- this is how it's played out sometimes. You know, we've identified the person, because we have a relationship with that particular lawyer. We know how things are going to play out. He or she knows who the person is. They may have transcripts on them. We sometimes can avoid the deposition altogether. That has happened. It's happened in my own experience.

What I worry about, though, is the mischief not with the people that we know that are the professionals and do it the right way. I'm not sure what the right word is, but I've had other experience, and more than just on a few occasions, where putting the name out in advance led to a whole lot of problems.

JUDGE BATES: Do you think that we should assume that mischief is only caused by the noticing

lawyer and never would there be mischief on the other side, for instance, not disclosing transcripts and the identity of the witness to make things more efficient?

MR. CONROY: I think --

JUDGE BATES: Or should we only assume that there's mischief on one side of the V?

MR. CONROY: Judge, it goes both ways. I mean, there's issues -- you know, we're all supposed to conduct ourself a certain way, and I think most people do. But I think on both sides there can be issues.

JUDGE BATES: All right. Thank you very much, Mr. Conroy. We appreciate very much your testimony.

MR. CONROY: Thank you. Good afternoon. Appreciate it.

JUDGE BATES: Good afternoon to you, too.

Next up will be Craig Leslie.

MR. LESLIE: Good afternoon. Thank you for the opportunity to address the Committee this afternoon. My name is Craig Leslie. I'm a partner with the firm of Phillips Lytle in Buffalo, New York. We have about a 180-plus-year history growing out of Buffalo and locations across New York State.

I am fortunate to have a practice that is not just regional but national and, to some degree, international, representing large and small companies. I do commercial litigation on both the plaintiffs' side and the defense side. I also do product liability defense, including assisting sometimes with cases in Ontario and Quebec, and I also do plaintiffs' personal injury work. So I have a broad spectrum of experience on both sides of the "v".

I consider myself first and foremost a trial lawyer, so I approach the proposed amendment to the rules from the perspective of does this help me or provide tools to me to efficiently resolve disputes whether or not they eventually go to trial. So I look at is it going to help me avoid unnecessary motion practice, is it going to help me focus and narrow the issues in dispute before I get to trial, and is it going to help me get a clean record by the time I get to trial for the purpose that I need to use the evidence or defend against the evidence.

And what I would submit at the outset is the present proposed amendment, in my mind and based on my experience, doesn't further those goals and may, in fact, impede them, particularly with respect to the

meet and confer requirement regarding witness identification. I will not repeat the comments that my colleagues have made on that particular point. Instead, I'll focus in on some of the questions that have been asked today of what are the problems with I.D.'ing the witness in advance.

And I can't tell you what that period is that the committee may be thinking about in terms of how far in advance, but I would say this. A requirement that I disclose the identity of the witness in advance without a corresponding duty on the part of the propounding party to give me sufficient notice in advance just compounds a problem that we already have, because if I am getting a 30(b)(6) notice seven days ahead of time, two weeks ahead of time, and then I am within a day, two days, a week having to disclose a witness to respond to a lengthy list of topics, it only compounds the problem that I already have, which is there's not a good procedure structure in place to resolve the problems with those topics.

So while I applaud the idea of meeting and conferring about the topics, I would say to you that proposed part of the amendment happens anyway by

necessity. I can't produce a witness to address more than 100 topics in a notice that I receive. I have to meet and confer on it, or else I'm stuck. I'm never going to be able to prepare a witness to address those topics. I have to get those resolved.

JUDGE JORDAN: In your experience, how often do you actually give the witness identity?

MR. LESLIE: Because of my past experiences, I no longer do so, is the shortest answer to that question. My practice now is not to disclose the identity of a 30(b)(6) witness when I receive a notice, because as a young lawyer I proved the adage that my law school civ pro professor taught me, which was you will learn these rules now or you will learn them by the cuts and bruises you suffer along the way, and I have suffered a few.

My practice when I was a younger lawyer, when I was starting out, was to try to be as collegial as possible with respect to the disclosure of the witness in advance. It proved to be exactly the parade of horribles that you've heard about, where my witnesses are there to speak on behalf of the company's knowledge, and the deposition devolves into an examination of their personal finances, what

they've done, perhaps, if they're a retiree in some instances.

I have legacy cases where the product has an extensive tail life, and we have to go back and sometimes have retirees represent the company because they're the only ones with knowledge, and in those instances it became an examination about those issues, which of course I would object to. I am hesitant ever to direct the witness not to answer except on privilege, because I am in many jurisdictions where you can't direct not to answer except for privilege.

And it also devolved into this strange, quasi, is it a 30(b)(6), is it a 30(b)(1), and so when I talk about getting a clean record, it makes it incredibly difficult to get a clean record when you have a party coming in on a 30(b)(6) notice and then they go off and they veer off into the 30(b)(1) territory.

JUDGE ERICKSEN: Could I -- could I --

JUDGE JORDAN: Help me understand -- oh, I'm sorry.

JUDGE ERICKSEN: Could I just explore that with you? And I think it's more to the conversation I had with Mr. Lieberman on the phone. Can you imagine

a way that the problem, if you will, of the -- we'll say plaintiffs and defendants, of the plaintiffs not knowing whether the very witness who they'll be facing is somebody who has previously testified on the same topics on behalf of the corporation? So that --

MR. LESLIE: Right.

JUDGE ERICKSEN: That seems to be information that leads to a great deal of efficiency. Can you think of a way to address that without requiring identification of the 30(b)(6) witness in every case?

MR. LESLIE: I would suggest that in cases where we're dealing with particularly mass torts or repetitive injuries from a product, typically the proponent of that notice can get transcripts about the company's knowledge regarding that product without knowing the specific witness that I'm going to bring in. I don't necessarily need that knowledge either when I'm on the other side.

JUDGE ERICKSEN: How do you get it?

MR. LESLIE: Well, there are the databases that are out there. There is sharing. Just like on the defense side, on the plaintiffs' side there is sharing of transcripts. I actually have less access

because I'm not a full member on the plaintiffs' side. I straddle that line. But the transcripts are there.

If I want to know about a particular defect in a product, this ratcheting component of the product, I can get, by reaching out to my colleagues, transcripts about the company's knowledge about that defect without it mattering who the company witness was. Now, it may very well be it's the same witness, but I can get those transcripts. I don't need a specific name to get those transcripts on that defect.

If, on the other hand, I'm in a case where my person is there to talk about specific knowledge of this particular product, and what I'm being asked to do is give a name so that the other side can go get transcripts about some other product, it's not advancing the purpose of 30(b)(6). You're not getting the knowledge. You're trying to get a sound bite, or you're trying to trap that witness. So in my practice, in my experience, I don't disclose that.

I see my time is up. Happy to answer any other questions. I would only close with this otherwise. As a litigator, like I said, I look at it as my toolbox. The initial package of proposals that this committee discussed over a year ago had some good

ideas in there with respect to how to make these objectives easier to obtain and to resolve litigation more efficiently.

I would submit this proposed amendment isn't it, and my fear is making these tweaks, this rule will sit for another 50 years before we can fix whatever mischief occurs if this proposed amendment's adopted.

JUDGE BATES: I'll make an observation, Mr. Leslie, with respect to the identity of the witness, disclosing the identity of the witness.

MR. LESLIE: Yes, Your Honor.

JUDGE BATES: What you've said seems to be what we don't want to see happening, which is you've said that your experience has taught you to be less forthcoming and less cooperative in this discovery process.

MR. LESLIE: I wouldn't say less cooperative, Your Honor. What I would say is --

JUDGE BATES: Well, not to disclose the identity of the witness.

MR. LESLIE: But the identity of the witness is irrelevant in the 30(b)(6) context because it's the knowledge of the company. Now, that's not to say that if I am in a situation where I have someone who is

seeking a 30(b)(1) notice of that same witness, or I know has indicated they intend to, that I won't say to them, "Look, let's coordinate here. I think this may be the person I'm going to produce." But it's going to depend upon my experience with that other law firm or set of lawyers, because otherwise it devolves into that personal examination and it muddles that record of that proceeding.

JUDGE BATES: Thank you very much, Mr. Leslie. We appreciate it.

MR. LESLIE: Thank you all very much.

JUDGE BATES: Next up, Lauren Barnes. Good afternoon.

MS. BARNES: Good afternoon. I didn't trip on the way up here, so I'm feeling like I'm winning already.

(Laughter.)

JUDGE BATES: You're halfway there.

MS. BARNES: Well, I haven't said anything about walking back yet. My name is Lauren Barnes. I am a partner in the Boston office of Hagens Berman Sobol Shapiro, and I sue drug companies. I sue drug companies on behalf of businesses, consumers, and sometimes governmental agencies. Those are entities

that have been harmed economically, usually by what we allege are anticompetitive, antitrust behaviors by these drug companies.

My plaintiffs represent a class, and usually throughout my practice those plaintiffs have been businesses themselves. They are wholesalers. They are pharmacies. They are insurers. So like several people have said today, I have been on the receiving end of as many 30(b)(6) notices as I have drafted and sent out. I have more than my fair share of experience negotiating the receipt of one, defending a -- preparing a witness and defending that deposition, as I have trying to put one together and sending it out and negotiating with the other side.

I thank you for the opportunity to speak with you today. I support the proposed amendments that this Committee has put forward. I think they are fair and balanced in the true, and not the Fox News, sense of the words. The proposed amendments, in my experience, simply codify what is the best practice already.

Efficiency is queen in my world. As Mr. Slavik mentioned earlier, I don't get paid if I am not efficient. My firm cannot cover its costs if we don't

move a case forward and get to resolution. So every hour that I work on a deposition or a topic that is pointless is an hour that I don't have any guarantee of recovery. Efficiency, in turn, depends on collaboration and transparency.

So what happens in the cases that I'm in? We serve a notice with the topics that we think that we need testimony on. We draft the topics with as much particularity as we can, which may mean a lot of topics. It may mean a lot of subtopics.

PROF. MARCUS: Could you tell us what "a lot" means?

MS. BARNES: Sure. So I looked up the most recent one that we sent in a case, and it had 26 topics. Several of those topics had particularity, right, so there were some subtopics. There were 23 of those. So is it a 26-topic notice? Is it a 49-topic notice? It depends probably on which side of the V you're on to count that.

That was a case where we were alleging two pharmaceutical manufacturers had engaged in fraud, and the underlying patent litigation that we were after had gotten to a certain point, and we issued that notice at a certain point in the course of discovery.

That may be different than one that I am thinking about now where there are different numbers of defendants, we are at a different -- that the underlying litigation went to a different point in time, that the record is different.

So the number of topics, I submit, depends greatly on the type of case that we are talking about, the status of the discovery, the number of things that the parties have talked about. Every single time that I get a 30(b)(6) notice, we have a meet and confer. It's just routine. And every time that I receive a 30(b)(6) notice on behalf of a class representative, I am asked who I will put up as the deponent, and I always tell them.

JUDGE JORDAN: Do you have --

MS. BARNES: I don't see any need to hide that.

JUDGE JORDAN: Do you have lawyers that you ask that information of who decline to give it to you?

MS. BARNES: I will say that I am starting to see that a little bit more, but the routine has been that we ask and we are ultimately told -- and part of the reason for that goes to the sufficiency of we often have individual notices as well as 30(b)(6)

notices, and multiple people answering various topics within the notices that we put out.

JUDGE JORDAN: Would it then be -- is the rule working just fine, then?

MS. BARNES: I think, frankly, the rule is working pretty well. I would submit that the meet and confers are already happening. It's a best practice. I don't think that it hurts to codify a best practice.

JUDGE BATES: Let me ask one question with respect to conferring. Do you, in your experience -- whether you're noticing the deposition or defending the deposition, do you, in your experience, confer as to the identity of the witness?

MS. BARNES: No. And I don't think that I get a say in who the defendant is going to put up. I may have a question about it. I'll give an example. Recently, for the patent-related topics of the 30(b)(6) notice, we got the name of somebody, and we -- we did, we went back to the database, and we looked, and we had 13 documents from that person, and this is a database that has probably two million documents, and all of those 13 documents post-dated the time period that was at issue.

So I did go back and say, well, wait a

minute. Why is it this person and, frankly, did we miss a whole lot of documents? This is a custodian that we should have learned about earlier in the process." And what we were told is that person had switched jobs and come in at that point, and that's why they were putting them up for the patent issues at that point. That's fine.

I wasn't saying that this wasn't the appropriate person. I just wanted to understand a little bit more about where it is and are we doing open and transparent discovery so that we are getting at what the discovery rules are all about, which is sharing information so that we can winnow it down, figure out what claims are supported, what claims can be defended against, and move forward. I think the --

JUDGE BATES: I'll give you a moment for another comment.

MS. BARNES: You know, I think I'm going to stay there.

(Laughter.)

JUDGE BATES: All right. Like to hear that.

MS. BARNES: Thank you.

JUDGE BATES: Thank you very much. We appreciate your testimony.

And next we will hear from Palmer Vance.

MR. VANCE: Good afternoon. I'm Palmer Gene Vance and I currently serve as chair of the ABA Section of Litigation. However, these comments, as with all comments from section leadership to this and the other committees, are offered in our individual capacity and on behalf of other section leaders as reflected in our written comments. They do not constitute the official position of the section or of the American Bar Association.

The section's Federal Practice Task Force has been engaged in this process with the committee for several years, and we appreciate this opportunity. The section's task force report of November 23rd, 2015 recommended changes that are far more extensive than those that are now under consideration, but we remain grateful for the attention that the Advisory Committee has given all of our suggestions, and we do view the current proposal as an improvement of the rule.

We have two specific comments to make today: First, as to the meet and confer proposal, the only current mechanism for obtaining judicial intervention to resolve a Rule 30(b)(6) dispute is a formal motion for protective order by the party or the other person

served with a 30(b)(6) notice. This proposed change is helpful in requiring that parties communicate in advance of 30(b)(6) depositions. But we submit that it does not go far enough as a practical matter.

We think that the rule should go a step further by including a provision for counsel to set forth in writing any issues with the notice before a meet and confer and include the language that we previously suggested in our May 24th, 2018 letter to Judge Campbell, and I quote, "If the parties cannot resolve material disagreements, they are encouraged to request a conference with the Court to obtain an early resolution of the matters," end quote.

JUDGE JORDAN: Can I ask you a question here now, Mr. Vance?

MR. VANCE: Yes.

JUDGE JORDAN: Because I'm not sure I entirely understand. You're careful to say that you're the ABA Litigation Section chair, but then I thought I heard you say you're not speaking on behalf of the ABA Litigation Section, but you have -- continue to speak in terms of the "we," so I want to make sure I've got this straight in my mind.

If I heard you right to say we think the

proposed rule amendment is good, I want to know whether that's Palmer Vance's position or that's the position of the ABA Litigation Section.

MR. VANCE: It is my position and the position of those signatories on the written comments that we have tendered, Your Honor --

JUDGE JORDAN: Okay.

MR. VANCE: -- which consists of the current upcoming chairs and members of the council and the Federal Practice Task Force of the Section of Litigation.

JUDGE BATES: Can I ask you a follow-up question to that?

MR. VANCE: Yes, sir.

JUDGE BATES: Specifically with respect to that group, can you represent to us that that group is a fair representation of both plaintiffs' lawyers and defense lawyers?

MR. VANCE: Yes, I can. The Section of Litigation is the largest organization --

JUDGE BATES: I'm just talking about the people who signed the letter.

MR. VANCE: Sure. Understood.

JUDGE BATES: Not the section.

MR. VANCE: Right. And to answer that question, Judge Bates, it is a broad church, and so it includes within it multiple perspectives, the plaintiffs' bar, the defense bar. And the leadership and those people who have signed the letters are broadly representative of the membership of the section, which is broadly representative of litigation practice on all sides of the "v".

PROF. MARCUS: Mr. Vance?

MR. VANCE: Yes.

PROF. MARCUS: The section has been immensely helpful for a long time to this committee, but I'm wondering if you can tell me where else in our rules there's a rule that says parties are "encouraged" to do something.

MR. VANCE: I am not aware of the use of the word "encouraged" in that context, and perhaps this would be something more appropriately placed in the comment. I understand the concern about something that is encouraging rather than directing. Nevertheless, we think that this approach is consistent with the 2015 amendments where we are seeking efficient justice, and they encourage more informal practices for hands-on Court involvement.

PROF. MARCUS: I'm sorry to interrupt you here.

MR. VANCE: Sure.

PROF. MARCUS: One other thought occurs to me that I think could fit in. Do you know if any of the folks on the -- about two dozen, I think, signed that letter.

MR. VANCE: Yes, sir.

PROF. MARCUS: Ever bring up the 26(f), Rule 16 point, a case management provision that would be available to deal with the problem on which we might encourage them to act sensibly later?

MR. VANCE: I can't speak to the other signatories with respect to that specific question, but I can give you my experience. I practice largely in Kentucky, in the Eastern and the Western Districts of Kentucky. Our judges are very much of the view that to the extent that informal resolution of these types of issues can be accomplished, it should be encouraged, and often, that's in the scheduling order, provisions such as you cannot file a discovery motion until you have had an informal conference with a magistrate judge. And I think that is the spirit that the 2015 amendments get to, and we believe that it's

appropriate that that same spirit should be taken into account when looking at Rule 30(b)(6).

With that, Judge, I think my time is coming to an end. I would make one other point. We had a second topic on which we provided comments, and that has to do with the number of 30(b)(6) depositions. And without going into the rationale, which is expressed in our written comments, our suggestion is that each seven hours of a 30(b)(6) deposition be counted as a single deposition toward the limit set forth in Rule 30(a)(2), and we have set that forth in our comments previously and in our comments in advance of this hearing.

JUDGE BATES: Good to see you again, Mr. Vance. Thank you very much.

MR. VANCE: Good to see you, Judge Bates. Thank you.

MR. VANCE: Next we'll hear from Tobias Millrood.

MR. MILLROOD: Good afternoon. My name is Tobi Millrood. I'm a partner in the law firm of Pogust Millrood, located just outside of Philadelphia. For over 20 years I have represented plaintiffs, mainly in the area of defective drug and device litigation. I

also serve as the vice president of the American Association for Justice, the largest plaintiffs' trial bar in the world, whose mission is to preserve the constitutional right to trial by jury when people are injured by the negligence or misconduct of others.

I present to the Committee today on behalf of AAJ, but I can share my wealth of personal experience as a litigator, having served as lead counsel in numerous drug and device litigations and having noticed and/or taken dozens of 30(b)(6) depositions.

AAJ thanks this committee for its time and thoughtful consideration in evaluating the possible 30(b)(6) amendments. As indicated in our submission, we voice general support for this rule, particularly given the balanced tenor of the language of the draft rule, which ensures that plaintiffs will have a fair shake in the 30(b)(6) discovery process, with meet and confer requirements and the disclosure of the identity of the witness.

Our suggested changes are few, if any, but we voice specific objection to the requirement to confer over the number of topics in a 30(b)(6) deposition notice, as it will result in unintended

consequences that will harm the discovery process and invite protracted litigation and delay.

There are a couple of preliminary matters I want to raise that follow from discussion from this morning. First, I want to emphasize a comment you made, Judge Jordan. You addressed a question to elicit an answer from a witness today in which you stated the answer should not be for the benefit of the plaintiff or the defendant but of all parties.

And I emphasize that at the outset, because one thing that struck me today is that at times it devolved into adversarial litigation of the rule. Our goal here should be to achieve a balanced rule for all parties.

JUDGE JORDAN: Well, on that topic, on that very point, why is it less than good and fair for the system generally to have, among other topics discussed at a meet and confer, a discussion of how many things are going to be reasonably covered in the course of a deposition? Why should the number of topics be off the table?

MR. MILLROOD: Thank you, Judge. I think the meet and confer on the number has two problems. It has both a superfluous nature and it has unintended

consequences. First of all, as has been pointed out earlier today, the rule already requires that noticing parties describe with reasonable particularity the matters for examination, and there, the quality should dictate, not the quantity.

But there are unintended consequences to discussing the number of topics. First, it will result in a broad designation of topics, as has been discussed before. Second, it will result in multiple numbers of 30(b)(6) depositions, which is an unintended consequence. And third, I believe that it undermines the authority of the Court to manage the specific litigation before it.

JUDGE JORDAN: Help me understand that second one. You're right, we've talked about the first one. How does talking about the number of topics going to end up meaning there'll be more 30(b)(6) depositions?

MR. MILLROOD: Well, let's say, for example, that either there was a presumptive limit imposed, such as 25 topics that can be addressed at a deposition.

JUDGE JORDAN: At this point, I'm not even talking about presumptive. I'm just trying to get --

you've said we don't want to have to talk about the number of topics. I'm trying to understand what's the problem with that. What's the problem with discussing with the other side the number of topics?

MR. MILLROOD: Well, that's a very fair point, because if I served a deposition notice that had 30 topics, and I received a phone call from opposing counsel, and she said, "Look, I've got a problem here that you've listed 30 topics in number." I said, "Okay. Could we talk about each one of them? Let's talk about what are the specific matters for examination, because if your problem is just the number, then it seems to be a form over substance issue. If your problem is a specific topic, let's talk about it and see how we can narrow it," which is why when the rule talks about meeting and conferring on the matters for examination, that is a salutary goal.

But the specific number, I don't know what we achieve by saying, "I'd like to talk to you, Tobi. You've got 30 in number here and that's a problem."

JUDGE BATES: But it's linked. What's wrong with having number and description being a subject for discussion? I'm with Judge Jordan on this. I don't

understand what the problem would be from having a discussion with respect to number, so long as there's no presumptive limit.

MR. MILLROOD: Right. I mean, I think, again, it's a little superfluous because I don't know what it actually achieves. I'm happy to talk about it. If someone were to call me up and say, "Let's confer about the number of topics you've listed," I'm happy to discuss that. But I don't know how that takes us to the next step in the litigation. By putting that into the rule, what does it achieve?

Now, I do agree, and I think one thing that all parties have discussed today, is that we should not use the rules to enable discovery abuse. We should all act with best practices. And I echo the sentiments of Ms. Barnes that this would be a great thing to achieve to codify best practices. If the majority of lawyers are good lawyers that are talking about these issues and identifying the witnesses, then let's put the majority of what happens into a rule to ensure that those outliers follow that.

And I hope that I've answered your question, but I'm happy to address it further if necessary.

JUDGE BATES: Any other questions for Mr.

Millrood?

JUDGE ERICKSEN: I wonder whether there isn't a collateral benefit in putting the meet and confer requirement in the rule, in that if you have a witness who's ill-prepared, and then you end up having to go to court for sanctions to say they didn't have an adequately prepared person, aren't you in a better position to make that motion if there's a rule that says, formally, we have to discuss the topics? So then it's going to be harder to come back in defense of your post-deposition motion to say, you know, "We thought we were doing a fine job."

So it's not just putting best practices into the rule. It's actually giving some formal recognition to the opportunity to narrow the topics such that you don't run into the problems downstream.

MR. MILLROOD: Yes, Your Honor. I agree that there should be a meet and confer requirement, and I agree that it helps further the litigation. If you've discussed it and it wasn't resolved, it helps with the motion practice. So I want to be crystal clear. We're not opposed to the meet and confer requirement. We just didn't know how the number advances it. But talking about it is fine.

I just want to make one final point, that I know that there's been some consternation at times as to whether or not there should be meet and confer over the identity of the witness. And I think one solution which has been alluded to, Judge Bates, is that what if we just required the identity of the witness but not a meet and confer, because I know there's been consternation that we want a seat at the table, or we want to pick who the witness is.

I think if there was an identity of the witness in a sufficient number of days ahead, that would solve the problem as well.

JUDGE BATES: Thank you, Mr. Millrood.

PROF. MARCUS: Could I? There is --

MR. MILLROOD: Yes.

PROF. MARCUS: -- one question to think about and perhaps supply later if you wanted to. Does AAJ have an idea of how to put into the rule something that would achieve the goal of judicial supervision where needed? Earlier witnesses have said there isn't any way to do that. Are you in favor of that and, if so, how?

MR. MILLROOD: Well, we will follow up in particular with comments, but I do want to point out

that we are in agreement with the comment made earlier by Judge Ericksen about the final paragraph in the committee note, that that really does help to serve teeing this up in the Rule 26 context.

JUDGE BATES: Thank you again, Mr. Millrood.

MR. MILLROOD: Thank you.

JUDGE BATES: Greg Schuck is next and the last witness before we take a brief break.

MR. SCHUCK: Good afternoon. My name's Greg Schuck. I'm from Birmingham, Alabama. I practice with the firm of Huie Fernambucq & Stewart. My practice is primarily in the area of product liability defense work for manufacturers. I'm admitted in states regularly across and throughout the United States in both state and federal court.

I also have the opportunity, and have had for 25 years, to continue to represent some smaller mom-and-pop-type companies and do that on a pretty regular basis. Small litigation, business disputes, sometimes third-party subpoenas in state and federal court on 30(b).

So I come at my testimony from that perspective, and one thing I would urge is let's not get lost on the fact that there's so much talk about

big mass litigation. When I hear about a lot of requirements and things that are going to be imposed, I'm worried about my smaller defendants or third parties who are receiving subpoenas and how much work we would have to do in those cases.

For example, oftentimes we don't identify witnesses. When somebody's getting a third-party subpoena, they're a former employee and their driving record, or whatever it may be, that's not going to happen sufficient days in advance. It's not going to be 14 days, as people would suggest. So just keep in mind that this rule applies to everybody if we make changes to it.

JUDGE ERICKSEN: So are you saying that any requirement for witness identification would have to be sufficiently in advance, like 14 days, so that it could be combined with the requisite notice for a 30(b)(1) deposition at the same time?

MR. SCHUCK: I am not for any notice requirement as to the identity of the witness, in part because --

PROF. MARCUS: With the mom-and-pop organizations, do you typically choose the witness the night before?

MR. SCHUCK: That has happened. Sometimes it's the day before, especially when it's a third-party subpoena, and it's a very narrow topic, and I've met with the owner of a company, and there's five people in the company, and we get there, and while he owns the company, he's not the best witness to talk about the records and how they were kept, and the driver logs, or whatever it may be. So it's a problem on that side of it.

It's also a problem, as other witnesses have talked about, for the large corporate defendants, and that's the bulk of my practice, let me be clear. And I have had mischief in cases. I can give you specific examples of former employees' houses on Google Earth being shown to them when we have given the name in advance, divorce records being brought up, just all sorts of things.

And unlike maybe some other people, I tend to let those questions get asked, because a lot of jurisdictions, I am not supposed to instruct not to answer unless it's privileged. And whether this person has a big house or a ranch isn't privileged, and so those questions go forward, and it has been a problem.

With that said, my experience is we meet and confer on the issues. We meet and confer on everything, typically, in these depositions. The best meet and confers happen before the notice is served. We talk about topics. We talk about numbers of topics. A limit would be great, but at least having the discussion gets us somewhere.

I've had cases where I've helped draft the notice, because there's technical terms, and somebody raised that about if there's these terms, and it's a term of art to the company, let's have a discussion. I'll give those to you, because I don't want you giving me a notice that just confuses the issue more. If you're looking for this type of document, ask for it. This is what it's called. And we have those discussions regularly.

But a requirement as far as identifying the witness in advance, either some specific time or even meeting and conferring on it, is problematic for a number of reasons. It changes. I can give you numerous examples where it's changing right up to the day before. Somebody's sick, the witness is somewhere. It happens. Does that happen every time? No, especially the large manufacturers. We typically

would know in advance and we're moving towards it, but when that change happens, what happens then? That would be my question.

A meet and confer requirement as written gives me great concern, because I don't know what to say in a meet and confer. If my client doesn't want me to identify the witness two weeks out, or we're not ready, the answer is simply no, and I can't really say, "We're still not sure who it is," because that potentially breaches a privilege. I can't say, you know, the reasons behind why we're choosing a witness or not choosing this witness. All those things get into my work product and potentially privileged issues.

JUDGE ERICKSEN: What if it said, instead of "the identity of each person," if that part of it said, "and the number of persons the organization will designate to testify?"

MR. SCHUCK: Well, the identity still gives me tremendous concern.

JUDGE ERICKSEN: No, but this takes out the identity. Take out --

MR. SCHUCK: Oh.

JUDGE ERICKSEN: -- "identity of" and

replace it with "number of."

MR. SCHUCK: That does not give me pause, and in my practice that's what we would do. Sometimes we get notices -- I've had some of these type notices, and we would have to divide it up. Sometimes it's two. Sometimes it's eight witnesses. I've had eight witnesses for one notice. And we would say, "All right, on Monday, Witness A is going to cover these six topics. On Monday afternoon, here's what we're going to cover," and we've done it for a week where we finish on Friday afternoon with eight witnesses, and that, I think -- you're hearing most people do that.

I also will say, and I know I'm about out of time, I give the name of with a lot of good lawyers. Where I have a reputation with people, and they have a reputation with me, if they ask, I'm going to give them the name. That's typically what happens, and it's happening now without any change to the rule.

JUDGE BATES: But you want to preserve the ability not to share that information with lawyers who you don't trust as much.

MR. SCHUCK: Well, it's not so much that I don't trust as much. I've had it where lawyers I don't know, I've given the name. I had it several

weeks ago in a case. I've gotten more requests since this proposed amendment came out for the identity --

JUDGE ERICKSEN: You're welcome.

MR. SCHUCK: -- than I had in --

(Laughter.)

MR. SCHUCK: Honest truth, in 24 years, I've had more in the last six months where people have been asking. And I had a lawyer I have never done it with beginning of January, and I said, "All right, please tell me this isn't going to devolve into something where you're going to bring in all this extracurricular stuff." And he goes, "No, let me tell you why I want it." I said, "That's fair." Deposition went off second week of January without a hitch.

So the meet and confer process is great. It works. It's what the rules require, but identification is a big problem.

JUDGE BATES: All right. Thank you very much, Mr. Schuck. We appreciate your testimony and the testimony --

MR. SCHUCK: Thank you.

JUDGE BATES: -- of all the witnesses who've been appearing, and we're now going to take a brief

break. We will resume in 10 minutes by the clock from the back wall and the front wall, at 3:16.

(Break.)

JUDGE BATES: And since I've gotten compliments for keeping us on track, I'll try to do so for the last segment.

And our first witness now will be Paul Bland. Mr. Bland?

MR. BLAND: Thank you. Thank you, Your Honor. I'm with Public Justice. I'm the executive director. Our organization both litigates a wide array of cases, environmental, consumer, worker cases, and then we also have a larger membership, about 2700 lawyers, virtually all plaintiffs' lawyers, and so I consulted with a lot of the lawyers who are members and supporters and whatnot in preparing for our testimony.

What I'd like to talk about is particularly in the morning, the second session before lunch, a number of the defense side witnesses in a row came up and were arguing in favor of having presumptive limits on the number of topics, and it generated a lot more questions in a way that sort of alarmed me, so I'd really like to focus my five minutes talking about

that particular issue, if I may.

So historically, one of the things that was surprising to me about that was that historically, the majority of the litigation where people are fighting over Rule 30(b)(6) tends to be over how specific the topics are. The topic's too vague. Are they giving the company notice of what they're really going to be asked for? Is it going to turn out to be something that's surprising?

If what you do is you were to have a limit on presumptive number of topics to, say, 10 in a deposition, what that's going to do is one of two things is going to happen. And so they both come out, but I think that the second one really goes to this point I was just making about what people have really been fighting over.

So one thing that's going to happen is there's going to be a lot of cases in which 10 topics, particularly if you're going to be very specific, is not going to be nearly enough. So are you going to have a rush of people going to court and filing motions? And this goes to the question that's asked about who is the burden going to be on. Do you want to have -- if someone is coming in with a binder that

supposedly has 260 unfair topics that's disastrous for the company, do they have to go and seek a protective order, or should somebody who has 12 topics have to go and seek an order, you know, for leave from the numerical limit?

I think what's more likely to happen is that people are going to write 30(b)(6) notices differently. So right now, if you might write a notice which would have a whole bunch of topics, but they're actually quite specific -- so we do a lot of Clean Water Act cases, so we will frequently know that there were emissions that exceeded the legal limits into a river on a variety of dates. If you specify that these are the dates we want to talk about, and we want to know who was handling things, what was going on on those dates, you could have 40 topics.

Now, if you're going to say, "Oh, you're limited to 10 topics," we'd have one topic. We'd say, "Oh, we want to know every time you leaked something illegally."

PROF. MARCUS: How do you define topic? Taking your example, and this is occurring to me as a problem of applying, so is it one topic to say we want to know about your data concerning release of whatever

you're interested in on the following dates, and you list 12 dates? Is that one topic or 12?

MR. BLAND: So the answer to that is that that's going to be what people are going to be fighting about, and going in front of judges, and briefing and arguing, and you're going to have a whole bunch of exciting new litigation over what is the definition of a topic, because -- I think that Ms. Barnes was speaking to this before, where she said, "Well, you know, one way of looking at it is we have a deposition notice of 23 topics, but then we have subparts where we're going into specific issues. Is that really 49 topics or 23 topics?"

Or similarly, you look at what Mr. Slavik was saying before lunch, where he said that there were -- he had a deposition that took three hours but had 47 topics, and he said basically the topics were so specific that he was given extremely specific notice, "We want to know about this particular thing," and that the topics actually provided so much specificity they were able to get through them in a couple of hours.

Now, you could change that around. Instead of giving really extremely specific notice, you could

give a really broad topic, or you could have an exciting opportunity to go in front of a magistrate and fight about that.

But I think that if you go with something artificial, and say there's going to be this strict numerical limit, what you're going to do is you're going to push people exactly away from what you want, which is greater specificity, and you're going to create a new opportunity for there to be a lot of litigation over this idea of exactly how do you define a topic versus a subpart, and so forth.

I think this goes back to the point that Hassan Zavareei was talking about, which is do you want to have fights over the substance of issues, or do you want to have fights over the formalities of them. He's saying when he was getting pushed -- and, Judge Jordan, you were pushing quite strongly on this issue of, you know, why are you objecting to the idea of talking about the number of topics, and he was saying, well, look, I'm totally open to talking about what are the topics, so are the issues that we want to raise actually the important ones in the case, but talking about the number of them I feel like is going to get us into this, you know, dancing on the head of

the pin and formalities and so forth. I think that -- I don't think -- and so I think that's a reasonable position from my standpoint.

The last thing I want to end with, though, is that there's been a good point that's been made here about how you want to have rules for everybody. And I will tell you that I've heard three people today, Mr. Parker, Mr. Schuck, and Mr. Conroy, essentially say in response to a question, "Well, do you tell people who the witness is going to be," say more or less some version of this, this is a rough paraphrase with my spin on it, but I think that this is effectively accurate, "We tell people who we think are good people, and if we think they're probably bad people, we don't tell them."

Well, that's a very strange way to run the discovery rules. I mean, is it really that you're not telling bad people, or they may be not telling people who are really good lawyers who think they're going to go after their clients and get a big recovery for the plaintiffs? I mean, you cannot have a set of discovery rules which are saying, well, you know, this information is information to be disclosed to people where the plaintiffs' lawyers are ones who the defense

lawyers like and not other people. That's a really bad approach. Thanks very much. My time's up.

JUDGE BATES: Thank you very much. We appreciate it, Mr. Bland.

Next, Philippa Ellis.

MS. ELLIS: Yes.

JUDGE BATES: Ms. Ellis?

MS. ELLIS: Yes. Good afternoon, Mr. Chairman and committee members. Thank you for the opportunity to allow me to come and provide a comment and testimony today. My name is Philippa Ellis, and I practice in Atlanta with a small firm, and I represent both plaintiffs and defendants, and I have been on the receiving side and sending side of 30(b)(6) deposition notices. My career over 30 years has included handling tort litigation, commercial litigation, product liability, and I represent small businesses, very small businesses, as well as global enterprises.

The proposed amendment -- and I have come here today from Atlanta as an individual who practices in the federal arena to ask that you reject the proposed amendment. I know you've worked very hard over the past few years, and thank you for your hard work on this important issue. However, there are many

problems that I see in terms of the unintended consequences of creating a complex web of discovery disputes and other collateral issues as a result specifically of the witness identity mandate.

The proposed amendment related to the witness identity mandate deprives entities of the right to choose witnesses who will speak on behalf of the corporation and focuses on the individual witness's personal background, in my experience. Oftentimes, as we are preparing witnesses, I think you've heard this from other individuals testifying today, it's a moving kind of situation where we find that the witness may not be the best suited. We've had one witness quit her employment because of the stress of even the preparation process. We've made changes.

So right now, the amendment is asking us to, either before or promptly after receiving the notice, to meet and confer, provide the identity of the witness and meet in good faith. So what happens --

JUDGE BATES: Do you have the same problem with respect to the proposed requirement that the parties must confer on the number and topics for examination?

MS. ELLIS: The topics can make the process more efficient if we have an idea as to the scope of the topics. However, the number of witnesses, that can change up until the day of the time we are providing a witness to sit before opposing counsel. It's happened on many instances in my practice where we may not know until the day of whether --

JUDGE BATES: But that could be discussed between the two sides in terms of conferring on that.

MS. ELLIS: It can be --

JUDGE BATES: What would be the harm in that?

MS. ELLIS: It can be discussed, depending upon the time. We get sometimes deposition notices five days before the date. But if the rule incorporated maybe a 30-day requirement for a deposition notice to be sent prior to the actual date, then the mechanism by which we can have a conversation, a meaningful conversation, a meaningful dialogue, would be something we could do.

But when we receive a notice five days in advance and we're scrambling to try to figure out who's the appropriate witness, there may be legacy litigation where we have witnesses who have retired or

died in some instances in litigation I've handled, and we're trying to educate the person who currently holds that witness's former position, trying to educate them on what the testimony should be or can be on behalf of the company, then that does create a problem.

PROF. MARCUS: When you get one -- you have received notices with as little as five days before the deposition?

MS. ELLIS: Yes.

PROF. MARCUS: Does that happen towards the beginning or towards the end of the pretrial litigation activity?

MS. ELLIS: Usually toward the end of the discovery period is where we're seeing that, and it appears to be where opposing counsel was trying to -- I guess realizes that discovery is almost at its conclusion, and they didn't cross all T's or dot all I's, and then we received this deposition notice. That's just my assessment on what possibly could be going on in my colleague's office across the street.

And the binding nature of the proposed amendment unfairly usurps the litigant's choice to identify who will testify on its behalf and invites the serving party to interpret the amendment as a

license to participate in the 30(b)(6) witness selection process. I heard one of my colleagues earlier talk about the bride who thought 100 was a small wedding, and the groom talking about how 50 was a small wedding, the difference in opinion, the difference in interpretation of even the scope or what that rule means. So what does it look like from a practical standpoint?

If we are to meet and confer as it relates to the identity of the witness, and I provide the name of a witness, but then I begin the preparation process, because I'm supposed to do this before or promptly after the subpoena arrives, I will not have time to actually go through what we typically go through to determine who is the appropriate witness.

So then I begin the preparation process and find that this witness is going to black out under stress, or this witness leaves their employment during the process, which has happened, or this witness really doesn't have the knowledge that is needed. So then once we change gears, does that mean every time we change gears I have to go back and talk to opposing counsel?

Also, as it relates to -- meet and confer

implies -- at least when I participate in a meet and confer, it is not just a one-sentence meeting or a one-word meeting. So if I provide the name John Doe, and opposing counsel is asking, "Well, what's the job title? Why did you select them," I would think that's a natural next step in a meet and confer, and that would require me as counsel to divulge attorney work product and violate the attorney-client privilege in most all of the instances I can think of.

JUDGE BATES: Ms. Ellis, do you normally provide the name of the witness?

MS. ELLIS: It depends. It depends on -- if we are at the point where we are able to identify a witness, yes, Your Honor. But if we are still trying to figure out -- and most times this is when opposing counsel has sent a subpoena that includes broad subjects, broad scope of topics, we're trying to figure out in good faith who is the most appropriate witness.

JUDGE BATES: But if you know the witness a day or two or three in advance, you would normally provide that information to the other side?

MS. ELLIS: Yes. I see no problem with doing that.

PROF. MARCUS: And do you --

MS. ELLIS: But that's not norm. That is typically -- and that would be in pattern litigation. Not all of my cases are pattern litigation. Pattern litigation is fairly simple. Plaintiff's counsel, they know who the identity is probably before they even serve the subpoena.

PROF. MARCUS: And you --

JUDGE BATES: That may be true.

MS. ELLIS: Thank you, Your Honor.

PROF. MARCUS: Am I right to guess that you would favor a command to the serving party to confer with you about topics?

MS. ELLIS: A command as in a mandate?

PROF. MARCUS: Well, as in the amendment.

MS. ELLIS: I think the amendment, if the word -- instead of the word "must," if the word "encourages" -- if you encourage the parties to meet and confer versus the parties must meet and confer, I think that incorporates best practices. It's the mandatory aspect of it that makes it, I think, a bedrock of disputes, and then as a result, that increases the cost of litigation. It wastes Your Honors' time, and it just is very problematic.

JUDGE BATES: Ms. Ellis, thank you --

MS. ELLIS: Yes.

JUDGE BATES: -- very much. We need to turn to the next witness.

MS. ELLIS: And thank you for the opportunity.

JUDGE BATES: We appreciate it.

Peter Fazio is next.

MR. FAZIO: Yes, thank you. Good afternoon. My name is Peter Fazio, and I'm from the law firm of Aaronson Rappaport Feinstein & Deutsch. We are a litigation-based firm based out of New York City. Over the last 17 years, I've had the honor and privilege of getting to travel across the country, appearing in both state and federal courts, representing mostly defendants in product liability litigation and mass torts.

Over my career, I've had the opportunity to defend dozens of 30(b)(6) depositions, and I want to use as an example throughout my statement today one case that I had, actually with Mr. Slavik, who's here today, which resulted in 10 corporate depositions as well as 31 fact depositions from that same employer.

I want to use that as an example today

because I personally believe that this committee has done such great work, and I had a high school teacher that used to tell me it's better -- it's better to rise to the occasion when you have the opportunity to do something great, and I think all of you, as well as us, have the opportunity to do something great, which is to actually correct the 30(b)(6) rule where there are deficiencies.

I've heard today a lot of agreement on the fact that there's really not an issue about meeting and conferring, and I've heard today that many plaintiffs, or some plaintiffs, don't really care who the deponent is going to be. Of course, we believe, I believe, that providing the deponent's name is not necessary.

However, I can say there are problems with the rule that we're overlooking, and these problems is what we see every day, and I believe the magistrate brought up an example of seeing motions about disputes, whether the number of topics or the scope of topics. That's every day, real-world practice, which is why I believe the committee should consider, and I know it's a lot of hard work, but going back to the drawing board to find tools that assist practitioners

and courts in streamlining the 30(b)(6) process; specifically, presumptive number of topics permitted for Rule 30(b)(6) depositions, a straightforward statement of how 30(b)(6) depositions count toward the presumptive limits on the number and duration of depositions --

JUDGE JORDAN: Mr. Fazio, why don't you specifically see if you can meet for us the assertion that we've heard here repeatedly in one form or another that saying you're presumptively limited to X number of topics is going to be just a distraction, lead to broader topics, less specificity, takes us in the wrong direction?

MR. FAZIO: Yeah.

JUDGE JORDAN: You know, why is saying a presumptive number going to be a help and not a hurt? What's your take on that?

MR. FAZIO: It's going to be a help, Your Honor, because putting a limitation in is something where both litigants on both sides of the V can strive toward actual productive meet and confer. One of my first federal cases was before Judge Jack Weinstein, who had a page limit on briefs. And as a young lawyer, I said, "Oh, my goodness, how am I going to do

this Daubert motion in 15 pages," right?

JUDGE JORDAN: Wait, hold on. This is the interrogatory analogy in another guise, page limit. The number of topics, it occurs to me, is not like a page limit, is not like interrogatories, necessarily, either, because it doesn't constrain you in producing in writing, nor does it constrain the other side in producing something in writing. It is merely the opening salvo and the platform from which questions begin to be asked.

MR. FAZIO: Yeah.

JUDGE JORDAN: So if you say you've got X number of topics, and they stay within those topics, if they frame the topics very broadly, I mean, that's the argument we're hearing from them, and I'm curious to know why that doesn't have traction. Why do you think that's not actually a matter to be concerned about?

MR. FAZIO: Well, Your Honor, because if we start with a presumptive limit, which for some reason has this connotation of being a taboo process in the 30(b)(6) notice, I would submit that when we meet and confer -- let's say the number's 25. Let's say the case I had with Mr. Slavik, who served notices well

over 100 topics, when Mr. Slavik showed up, and he arrived late in the case, think about the practicality of it.

Can anyone cover 100 topics in a seven-hour limit? Right? And Mr. Slavik, again, while we don't always agree, was able to look at that notice and say, "I really can't cover these 100 topics, so I have two options. Get through as many as I can, or ask for more time," which is what he tried to do. But Your Honor --

JUDGE JORDAN: How does a presumptive limit meet that if --

MR. FAZIO: It focused --

JUDGE JORDAN: What you're describing is a meet and confer that leads to a more sensible result.

MR. FAZIO: I think the presumptive number is a starting point, just like when Mr. Slavik came to me, if the number was 25, and said, "Peter, I really have 50," I can tell you all now I wouldn't appear in your courtroom going, "We have this big disagreement over 25 or 50." We would work through it.

But not having that number, 100 topics, if I take the time to prep one witness on 100 topics, and I spend an hour, an hour a topic, to prep that witness

because I have an obligation --

JUDGE JORDAN: You would --

MR. FAZIO: I would?

JUDGE JORDAN: -- confer with Mr. Slavik, right?

MR. FAZIO: I would confer with Mr. Slavik, which I did in that very case, which resulted in 10 corporate rep depositions, 31 fact depositions, some of those going longer than 13, 14, 15, 22 hours for one witness.

PROF. MARCUS: So those all exceeded the limits in the rules for those things, and they occurred anyway.

JUDGE BATES: With judicial permission?

MR. FAZIO: Well, after a while there was judicial permission, and then the judges shut that process down. Mr. Slavik did come back for another attempt, but after 21 hours, we won that argument.

JUDGE BATES: But presumably the judge made an assessment of what was warranted in the case.

MR. FAZIO: No, because we did not fully brief the issue, because the misnomer that we look at metrics from a filing of the motion practice, when we're encouraged not to file motions, many magistrates

say send letters, don't file motions, and then we get docket entries. It's an unfair characterization that the court somehow ruled on a fully briefed issue.

MR. SELLERS: So what's the number? What's the number you would recommend?

MR. FAZIO: Listen, look. Again, everybody has struggled with that issue. I don't think I struggle with it. I think if we start out at 25, with the understanding that there are more complex cases that may require additional topics to be added, I truly believe the initial conference is a great place to start that conversation, and I've had magistrates across the country, as well as district court judges, take an extremely active role from day one in that process, and these are not snowballs in Texas.

When the court assists the parties in that process, I don't get these types of notices, and I think it's because when someone like Mr. Slavik and I can sit down and talk about it before he serves the notice, I don't get 150 topics.

MR. SELLERS: So what makes you think 25 is the right number, it's not too high, not too low?

MR. FAZIO: Perfect example, sir. Twenty-five is the perfect number because in that case that I

was handling with Mr. Slavik, after 41 depositions were taken, they provided their experts with three transcripts. The three transcripts they provided were the three corporate representatives that we said would be the most knowledgeable. So when I say 25, they literally covered maybe seven topics with each witness on a incredibly complex case that spanned probably about 10 years of vehicles.

So again, you know, my time is way over, but I do want to just, again, stress the importance of trying to use this opportunity to actually address issues that truly exist, as opposed to creating a toolbox or a set of tools that, to most practitioners, would have little to no effect on resolving the real problems. Thank you.

JUDGE BATES: Thank you very much, Mr. Fazio.

Now comes for my toughest task of the day. The next witness is Mark Kosieradzki.

MR. KOSIERADZKI: Very good. I am Mark Kosieradzki. I'm from Minneapolis. I'm a founder of a small law firm. We represent almost exclusively, but not exclusively, victims of elder abuse: nursing home cases, families whose grandmother's been raped,

fathers who have been drugged into oblivion till they die, people left in their waste until their body decomposes, cases that are very important to the families.

And we find that those cases are almost universally arising from systemic issues in nursing homes, and 30(b)(6) is the most efficient tool to identify why something happened, because the "why" is important to our family to find out what, and what gave rise to it. We don't even know who runs the nursing home because the licensee never has anything to do with it. It's a series of businesses run together.

So we use 30(b)(6), and I can speak from personal experience that 30(b)(6) works. The problems that I see with 30(b)(6) are lawyers who don't understand the rule or choose not to follow the jurisprudence. Having spent more than -- you know, more time than a rational person would studying the rule and writing about it, and having taken hundreds of 30(b)(6) depositions in the 39 years of practice, I can tell you, it really works when the lawyers follow the rules.

JUDGE JORDAN: So is no change --

MR. KOSIERADZKI: Yes.

JUDGE JORDAN: -- no change needed?

MR. KOSIERADZKI: I'm happy with the rule the way it stands, because of the jurisprudence interpreting it. I don't oppose the changes. I do have a concern that I'd like to raise, and I'm a big fan of meet and confer. I think that the more lawyers work together professionally, that breaks down a lot of the animosity that we see out there.

I have some concern that if we have a presumption of a problem before we start, it's inviting a problem. And I'm very concerned with this concept of presumptive limits. I can tell you I've done 30(b)(6)s all over the country in state and federal courts, and what I've learned is in our district in Minnesota, I actually have less of a problem of people not being prepared because most of the federal magistrates follow the rule of Prokosch v. Catalina Lighting, which requires identification of issues in painstaking specificity.

So now when we go to a presumptive limit, it's presumptive limit of what? Are we saying, okay, we're going to talk about how the database is structured, or how the licensing is structured on this

nursing home chain? But under Prokosch I'm going to say, "I want to learn about the email. Tell us about what servers are, what archival software there was. What are the historical softwares? And what are the different ways to access that information so we can find the most proportional way to do it?" Well, is that five topics or is that one?

JUDGE BATES: I know we have a problem defining what "topics" means. But if there were a presumptive limit of 25, as Mr. Fazio, the last witness, suggested, how would that affect your practice? Do you have a lot of cases in which you have more than 25 topics in a Rule 30(b)(6) notice?

MR. KOSIERADZKI: Thank you. Well, it depends on how you define it. Typically, I won't have 25 general subject matters, but I will find through the interrogatory practice that people will say, "I'm looking for the five people who were on staff here that day," and in the gamesmanship that happens in the trench, that tries to get defined as five different questions. And I find that to be a problem.

I think the real thing that drives these cases is how many -- or the numerical numbers, how many issues there are that have to be dealt with,

legal issues, how many factual disputes actually exist, and then the elephant in the room is how much stuff is being withheld, and you're going to need depositions to vet the objections so the court can have a legitimate basis on ruling on the objections.

I see I'm done, so --

PROF. MARCUS: Wait, can I --

MR. KOSIERADZKI: -- thank you.

PROF. MARCUS: Before you go, I know you've written a very thorough book on 30(b)(6). I asked someone this morning, "Is there a state that has a limit on topics in its statute or rule?" I wonder if you know.

MR. KOSIERADZKI: To my knowledge, there isn't. Forty-eight states are either identical or substantially similar to the federal rule. California has a person with most knowledge standard. New York's courts of general jurisdiction do not have 30(b)(6). Their commercial courts adopted it in 2015.

What I've just learned recently, because I had another book, was that the time limits on depositions, though, change from state to state.

JUDGE BATES: All right. Thank you.

MR. KOSIERADZKI: Thank you.

JUDGE BATES: We've got one more question.

JUDGE ERICKSEN: I want to thank you for the book.

MR. KOSIERADZKI: Thank you.

JUDGE ERICKSEN: And then just real quickly, I didn't see in there a crying need for disclosure of the identity of the witness beforehand. I didn't recall that coming up in the book or at our initial meeting which, again, thank you for attending.

MR. KOSIERADZKI: I am not aware of any jurisprudence on timing of disclosure of witnesses. I have thoughts on it, but my time is up on it, so thank you.

JUDGE BATES: Thank you very much.

Next up, Altom Maglio.

MR. MAGLIO: Thank you very much, and I'd like to start out by confessing that I have written no books on this topic.

(Laughter.)

MR. MAGLIO: I am actually just --

JUDGE BATES: Well, then you can sit down.

MR. MAGLIO: That was easy, then. I am actually just an attorney, a plaintiffs' contingency fee attorney, from Sarasota, Florida. I represent

individuals, individual people, in suits against corporations. And why 30(b)(6) depositions are extremely important to me and my practice and my clients is because they serve to level the playing field.

When my client is deposed and sits there and answers questions, my client's clearly speaking for themselves, and binding themselves, and they're the ones testifying, and there's no doubt or question about that. On the other hand, when I'm taking an employee's deposition of a corporation, whether they're speaking for the corporation is kind of up to the corporation in retrospect. They get to decide down the road if that person was speaking for them when they spoke.

PROF. MARCUS: If they're talking about something within the scope of their employment, why is that true?

MR. MAGLIO: Well, because they weren't speaking for the corporation when they said that, they didn't know what they were talking about.

PROF. MARCUS: Well, what is it that keeps it out? It's not a hearsay objection. It's not a personal knowledge. What's the objection that keeps

it out?

MR. MAGLIO: I'm not speaking as far as evidence. I'm speaking as far as their ability to bind the corporation and speak for the corporation. It's not the corporation who's talking. It's just one of the employees who wasn't authorized to say that, and when they were testifying they weren't speaking --

PROF. MARCUS: You mean you're doing discovery for some purpose other than getting evidence?

MR. MAGLIO: No, when I'm gathering evidence in the case, if that employee speaks to a certain thing that the corporation retroactively, retrospectively doesn't agree with, that person was speaking out of school and, you know, that's the position that will be taken down the road in that trial.

JUDGE JORDAN: Can I ask you, in your written submission, you said that it's a, quote, "standard practice" to identify a witness in advance, and then you also say that codifying that would help alert the noticing party when a problematic representative selection is made.

That prompts two questions. One, is it

really the standard practice in your practice field that a 30(b)(6) witness identification is always made? And second, if you take the position that this would allow you to do something when a, quote, "problematic representative selection" is made, are you not doing precisely what the defense bar says ought not to happen; that is, demanding a seat at the table for the selection of their representative?

MR. MAGLIO: So going to the first question, the vast majority of the time, thinking back on 30(b)(6) depositions, the vast majority of the time the identity of the witness is disclosed, and when the witness's identity is not disclosed is typically the ones that tend to be the more problematic depositions. And I believe one of the prior witnesses testified about the person being from a different time period in the problem with the product, I think it was, or whatever it was, that their employment was not at the time that was at issue, and bringing that to the attorney on the other side's attention, and then they pointed out no, they actually were the right person.

The examples that I've run into that come to mind, and it's a fair point, one issue I have is it's not so much a witness who doesn't know the answer.

It's an evasive witness or a witness who is almost a professional witness. That is an alert to me. That has happened, you know, a number of occasions, and they're always problematic depositions.

JUDGE JORDAN: You wouldn't know that in advance, though, right, with the identification of the witness?

MR. MAGLIO: I would respectfully say if it's a certain lawyer who's being identified as a witness, yes.

JUDGE JORDAN: And if that's the case that you know, "I'm going to have a problem with this witness," is it your position, then, that the plaintiff in that circumstance, the requesting party, should have the right to say, "That's the wrong person, I don't want that person, that's an evasive person?"

MR. MAGLIO: Your Honor, it's more to warn the defense that if that witness is evasive, if that witness is not going to answer the questions, that this will have to go to the Court, and make adequate preparations and an adequate record for that. It's not a good situation.

JUDGE JORDAN: So it would become a

negotiation, in effect, over who the corporate representative should be?

MR. MAGLIO: Actually, not who the corporate representative should be, but the responsiveness to the questioning of the corporate representative. Thank you very much.

JUDGE BATES: Thank you, sir. We appreciate it.

Next witness, John Guttmann. Please.

MR. GUTTMANN: Good afternoon.

JUDGE BATES: Good afternoon.

MR. GUTTMANN: Thank you for the opportunity to speak about the proposed amendments. I'm a shareholder here in Washington of Beveridge & Diamond. I've been doing civil litigation for 39 years, plus. It astonishes me to think about that, but it's true. All my work is in the environmental and toxic tort areas, and I mention that because listening to the other witnesses, I think it is important to recognize that things can vary depending upon the area of practice, the area in which the case arises.

I represent both plaintiffs and defendants in the environmental area. I'm also a national director of DRI. Although others have spoken for DRI

as an entity, I'm here speaking as a practitioner here in Washington.

PROF. MARCUS: And I take it from your introductory comments that one of your points is that an across-the-board numerical limit really doesn't fit the various kinds of cases that come to the federal courts.

MR. GUTTMANN: In terms of the number of 30(b)(6)s?

JUDGE BATES: Number of topics.

PROF. MARCUS: No, the number of topics.

MR. GUTTMANN: Oh, the number of topics. So I actually think -- here's my view on this. I think there should be a presumptive limit. And the question arose earlier, "Why? Doesn't that lead just to broader topics, fuzzier stuff?" With all respect, I actually think the opposite is what would happen with presumptive limits. They can always be changed, obviously, for a specific case.

But I'll give you the example of the limit on 10 depositions under the rules. That requires lawyers to think about which depositions are important. And I think that lawyers function best when they have to make decisions about what really

matters, what's important to the case, and presumptive limits will do that.

JUDGE JORDAN: Well, I'm having trouble articulating this in a way that's effective, I guess. It seems to me that there's a category error here, because people are equating all limits as having the same effect. I can understand that if you've got 10 depositions, you'll be careful with how you use your time in 10 depositions. And if you've got five pages to brief something, you'll be careful with your five pages.

But if your aim and object is to get a certain amount of information which will be -- your requests will be the platform for your questioning at a deposition, you will not be -- you will attempt naturally, will you not, to cast that as broadly as you possibly can to capture as much information as you can, so that when you go to the Court and argue, "No, this was within the scope of what I asked?"

If you're limited, that doesn't mean you'll be more specific and more careful. It means you'll be broader because you're trying to capture as much as you can. That seems to be the logic of what plaintiffs are saying to us, and that has some

resonance. I'm struggling with the idea that a presumptive limit will not result in broader topic designation. Help me through that, if you can.

MR. GUTTMANN: Well, I think the important thing is you have to look at it in the context of the meet and confer process. Mr. Slavik gave the example, I believe it was him, before lunch of a deposition he noticed with, I don't know, 130 topics or something like that, each narrow and discrete, and then he went through the deposition in three hours.

PROF. MARCUS: Forty-seven topics.

MR. GUTTMANN: Whatever it was. If he came to me with that, my reaction would be, "I want to think about it, but it sounds like a really good idea." Good lawyers work things out.

JUDGE JORDAN: That's a great example, actually, because if you said you've got a presumptive limit of 10, then instead of getting 47 carefully targeted, you'd get 10 much broader things, and instead of having a two- or three-hour deposition, you might have a much longer deposition with more objections because you'd have a less prepared witness. That's, I take it to be, the argument coming from the other side. Why is that wrong?

MR. GUTTMANN: Well, first of all, I don't think the issue of preparing the witness has anything to do with it. To me, that's a completely separate question.

JUDGE JORDAN: How can it not have something to do with it, Mr. Guttmann, if the notice and the topic designations are what are, in fact, used to prepare the witness?

MR. GUTTMANN: Right, but the idea that lawyers producing witnesses don't have them prepared is a function of the behavior of lawyers, not the scope of the notice. You're hearing that lawyers don't do that today in some cases. The reality is in my practice it does not come up very much, because the lawyers on both sides are good lawyers, and they work these things out.

Patrick Regan testified before lunch. He and I had a complex toxic tort case that went on for five years. We didn't burden the magistrate with a single discovery dispute in five years. Why? Because he's a good, reasonable lawyer, and I think I am as well. Not everybody is. There are lawyers in my practice who will go out of their way to create disputes, and here's why, because in the environmental

area, there are provisions for attorneys' fees in citizen suits, and there are lawyers there who would create disputes in order to create a basis for a larger fee. I see it all the time.

JUDGE JORDAN: Does it, the fact that it seldom comes up in your practice, if I heard you right, indicate that presumptive limits -- they might help in certain cases, but in the mine-run of cases it wouldn't make that much difference in your practice?

MR. GUTTMANN: Well, I think that my answer to that would be somebody said this morning you shouldn't write rules for the lunatic fringe. Most lawyers work things out. Most magistrates will say work this out. But there are unreasonable lawyers out there, and they are the ones that really have to be focused on, in my view, because they're the ones that drive us to magistrates, take up the Court's time, and drive up cost for my clients.

JUDGE BATES: Let me ask you a quantitative question as we close your testimony out. You've got a specific area of practice, the environmental area of practice.

MR. GUTTMANN: Yes.

JUDGE BATES: But you've been on both sides

of the V.

MR. GUTTMANN: Yes.

JUDGE BATES: And from your experience, if there were a presumptive limit, what would be a presumptive limit on the number of topics that would reflect the reality of that practice?

MR. GUTTMANN: You know, it's just like why is 10 the right number for depositions.

JUDGE BATES: Well, I'm asking --

MR. GUTTMANN: I know.

JUDGE BATES: -- based on your experience in that area of practice.

MR. GUTTMANN: Based on my experience, the number 25 was raised earlier. I think that's a perfectly reasonable number. It can be raised in a specific case if it's appropriate. And again, I'm all for a lot of specific topics if they're going to make the deposition and the discovery process as a whole more efficient. So that seems to me to be an eminently reasonable number.

JUDGE BATES: Thank you, Mr. Guttmann.

MR. GUTTMANN: Thank you very much for the time.

JUDGE BATES: We appreciate your testimony.

Next up, Edward Blizzard. Mr. Blizzard, please.

MR. BLIZZARD: Good afternoon. Thank you for allowing me the opportunity to speak to you today. I have my own practice in Houston, Texas. As of this month, I'll have been practicing law for 41 years. I started my legal life as a defense lawyer and about 20 years ago was fully converted to plaintiff-ism, and so I've been a plaintiffs' lawyer for 28 years. And for most of that those years, I've been specializing in medical products and pharmaceutical litigation.

I represent individuals who have been harmed by pharmaceuticals or medical products, and I initially had more of a state court practice, but as things have developed over the years, that's evolved more into an MDL practice, and I've been on numerous PSCs and executive committees, and even been one of the leaders in one of the litigations, one of the MDLs.

So what brought me here to Washington, D.C. was Mr. Pratt's testimony from Phoenix. I've known Mr. Pratt for years, primarily as a lawyer defending Bristol-Myers Squibb in litigation when he was at Shook Hardy, but then he became general counsel for

Boston Scientific and has recently retired. I respect Mr. Pratt, and I'm just here to bring some context to what he testified was an abuse that occurred in the pelvic mesh litigation.

In fact, you know, I think the issue with Mr. Pratt's testimony and my bringing some context to us illustrates the danger of, you know, deciding things based upon one side's parade of horribles. So Mr. Pratt talked about over 100 topics were listed after 36 witnesses were deposed in the pelvic mesh --

PROF. MARCUS: My recollection is not just thousands but tens of thousands of plaintiffs exist in those cases in West Virginia, is that correct?

MR. BLIZZARD: There are. Just in the Boston -- there's six MDLs that Judge Goodwin is supervising. Just in the Boston Scientific litigation there were 26,000 women, so the depositions pertained to 26,000 women. There were 13 different Boston Scientific products, so there was a lot of ground to cover. There were 36 witnesses, individual witnesses, that had been deposed previously, but then there was an issue that came up regarding some of the polypropylene resin coming from China, and so actually the focus of the 30(b)(6) was related to that.

There was motion practice on this. There were meet and confers. There couldn't be an agreement, so a protective order was litigated in front of Judge Eichert (phonetic), and I've attached Judge Eichert's ruling as part of my written comments. And what she did was not impose any kind of limits on the topics, as was suggested would be a solution by Mr. Pratt. In fact, what she did was --

JUDGE JORDAN: That was not suggested by him at the time, though.

MR. BLIZZARD: No.

JUDGE JORDAN: I think your letter actually is careful to say that. So can we draw any conclusion from the fact that she didn't grant that relief when nobody was asking for it in that particular instance?

MR. BLIZZARD: I think what he was complaining about was the breadth of the deposition notice and that they had already given a substantial amount of testimony. So I think what is fair to say is that there was an argument about the breadth of the deposition notice, considering what discovery had already occurred.

JUDGE JORDAN: Given the extraordinary nature, as you've already described, of this pelvic

mesh litigation, isn't it sort of the classic case of the outlier, where you don't craft the rule with that outlier in mind, you craft the rule for the general, average kind of case you're going to deal with, and you trust good lawyers and good judges to craft specialized procedures when you hit the 26,000 plaintiff class action?

MR. BLIZZARD: I agree with that. I agree with that, Your Honor. I do think what it illustrates is that here there's always two sides to the story, right, as to whether the deposition notice was too broad, or there were too many topics, and so it's really important to have some context for why that happened in that pelvic mesh litigation, and that's part of what I'm bringing here today.

Also, I've been here all day, and I've listened to a lot of the comments, and so I'd just like to say that I do support meet and confer. I do it in every one of my cases. I do support the disclosure of the identity of the witness.

JUDGE BATES: What about meet and confer as to the identity of the witness?

MR. BLIZZARD: That's fine, Your Honor. I don't have a problem with that. I think the actual

specific requirement of disclosure would be better. In all the years that I've been practicing, I think it's rare -- although it happened to me last week, it's rare for defendants to refuse to disclose the identity to me.

But I think a disclosure of the identity of the witness in a reasonable time period before is the best practice that's out there now, and I see no reason not to codify that in the rule.

So I see my time's up, and --

JUDGE BATES: Any other questions for Mr. Blizzard?

JUDGE ERICKSEN: Would that reasonable time be the 30(b)(1) time?

MR. BLIZZARD: You know, I've seen some of the proposals and heard some of the discussion. I don't have personally -- I personally don't have a problem with a 30-day notice, and my suggestion would be seven days before the deposition. If you've got a 30-day notice, seven days before, disclose the identity of the witness.

JUDGE BATES: Thank you.

Our next witness, Andrew Trask.

MR. TRASK: Thank you, Your Honor, and thank

you for allowing me the opportunity to speak, and because I've watched you do it again, all of you, thank you all so much for being so prepared by reading all of our comments ahead of time before we talk. And because I know you have read all of our comments, I thought what I would do is two things. I've heard a lot of questions about each attorney's practice, so I thought I would offer up what my practice is, and then I would, if there was time remaining, offer up some context for my comments but not simply rehash them.

My practice over the last 20 years has been in the defense area. I think I've taken two 30(b)(6) depositions in that time, one for a pro bono case and one for a patent dispute that I was brought onto, but I primarily am experienced in defending class actions and preparing and defending 30(b)(6) witnesses. I would say I've done it probably between 20 and 40 times. I actually was on that case that Peter Fazio discussed, although I was not in charge of the 30(b)(6) depositions. He was. But I can speak to some of what he was going through.

In general, my experience has been that when we receive a 30(b)(6) witness -- or a 30(b)(6) notice, as defense counsel, the first thing we do and the

first thing I do is to pick up the phone, after talking to my client about what we can do to respond, and pick up the phone again and talk to opposing counsel. And I do this because, very often, there are numerous topics. Sometimes they're described with specificity. Sometimes they're not.

And I try to walk through what topics will actually be addressable, what we can actually provide for information, if there are alternative means of providing that same information that might be more appropriate in the circumstance, and anything else that might smooth the amount of time that it's going to take to prepare and to take a 30(b)(6) deposition.

JUDGE BATES: Is that usually a successful process?

MR. TRASK: Yes, usually. I would say not always. I would say 80 percent of the time, and 20 percent of the time we're either dealing with counsel who, for one reason or another, have a tactical reason that they're being obstreperous, or are simply inexperienced and don't quite trust the process yet. But definitely when I'm up against people of the caliber of whom are testifying today, it's not really a problem.

Once I've done that, we figure out who the witness is, because then we have a better idea of what the topics are, and we try and get, as early as possible, a definite lock on who that witness or witnesses are going to be. I have been in many cases where we've split a 30(b)(6) notice up among anywhere between three and I believe Peter testified to -- Mr. Fazio testified to 10 witnesses to cover the number of topics that were offered, and the level at which we thought they would have to be testifying on each.

We ordinarily, at this point, do not disclose the identity of those witnesses except under certain circumstances. Those circumstance are as follows. If the witness has already been a 30(b)(1) witness in the case, or is already noticed as a 30(b)(1) witness in the case, we'll let opposing counsel know, because we want to be able to arrange for those to happen together if possible, and to appropriately segment out which portions are going to be which. You know, we're going to offer them the morning for 30(b)(1), we'll offer them the afternoon for 30(b)(6), or the reverse, but with the idea being that we can have as clean a record as possible going forward.

We've also offered up sometimes, if we think the witness is an appropriate --

PROF. MARCUS: Can I ask you a question about --

MR. TRASK: Absolutely.

PROF. MARCUS: -- that, since it's come up --

MR. TRASK: Yes.

PROF. MARCUS: -- many times over the years? Assuming this witness is testifying, answering questions about things within the witness's scope of employment, why does it matter whether --

MR. TRASK: That's a very good question.

PROF. MARCUS: -- this person is presently testifying as an individual or presently testifying as the designated corporate representative?

MR. TRASK: And, Professor, I assume that your question is based on the fact that if they're testifying as an individual employee --

PROF. MARCUS: 801(d)(2)(D).

MR. TRASK: Precisely. At that point, what you're getting to is they're essentially an agent of the corporation anyways, and the reason that we sometimes make the distinction there is as follows.

Sometimes either the plaintiff or the defendant is going to make an argument against that person even speaking in their capacity as an employee speaking on behalf of the corporation.

And this is not something I've specifically encountered, but let's say you've got a pattern and practice case like Dukes v. Wal-Mart, you could very easily have a manager that you depose in their individual capacity who talks about what they did for hiring decisions, but it turns out those were in absolute violation of the allegedly common policy that was going on, and at that point, are they speaking about the common policy or are they speaking about their individual management decision?

You have to be able to tell at those points whether they're speaking on behalf of the entire corporation or in their role as an employee who may or may not have done a good job. And so that's one of the reasons why we do still make that distinction. But you're absolutely right that the law does say that those should be similar.

So if we think they'll make a good 30(b)(1) deponent, and there's still space left, we might sometimes offer up the name simply because we think

that it might be appropriate for them to also be deposed in their fact capacity.

JUDGE JORDAN: What if you think that they're likely, after they're deposed in their 30(b)(6) capacity, that there's some fair prospect that the other side's going to say, "Now I want to talk to this person in some more depth," wouldn't you have the same efficiency point that would make you want to raise that with the other side?

MR. TRASK: I actually appreciate the question, because that more specifically says what I just said. If I'm saying that I think they're probably an appropriate 30(b)(1), it means that I assume that after their 30(b)(6) testimony I'd be seeing a notice anyway.

JUDGE JORDAN: And so the question then becomes why is holding that information something that -- why shouldn't the rule suggest to people, or not just suggest, but tell people, "Look, it won't always be the case that you've got a thoughtful and cooperative professional like Mr. Trask on the other side," you might have somebody who's just going to make you fly from St. Louis to San Francisco for a 30(b)(6) and not tell you who's going to show up

there, and it's somebody who, in fact, everybody knows or should know is going to be a 30(b)(1)?

Just make them tell it in advance, and that way it improves efficiency across the board, because then even if the defense lawyer chooses not to be forthcoming, it's going to come out because they're required to put it out there.

MR. TRASK: My answer to that one, and it's one that I've seen on behalf of my clients, and I've heard it in the room today, is that stuff happens. If I actually disclose a witness who's going to be noticed only for 30(b)(6) and are not yet noticed as a 30(b)(1) witness, and then they get sick, they have a heart attack, they quit under the pressure -- I haven't had that one happen but I've had colleagues have it happen to them -- in that case, I've just noticed up somebody who's now going to get a 30(b)(1) notice even though they're in a hospital bed, they'd rather quit their job than testify for whatever reason, and there was no need to put their name out in the first place. In addition, sometimes I get accused of gamesmanship if I offer up one name and then switch the name later on.

So my policy after that, my practice at

least, is once I've had the meet and confer with the other side, I will immediately sit down and type up a letter to the other side that commemorates what we talked about. I do this for one of two reasons. Either there's already been a dispute and I want to make sure that I've papered that dispute so that if it goes in front of a judge, we can talk immediately about what was actually said and not said at the time. And I assume my letter will prompt a response letter if they thought I got anything wrong. Or there's been no dispute. I don't want one coming up later, and so I do the exact same thing.

But in either case, I try to make sure that that's papered, and then we go about preparing our witnesses. I would say in my experience, and I mean, topics have varying levels of specificity, but rule of thumb is for every topic I see, I assume there's going to be between a half an hour and an hour of testimony, and I presume I need to prep for twice that long, in between finding documents, going over them with a potential deponent.

It might be fewer if they're also testifying based on personal knowledge, but if they're not testifying based on personal knowledge, I absolutely

want that much time for them to learn the topic properly.

PROF. MARCUS: So I take it, then, you favor conferring about at least the topics before.

MR. TRASK: Yes. I'm not sure if there's a requirement for the Rule 30(b)(6) to specifically require conferral, because in my mind --

PROF. MARCUS: But this amendment does say that.

MR. TRASK: Right, I know it does, and so I don't think there's a harm in conferral. I'm not absolutely certain it's necessary. I know that sometimes the committee goes with a do no harm approach, and sometimes they go with a codified best practices approach, and to my mind there's a reason you're all sitting on that committee and I'm not, so I defer to you on that portion of it. But I wouldn't have a problem with something that says meeting and conferring about the topics and their number and complexity.

JUDGE BATES: Mr. Trask, we need to move on to the next witness.

MR. TRASK: Absolutely. Absolutely. Thank you very much.

JUDGE BATES: So thank you very much. We appreciate it.

Our next witness is Ira Rheingold.

MR. RHEINGOLD: Good afternoon. My name's Ira Rheingold. I'm speaking on behalf of the National Association of Consumer Advocates, which is my organization, and my colleagues at the National Consumer Law Center. NACA's an organization of consumer lawyers, both private and Legal Aid attorneys from across the country, and National Consumer Law Center is dedicated to the representation of low-income consumers.

As I prepared for -- I know it's late in the day, so I'll try to keep this fairly brief, and I'll make my points fairly short, and be happy to answer any questions you might have. As I prepared for the testimony today, I surveyed our membership. I'm a former Legal Aid attorney, and I've had experience, but it's been a while since I've been in a federal courtroom, but our lawyers are in federal courts every single day. And I asked them what was the issue around 30(b)(6) that concerned them the most.

Now, I'll point out that universally, they believe 30(b)(6) is the most important part of the

discovery process, that for the work that they do, getting in there early, finding out the parameters of the case, setting up the rest of the discovery, the 30(b)(6) process is the most important part. They also indicated that for the most part, it's really working well, and we're very supportive of the proposals you've offered here as well.

The one issue that came up time and again was simply going to a 30(b)(6) deposition and not having a prepared witness on the other side, whether they were known or not known ahead of time, going into a deposition and the person simply being unable to answer the questions that had been dealt with beforehand.

JUDGE JORDAN: How often does that arise?

MR. RHEINGOLD: Fairly frequently. I mean, I can't give you a percentage of it, but I know for the type of cases our folks do, if there was one constant complaint, it may happen one out of five times, one out of 10 times. It depends on sort of the nature of the cases.

Our folks are dealing with typical cases, maybe something under the Fair Credit Reporting Act, or a debt collection issue, or a mortgage servicing

issue, a predatory loan. Sometimes these are very large companies. Sometimes they're small companies. But oftentimes, they find that when they step into that 30(b)(6) deposition, it's a big disappointment in terms of trying to get the proper response. That's why I think --

MS. WITT: Mr. Rheingold --

MR. RHEINGOLD: Sure.

MS. WITT: -- your comments tie the issue of preparedness to the identification of the witness --

MR. RHEINGOLD: Exactly.

MS. WITT: -- and the bandying problem.

MR. RHEINGOLD: Exactly.

MS. WITT: Is it really an identification issue, though? Can't there be unprepared witnesses who look like the right witness? How are they necessarily so linked?

MR. RHEINGOLD: I think that's a fair comment. I think that's fair. I think that the notion of meeting and conferring and discussing the identity may get past some of those issues. Saying this is what the topic we're looking at -- I mean, you may not actually resolve that problem. But at least having the meet and confer process, at least having a

discussion about the identity of the witness, you may be able to narrow down the questions you're wanting to ask and the information that you want to get from that person.

So when you have that conversation, you make it pretty clear who the person you want is and what information they need to provide, and you hope that in that conversation you actually identify the right person for your party. You're right, you may identify somebody. You may agree to that person. The person who shows up simply isn't prepared to make it, and then it just makes things that much more difficult, because you may have to go do another 30(b)(6). You may have to go to court and say, wait a second. This is a completely unresponsive witness.

So yeah, that's accurate, but I think, again, what we're trying to do is build a system that's collegial, that makes people sit down and simply talk to each other, and that there are no surprises in this game. I think from the perspective of attorneys who represent consumers of modest means, who are dealing with a real asymmetry of both information and resources, anything that we can do to sort of not waste people's time, so that they can go

to -- they can do this, and they can do it well, they can do it effectively, get the information they need and move on, is a good idea.

And again, I think having the meet and confer process, having a discussion about topics, having a discussion about identity, again, we're not -- I mean, we may know from past experiences, I mean, again, the other idea about identity is our community can talk with each other, right?

JUDGE BATES: Would a --

MR. RHEINGOLD: I'm sorry.

JUDGE BATES: Would a presumptive limit on the number of topics for a 30(b)(6) deposition adversely affect the people in your organizations who litigate these cases?

MR. RHEINGOLD: I think it's a really silly idea, to be perfectly honest with you. I think the notion of creating a presumption of numbers really sort of just makes -- just turns it into a game. I mean, some of these cases that we have are complex. Some of the cases are not complex. It depends on the nature of the case. There are folks that will bring class actions based on what they discover in a smaller case.

So I think when we talk about presumption of numbers, what I hear is, "Well, if we say there's 25" -- I think my colleague Mr. Bland earlier made a really good point, that if we say you need five, or you need 10, or you need 25, you're going to squeeze your questions into that presumptive number that you've created.

If you want topics that are distinct and effective and narrow in scope, then having that number sort of defeats that purpose, because if you say you need 25, then you're going to create 25, and you're going to squeeze everything else in that you need to have into that box.

JUDGE BATES: All right. Anything else?

MR. RHEINGOLD: That's all I've got.

JUDGE BATES: All right. Thank you very much. We appreciate it.

MR. RHEINGOLD: Thank you.

JUDGE BATES: Next, Thomas Pirtle.

MR. PIRTLE: I'd like to thank the committee for the opportunity to address the committee on this very important subject. My name's Tom Pirtle. I'm from Houston, Texas. I have a law firm that is engaged in plaintiffs' work almost exclusively. I've

got a handful of defense clients, but I'm a plaintiffs' lawyer.

I have litigated from the very beginning of my career drug and device cases, starting back with breast implants and moving all the way into transvaginal mesh, drugs from fen-phen to proton pump inhibitors today. I also do individual cases and some catastrophic injury cases. And I would like to say first, having done a lot of this work both inside of MDLs and out, the 30(b)(6) system is working, at least from my perspective.

And by way of best practices, I think it's an excellent idea for there to be a meet and confer. I mean, we have to do that in an MDL. Every time, the judge would look at us and say, "Why wouldn't you be talking about this?" So we talk about the subjects, and I can't remember a time when I didn't have the identity of the witness disclosed to me.

And I just got through taking a 30(b)(6) deposition on the way up here. I knew who the witness was, and the reason why they -- and that was in a proton pump inhibitor case, but the reason why the other side disclosed it is the witness is -- we want to move -- we want to be efficient. We've got a

limited number of hours and we've got a lot of clients. So we disclose back and forth --

PROF. MARCUS: How long before the deposition do you ordinarily find out who is going to be the witness?

MR. PIRTLE: Now, it'll vary, to be honest with you, but they'll get it as soon as it's convenient, and you've got about a week or so to peruse around. And you know, sometimes I do find that these people have testified as corporate representatives before in earlier cases, which would be very important to know that when I'm taking a deposition for several thousand people. I want to know that. I'm getting that information.

PROF. MARCUS: But seven days is enough, as far as you're concerned.

MR. PIRTLE: At least on the identity, to check out the transcript.

PROF. MARCUS: Yeah, that's what I mean.

MR. PIRTLE: Yeah. Yeah. Yes, sir. Sorry. Professor. The other thing is this idea --

JUDGE ERICKSEN: So if seven days is enough for the professor, if part of the purpose is to take 30(b)(1) questions at the same time, then wouldn't you

say that seven days in advance -- do you think that's enough time to prepare the witness who has been identified to answer 30(b)(1)-type questions? And how do you have a time limit for the disclosure of the witness without somehow getting into the question of a time limit before the 30(b)(6) that notice has to be given? And then we're into a whole structured program.

So if you have a thought about how we could just carve out that one part of a schedule without opening the Pandora's box of a whole bunch of --

MR. PIRTLE: We normally have a -- Your Honor, we normally have a fairly large lead time on our depos, at least in these kind of cases, so you know, we're negotiating where the site is, and you know, who's going to be there, and this, that, and the other. But Mr. Blizzard had said something about 30 days. I don't have a problem with 30 days myself.

JUDGE BATES: Do you think 30 days is required under Rule 30(b)(1) right now with the term "reasonable notice?"

MR. PIRTLE: Your Honor Bates, I'm not going to go so far to say that 30 days is reasonable notice, because there's case law out there that says shorter

period of times are reasonable notice. But so I think a shorter time can be reasonable notice, but 30 days is reasonable. And I don't like the idea of any limits on the number of subjects.

JUDGE BATES: Why not?

MR. PIRTLE: The main reason is cases vary. You know, I will do something as simple as a case where someone got injured and maybe lost their leg. Twenty-five might be fine. If I'm doing a commercial case where I'm pursuing a corporation against a corporation, which I also do, for theft of trade secrets, 25's a starting point. And then we're going to -- the bigger case is going to be always going back to the judge, back to the magistrate.

I think that if somebody's abusing the system, and the person who's being abused brings it up to the federal judge, that judge will handle it. I wouldn't want to be on the receiving end of abuse of discovery standing in front of the judges that I have to practice in front of, and I think most reasonable lawyers feel the same way.

I don't want to be governed by the exception. You know, I want to be governed by the vast number of lawyers out there whose practice is to

do the right thing. Thank you.

JUDGE BATES: Thank you very much, Mr. Pirtle. We appreciate it.

Brittany Schultz is next.

MS. SCHULTZ: Good afternoon, may it please the committee. My name is Brittany Schultz. I'm counsel at Ford Motor Company. I am in the litigation and regulatory group, and I have significant responsibilities for discovery. Before joining Ford Motor Company, I was a trial lawyer for 13 years, where I defended and requested 30(b)(6) depositions. Thank you for the opportunity to testify today.

Ford is a defendant, Ford is a plaintiff, and Ford is a recipient of subpoenas for corporate witness depositions. Ford prosecutes cases, and Ford defends cases, and it has and will continue to be on both sides. Ford's litigation experience is diverse and extensive and includes commercial disputes, antitrust matters, class actions, intellectual property, consumer and product liability cases, and employment litigation, and many, many more.

In short, the proposed rule hinders and does not help the legal process and ignores the practical realities of real-life litigation on both sides, for

the plaintiff and the defendant, as Ford sits.

JUDGE BATES: Do you favor a presumptive numerical limit on the number of topics?

MS. SCHULTZ: Yes.

JUDGE BATES: Would one number cover all the different kinds of cases that you've just explained that Ford faces or brings?

MS. SCHULTZ: The presumptive limit that Ford suggested in its prior submissions and comments to this committee is 10, and what is really important about that number is that the presumptive limit could be reduced, because maybe 10 is too many, or the presumptive limit could be added to, because the number is too low.

I completely agree that you need to meet the needs of the case and the spirit of Rule 26, proportionality and what is needed for that case, which is why the presumptive limit is merely presumptive. You can ask the --

JUDGE JORDAN: But it would involve the Court, right, Ms. Schultz? By setting a limit, people will gear to the limit, and then it's not as simple as saying it could go down, it could go up. It could go down or go up only by involving the Court, if one side

or the other is unwilling to negotiate, right?

MS. SCHULTZ: I agree that if the other side isn't willing to negotiate, you would need Court assistance in that process. In my experience, with good lawyers and reasonable lawyers, that meet and confer process results in a resolution that's favorable to all.

JUDGE BATES: Wouldn't it do so even without a presumptive limit, though?

MS. SCHULTZ: No.

JUDGE BATES: Why not?

MS. SCHULTZ: The Court isn't --

JUDGE BATES: Isn't it doing so now?

MS. SCHULTZ: No. The Court role is in dire need of structure and a guidepost. Lawyers need a guidepost to help focus the needs of the case. That goes to the heart of the proportionality considerations that were mandated in 2015. Where you have focus and you need to look at the needs of your case, that results in topics that are reasonably tailored to the needs of the case. As one district court judge --

JUDGE JORDAN: Does that actually advance your argument or impede it? Because when you talk

about proportionality, you're necessarily talking about gearing something on an individual basis to the specific case. A presumptive limit is just a -- it's a number. It's just picked out of the air and said to be presumptive. How does that advance proportionality?

MS. SCHULTZ: Because it helps the parties focus. If you know there is a guidepost, presumably 10, or interrogatories, which I know you don't like that example, presumably 25, or a page limit, presumably 50 pages, you know you've got a bogey. That bogey can be shifted depending on the needs of the case, and you can move that bogey by stipulation. You can move that bogey by court intervention. You should have to show some reason why you need to move that bogey.

Ten may be too many for the typical case, and it might need to be three. It could need to be 25. But that's the flexibility that a presumption gives, because you can ask with leave of the Court or you can talk to your opponent about what matters for that case.

PROF. MARCUS: A presumption introduces flexibility that was not there before?

MS. SCHULTZ: It absolutely does, because it provides a guidepost, and it provides a way to have a common theme where parties can go to for a starting point. Otherwise, where it stands right now, of unlimited, that breeds actually very broad discovery requests, because many lawyers don't know what they don't want to give up, because they're afraid to say I only want a certain limited number.

Case in point, deposition notice that I received just a couple days ago, which had over 150 topics. I receive a request something along the lines of this, and by the way, this is not a snowball. This happens frequently, frequently at Ford Motor Company. The topic is "all information relating to any and all documents regarding your history." I can guarantee you we met and conferred on this topic. Didn't want to confer. I said what I wanted, and that's what's going to happen.

Without some guidepost of limitation, presumptively --

PROF. MARCUS: There you are. I mean, that's one request.

MS. SCHULTZ: Right. There's 155 just like this one.

PROF. MARCUS: That's hard to imagine.

MR. SELLERS: Can I just interrupt?

JUDGE BATES: Yeah, go ahead.

MR. SELLERS: I'm sorry. Wouldn't it have been more effective if instead of worrying about the limits on the number, if the negotiation over that request being so broad, and that it would be much more effective if it were narrowed considerably, even if it was broken up into five requests, but at least the company would have a much clearer idea of what's being requested?

MS. SCHULTZ: I think having a starting point of a presumptive limit will help the requesting party, as it helps when Ford crafts its own deposition notices, to figure out, "What do I really need to try my case?" Jury instructions don't have 155 separate things to tell the jury on guiding them on what to do. They're targeted. They're purposeful.

And that's what a 30(b)(6) deposition needs, and that's what this committee needs to help the lawyers do, so we don't continue to receive 150-plus, 30-plus deposition topics.

And what I heard today -- and I know I'm over time. What I heard today is that won't that

breed more or broader topics. The answer is no. Ford is seeing already exceedingly broad topics. How could you make it worse?

PROF. MARCUS: So you're saying, if I'm understanding this correctly, that it really doesn't matter if you give people a lot of room to maneuver, they're still going to have horribly over broad topics, and therefore a presumptive limit will fix the problem?

MS. SCHULTZ: I think it will.

PROF. MARCUS: Have I followed that?

MS. SCHULTZ: I think it will definitely help fix the problem, because it gives a roadmap of how to get somewhere that embraces the proportionality rules. Without having some guidepost that says you need to focus on your case, on what's important in your case, what you need to try your case, instead of, "Tell me the entire corporate history and all documents relating to it," there's nothing for the lawyers to do except for move through minutiae and mountains of discovery disputes.

I actually had several other comments, but I know I'm out of time.

JUDGE BATES: Well, I take it that your

view, unlike a couple of witnesses that we heard from a few minutes ago, is that 30(b)(6) is not working well.

MS. SCHULTZ: It's not working well with respect to having a basic, common-sense procedure on what to do when a dispute arises. And with all due respect, a meet and confer doesn't get you there. Great, you conferred, but now what, once you reach an impasse? The rule is silent as to what to do next and what to confer about. What is this procedure that the parties are supposed to do?

And what happens when adversaries start accusing each other of, "You are not meeting and conferring in good faith?" Does that create a springboard for motion practice because you think the other side didn't do its job meeting and conferring?

And by the way, who makes the call when the meet and confer is over? The rule does not say. I've had many opportunities where I've engaged before and after Ford Motor Company where I don't think the other side conferred in good faith, and I didn't think the conferring session was over, but they said, "We're done." But the rule doesn't address the real-life situations of that, that oftentimes meet and confer is

check the box. So this rule needs --

PROF. MARCUS: So if there's a 10 --

MS. SCHULTZ: -- to go farther.

PROF. MARCUS: If there's a 10-topic limit, will that answer these questions you just raised about when the meet and confer is done?

MS. SCHULTZ: I sure do think it'll help narrow the scope of disputes. And after those 10 topics go forward, let's say the deposition goes forward, and that other side says, "Great. I got my testimony on these 10 topics. I'm still missing A, B, and C," that is either perfect for a further meet and confer to stipulate to additional testimony, or if the other side is unreasonable, or says no, then that's a perfect springboard to bring to the magistrate's attention or to the Article III judge's attention to say, "This is why I need more. This is what I can show you as to why I need more," and then there's a mechanism to get there.

And you get there by providing some basic procedure on how to do that, like an objection procedure, or whoever has to bring the motion for protective order, motion to compel. I'm not sure I care about that, but I need somebody to tell me how to

do that and when to do that, and this rule does not say.

JUDGE BATES: All right. Thank you very much, Ms. Schultz.

MS. SCHULTZ: Thank you very much.

JUDGE BATES: We appreciate it.

And now for the caboose, Terry O'Neill.

MS. O'NEILL: Good afternoon. I'm Terry O'Neill. I'm the executive director of the National Employment Lawyers Association. We advance employee rights and serve lawyers who advocate for equality and justice in the American workplace. We have 4,000 members. We have 69 circuit, state, and local affiliates, and the vast majority, over 70 percent, of NELA's members, are either sole practitioners or they are in firms of four or fewer lawyers.

I really want to emphasize that, because the reality is that for my members, the members of my organization, there is a huge disparity between the resources on the plaintiff's side and on the defense side, and a very large disparity in the information. In employment discrimination cases, in wage theft cases, it's the employer who has the vast bulk of the information that the plaintiff needs in order to make

their case.

PROF. MARCUS: Can I ask you --

MS. O'NEILL: Yeah, yeah.

PROF. MARCUS: -- about something that this committee was involved in promoting -- that's maybe the wrong word. Judge John Koeltl, a former member of this committee, with the assistance of lawyers on both sides of the V, ended up with what we call protocols for discovery in individual employment discrimination. Are you familiar with those?

MS. O'NEILL: I am not.

PROF. MARCUS: Okay.

MS. O'NEILL: I am not, so I apologize.

PROF. MARCUS: Okay.

MS. O'NEILL: I became executive director of this organization one year ago, and I should say I personally have not litigated. I am an executive leader --

PROF. MARCUS: Okay.

MS. O'NEILL: -- of a nonprofit organization. I am an attorney and have been a law professor but have not litigated.

I wanted to point out the disparities in resources and information because that is the context

in which I hope the committee will consider this proposal around the notice and objection sort of process that the defense bar has brought forward.

So under the current system, if the defense attorney thinks that the notice for the deposition is too broad, then a protective order is available. The proposal from the defense bar is to flip the burden, permitting the corporation to continue withholding information unless and until the plaintiff counsel seeks to compel the information.

PROF. MARCUS: I'm sorry to interrupt again, but am I right in understanding that you are speaking now about something that is not in our package and --

MS. O'NEILL: Yes. I'm worried about it.

PROF. MARCUS: Are you --

MS. O'NEILL: It has been proposed, yeah.

PROF. MARCUS: Well, yes. Do you have problems with what is in our package?

MS. O'NEILL: No. We do support what's in the package. The comments that we provided were very supportive of it. We think they are balanced. We think that a requirement for meeting and conferring both with respect to the topics and with respect to the identity of the witness make a lot of sense. It's

a best practice anyway.

JUDGE BATES: Wouldn't requiring that the parties confer as to the identity of the witness inevitably lead into discussions about topics that are really up to the organization to determine, the propriety of the witness, the knowledge of the witness, who the best witness is? Wouldn't it inevitably get into subjects that really shouldn't be explored?

MS. O'NEILL: No more than meeting and conferring on the topics gets into having the defense counsel able to influence the plaintiff lawyer about what it is they want to ask for. So I frankly don't think that that is a problem. If there's a fear that there is some kind of slippery slope, that somehow the plaintiff lawyer will be able to influence who the designee is, or somehow the defense lawyer will be able to influence what the topics look like, we just haven't had a problem with that.

JUDGE ERICKSEN: So would you have a problem if the current language was changed such that instead of "identity of each person the organization," that read "the number of persons the organization will designate to testify?"

MS. O'NEILL: No, I think the identity of the person is important. It serves efficiency values. A number of people have testified to that, that if you know who the person is, you can go through the documents that have already been produced and see.

JUDGE BATES: But isn't that taken care of by disclosure of the identity, as opposed to conferring with respect to the identity?

MS. O'NEILL: Yes. So disclosure of the identity, I think, is important. Conferring about the identity makes sense. It's not clear to me -- well, let me put it this way. If there's a requirement to meet and confer about the topics, and shape the topics, and narrow the topics, and make sure that they're the right topics, I don't understand why there wouldn't be a requirement to meet and confer similarly to make sure that the designee is going to be adequately prepared.

PROF. MARCUS: How do you make sure that the designee will be adequately prepared?

MS. O'NEILL: You go find out what that designee -- who the designee is, and have a conversation about it, right?

JUDGE BATES: Before the deposition?

MS. O'NEILL: Sure. If it's A, "So who is your designee?" "Well, we're probably going to use A. This person has testified before in similar litigation." And yes, and that does happen.

PROF. MARCUS: So you'd expect --

JUDGE BATES: Okay, we --

PROF. MARCUS: -- the conference to include a pitch for the witness that you would be able to accept or reject as the requesting party?

MS. O'NEILL: No, I think what the plaintiffs do is talk to the defense -- the proponent talks to the recipient lawyer about whether the proposed designee is the right person to answer the questions that need to be asked. That's a conversation about both topic and who can actually speak to the topic, so it's really a combined thing.

I don't think it makes any sense to separate them out and say, "No, we won't have a conversation about this part of what's going to happen at the deposition. We will only have a conversation about that part about what's going to happen at the deposition."

JUDGE JORDAN: Doesn't that actually invite the problem that we've been hearing about from the

defense side, which is it puts you in the posture of saying who their voice should be? And it also puts them in a position where if they disclose that information to you, and they decline to pick the person you want, they're inviting a 30(b)(1) notice deposition for somebody that might not otherwise have been pulled into the litigation maw.

MS. O'NEILL: So I think two things the rule makes very clear -- the draft of the rule makes very clear that it's up to the corporation itself to say who the designee will be, so I really do think that speaks to that. I get that the --

JUDGE JORDAN: If it's true that it's up to the corporation, and they say, "It's up to us, and it's in our exclusive right to say it," then there's no need to meet and confer, because there's really nothing that the other side has to say that's worth anything to us in making that designation. All it does is invite them to invade our attorney-client privilege, to invade our work product, and to maybe start noticing depositions of people who we've identified but change our mind later.

MS. O'NEILL: Right.

JUDGE JORDAN: What's the answer to those

concerns?

MS. O'NEILL: There's a difference between having a voice and having a veto. Having a voice and having a conversation to allow a more efficient and inexpensive way of shaping that deposition makes a lot of sense. But having a voice means having a conversation about it. That is not a veto. That is not even close to the same as the proponent party saying, "No, I don't want that to be the witness. That can't be the witness. I'm going to go make your life miserable because I don't want that for the witness."

When that happens, there are protective orders. There are things that the receiving organization can do about it, right? So there was another part to your question, though, that -- and I can't remember.

JUDGE BATES: Well, here's another question.

MS. O'NEILL: Yes.

JUDGE BATES: Would a reasonable numerical limit on the number of topics adversely affect your organization's cases?

MS. O'NEILL: Yes.

JUDGE BATES: Why?

MS. O'NEILL: Yes, because some of our cases are wage theft cases that may involve many thousands of employees, and then you get to how do you count topics. It's not so much -- I don't think the problem that people are having is how to define the topics. It's really how are they counting. The topic is we want to ask about what are the policies, the employment policies, in five different plants for this one defendant. Is that five topics or is it one topic?

I think it gets to be extremely contentious, and besides that, in order to comply with the proportionality idea, the proportionality rules, the spirit of proportionality and the spirit of efficiency in litigation, it makes sense to talk about what the topics are. It does not make sense to talk about numbers as much as it makes sense to talk about what they are.

Putting a number limit on it simply allows parties to not confer about the important things, which is this is what I need, this is the information I'm going to need from you so that I can figure out whether my client has a case for employment discrimination.

JUDGE BATES: All right. Ms. O'Neill, thank you very much. We appreciate your testimony.

And with that --

MS. O'NEILL: Thank you.

JUDGE BATES: -- we have succeeded in hearing from 50-some witnesses today, and that completes this second public hearing on proposed amendments to Rule 30(b)(6), and we are adjourned for the day. Thank you all again very, very much for your patience and the quality of your testimony.

(Whereupon, at 4:45 p.m., the hearing in the above-entitled matter was concluded.)

REPORTER'S CERTIFICATE

DOCKET NO.: N/A

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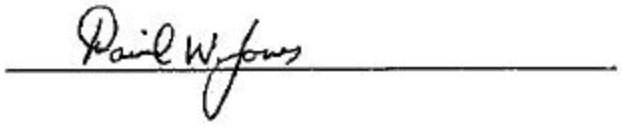
I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: February 8, 2019



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