LAWYERS FOR CIVIL JUSTICE

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

NOT UP TO THE TASK: RULE 30(b)(6) AND THE NEED FOR AMENDMENTS THAT FACILITATE COOPERATION, CASE MANAGEMENT AND PROPORTIONALITY

December 21, 2016

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") and its Rule 30(b)(6) Subcommittee ("Subcommittee").

I. INTRODUCTION

Federal Rule of Civil Procedure 30(b)(6) governs a unique and complicated aspect of civil discovery, but it does not have the necessary mechanisms to do so effectively. Rule 30(b)(6) is unique because it requires the recipient organization to find the witnesses who are prepared to discuss "information known or reasonably available to the organization."[2] Parties and practitioners who navigate Rule 30(b)(6) confront the same problems over and over again, taking time and focus away from the merits of their cases and the functioning of their organizations. The disparity between the rule's purpose and its function is even more obvious now that other discovery rules have been amended to facilitate cooperation, case management and proportionality—concepts that are absent from the current version of Rule 30(b)(6).

An important question was asked at the Committee's November meeting: Given the wide use of Rule 30(b)(6), does the relative infrequency of motions prove that the rule is working well? The unfortunate answer is no. Motions on 30(b)(6) issues—particularly those filed towards the end of discovery—are so unlikely to assist that lawyers seldom bother filing one. In other words, a sense of Rule 30(b)(6) "fatalism" prevails among lawyers who handle complex cases.

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[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 29 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] *See* FED. R. CIV. P. 30(b)(6).

The issues that arise under Rule 30(b)(6) can be easily addressed by several straightforward amendments to the case management rules as well as to Rule 30(b)(6). Specifically, Rule 30(b)(6) should be included in Rule 26(f) party conferences and addressed in Rule 16 pretrial conferences and scheduling orders. These changes will ensure early case management and facilitate cooperation between the parties that will reduce the number of disputes that arise later. Rule 26(e) should be amended to allow supplementation of 30(b)(6) depositions.

Rule 30(b)(6) itself should also be amended. It should include a 30-day notice requirement and a mechanism for objections. In addition, the rule should require specific delineation of topics and prohibit contention questions and questions regarding protected material. Finally, Rule 30(b)(6) notices should be expressly subject to the scope of discovery defined by Rule 26(b)(1), including the principles of proportionality; this includes a presumptive limit on the number of topics and an express acknowledgement that depositions may not be necessary where other evidence exists, e.g. through written discovery, prior depositions on the same topic or by the same witness, or where the organization has no knowledge.

Although the recurring problems with Rule 30(b)(6) are difficult, time consuming and distracting, the solutions are not complex. The amendments suggested in this Comment will provide Rule 30(b)(6) with the tools necessary to accomplish its goal while facilitating the fundamental principles this Committee has adopted with respect to discovery: cooperation, case management and proportionality.

II. INCORPORATING RULE 30(b)(6) EXPRESSLY INTO RULES 16 AND 26 WOULD INCREASE COOPERATION AMONG PARTIES AND FACILITATE BETTER CASE MANAGEMENT.

A. 30(b)(6) Depositions Should Be an Express Component of Rule 16 and 26(f) Conferences and Included in the List of "Required Contents" of Rule 16 Scheduling Orders.

A Rule 30(b)(6) deposition is a key element of discovery in many cases. Despite its importance, however, the substance and logistics of the 30(b)(6) deposition are typically not discussed by the parties or the court until late in the discovery process. A 30(b)(6) notice that arrives late in the discovery period and includes a short deadline and numerous poorly defined topics frequently results in disagreements about the timing, scope or location of depositions. Faced with the responsibility of finding the appropriate witnesses and investigating organizational knowledge, a responding party that cannot reach an agreement with opposing counsel has only one recourse: a motion to quash or for a protective order, which is a blunt instrument inapt for most situations.

The purposes of a Rule 16 pretrial conference include "establishing early and continuing control so that the case will not be protracted because of lack of management" and "improving the quality of the trial through more thorough preparation."[3] The Committee Notes from the 1983 Amendments recognized that, "the fixing of time limits serves to stimulate litigants to narrow the

[3] *See* FED. R. CIV. P. 16(a).

areas of inquiry and advocacy to those they believe are truly relevant and material" and force litigants to "establish discovery priorities and thus to do the most important work first." The 2015 Committee Notes provide:

> Litigation involving complex issues, multiple parties, and large organizations, public or private, may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way.

This background is particularly pertinent to Rule 30(b)(6) depositions (although neither the rule text nor the Committee Notes provides such context). Given the amount of time that organizations invest in selecting, preparing and presenting witnesses to testify and the potential for burdensome and time-consuming motion practice, the purposes underlying Rule 16 naturally apply. Requiring the definition of topics that may be noticed in a 30(b)(6) deposition early in the discovery period will assist the parties and the court in achieving judicial economy, reducing unnecessary costs and navigating the early resolution of disputes. To that end, courts' scheduling orders as set forth in Rule 16 and the parties' discovery plan as provided in Rule 26(f)(3)(b) should be amended to include a reference to the timing, scope and limitations regarding Rule 30(b)(6) depositions.[4] Such amendments would promote early cooperation between the parties, efficient case management and reduce the overall costs of litigation.[5]

B. Rule 26(e) Should Require Supplementation of 30(b)(6) Depositions.

Rule 26(e) requires supplementation of written discovery including interrogatories, requests for production and requests for admission, but it does not address supplementation of Rule 30(b)(6) depositions. It would be helpful to both requesting and responding parties if 30(b)(6) depositions were expressly included in the Rule 26(e) supplementation requirement.

It is critically important to ensure that an organization's representative is providing testimony that is accurate and complete. Indeed, one of the main purposes of discovery is to "ascertain the truth."[6] It is widely recognized, however, that legal arguments and the theory of a case may change throughout the life of a case. Accordingly, the FRCP should provide a process for supplementation of Rule 30(b)(6) testimony as additional facts and legal arguments develop during the course of the litigation.

In addition, a designee's testimony pursuant to Rule 30(b)(6) is often deemed to be binding on the organization.[7] If it is learned that the designee's testimony was incomplete, inaccurate or incorrect, the organization should have the right and responsibility to supplement it with

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[4] *See Card v. Principal Life Ins. Co*., No. CV 5:15-139-KKC, 2016 WL 1298723 (E.D. Ky. Mar 31, 2016). S*ee also Standing Order for Discovery in Civil Cases Before Judge Donato*, (2014), http://www.cand.uscourts.gov/filelibrary/1393/2014-04-25-Standing-Order-Regarding-Civil-Disc.pdf.

[5] *See* Rule One, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, http://iaals.du.edu/rule-one, (last visited Dec. 15, 2016)(In many jurisdictions around the country today, the civil justice system takes too long and costs too much.).

[6] *In re Certain Asbestos Cases*, 112 F.R.D. 427, 433 n. 8 (N.D. Tex. 1986).

[7] *State Farm Mut. Auto. Ins Co. v. New Horizont Inc*., 250 F.R.D. 203, 212 (E.D. Pa. 2008).

corrections, replacement information or updates. Case law is inconsistent on this issue.[8] For example, some courts permit submission of affidavits that contradict Rule 30(b)(6) testimony where there is independent evidence already on the record or the affidavit is accompanied by a reasonable explanation as to why there is an inconsistency.[9] One court even found it permissible for a corporation moving for summary judgment to introduce new declarations to support its 30(b)(6) testimony.[10] These common sense approaches, however, are far from universal.

Amending Rule 26(e) to permit and require supplementation of a 30(b)(6) deposition when testimony is incomplete or incorrect would ensure an accurate record. Although the amendments to Rule 16 and 26 suggested above, and the 30-day notice requirement suggested below, would lessen the need for supplementation by providing more time for a full investigation of the facts, the duty to supplement is an important mechanism for ensuring an accurate record on which the parties can evaluate their case for trial, settlement or other resolution.[11]

III. RULE 30(B)(6) SHOULD REQUIRE AT LEAST 30 DAYS' NOTICE IN ORDER TO ENSURE PROPER PREPARATION, AND THE DEPOSITION SHOULD BE SCHEDULED AT A TIME AND DATE AGREEABLE TO BOTH PARTIES.

A. Reasonable Notice Is at Least 30 Days Prior to Deposition.

Rule 30(b)(6) does not set forth how much notice a party must give an organization prior to the deposition, and this deficiency in the rule is responsible for friction between parties and allegations of lack of preparation. Some courts have held that granting reasonable notice is of paramount importance due to the complexities involved with a 30(b)(6) deposition.[12] The

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[8] *Martin Cty. Coal Corp. v. Universal Underwriters Ins. Servs., Inc.*, 792 F. Supp. 2d 958 (E.D. Ky. 2011), aff'd sub nom. *Martin Cty. Coal Corp. v. Universal Underwriters Ins. Co.*, 727 F.3d 589 (6th Cir. 2013) (corporate party whose 30(b)(6) witness testified to lack of knowledge cannot claim at trial to have knowledge on that topic). *But see Daubert v. NRA Grp., LLC*, No. 3:15-CV-00718, 2016 WL 3027826, at *12 (M.D. Pa. May 27, 2016) (noting that "corroborating evidence may establish that the affiant was understandably mistaken, confused or not in possession of all the facts during the previous deposition"); *State Farm*, 250 F.R.D. at 213 ("[w]here the affidavit is accompanied by a reasonable explanation of why it was not offered earlier, courts have allowed a contradictory or inconsistent affidavit to nonetheless be admitted to supplement the earlier-submitted Rule 30(b)(6) testimony."); *Ozburn-Hessey Logistics, LLC v. 721 Logistics, LLC*., 40 F. Supp. 3d 437, 451 (E.D. Pa. 2014) (finding "Rule 30(b)(6) does not prohibit the introduction of evidence at trial that contradicts or expands on the deposition testimony of a Rule 30(b)(6) witness").

[9] *See Daubert,* 2016 WL 3027826, at *37 (noting that "corroborating evidence may establish that the affiant was understandably mistaken, confused or not in possession of all the facts during the previous deposition"); *State Farm Mut. Auto. Ins*., 250 F.R.D. at 213 (citations omitted) ("[w]here the affidavit is accompanied by a reasonable explanation of why it was not offered earlier, courts have allowed a contradictory or inconsistent affidavit to nonetheless be admitted to supplement the earlier-submitted Rule 30(b)(6) testimony."); *Ozburn-Hessey Logistics, LLC*, 40 F. Supp. 3d at 451 (finding "Rule 30(b)(6) does not prohibit the introduction of evidence at trial that contradicts or expands on the deposition testimony of a Rule 30(b)(6) witness").

[10] *See Joseph v. Pennsylvania, Dep't of Envtl. Prot.*, No. CIV.A. 06-4916, 2009 WL 3849696, at *5 (E.D. Pa. Nov. 16, 2009) (finding a moving party in a motion for summary judgment could provide affidavits of its representative to supplement its Rule 30(b)(6) testimony).

[11] *See Id.*

[12] *See Gulf Prod. Co. v. Hoover Oilfield Supply, Inc*., No. CIV.A. 08-5016, 2011 WL 891027, at *3 (E.D. La. Mar. 11, 2011). S*ee also In re Asbestos Prod. Liab. Litig. (No. IV)*, No. 11-CV-63953, 2012 WL 3104833, at *1 (E.D. Pa. July 31, 2012) (finding that one day notice of 30 corporate designees was "unduly burdensome").

current rule, however, does not specify that a certain number of days be provided before the notice is deemed reasonable,[13] and courts have taken varying approaches to what length of time is considered "reasonable."[14] It is generally accepted that less than one week is not sufficient,[15] but in extenuating circumstances, some courts have found shorter notice periods reasonable.[16]

A 30-day minimum notice requirement would help parties properly prepare their witnesses and avoid potential sanctions that could be imposed if a witness is inadequately prepared.[17] Furthermore, defining the reasonable notice timeframe would aid parties and courts in managing and planning for discovery and eliminate the need for motion practice over the issue.[18]

B. 30 (b)(6) Depositions Should Be Scheduled at a Time and Date Agreeable to the Parties.

The scheduling of 30(b)(6) depositions is a frequent source of dispute and gamesmanship. Courts are reluctant to intervene by granting motions to quash.[19] Some courts will admonish counsel "to consult with other counsel in order to find a mutually convenient date and time" for depositions,[20] and others will undertake an examination of whether the party seeking the deposition "demonstrated a willingness" to work with opposing counsel on the issue.[21] Due to the inconsistency of approaches and the lack of a clear standard, an express requirement that parties find a mutually agreeable time and date for a Rule 30(b)(6) would result in an increase of cooperation and a decrease in needless motion practice.

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[13] *Hart v. United States*, 772 F.2d 285, 286 (6th Cir. 1985) ("The rules do not require any particular number of days, so that reasonableness may depend on the particular circumstances.").

[14] *See, e.g., Paige v. Commissioner*, 248 F.R.D. 272, 275 (C.D. Cal. Jan.18, 2008) (finding that fourteen days' notice was reasonable); *Jones v. United States*, 720 F.Supp. 355, 366 (S.D.N.Y. 1989) (holding that eight days' notice was reasonable); *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 327 (N.D.Ill.2005) ("ten business days' notice would seem to be reasonable").

[15] *See, Gulf Prod. Co.*, 2011 WL 891027, at *3; *Mem'l Hospice, Inc. v. Norris*, No. CIV.A. 208CV048-B-A, 2008 WL 4844758, at *1 (N.D. Miss. Nov. 5, 2008) (citing *Donahoo v. Ohio Dept. of Youth Servs.*, 211 F.R.D. 303, 306 (N.D.Ohio 2002)) ; *but see P.S. v. Farm, Inc.*, No. 07-CV-2210-JWL, 2009 WL 483236, at *4 (D. Kan. Feb. 24, 2009) (finding that five days' notice was reasonable).

[16] *See, e.g., Natural Organics v. Proteins Plus, Inc.*, 724 F.Supp. 50, 52, n. 3 (E.D.N.Y. 1989) (noting that one-day notice was reasonable because the parties were on an expedited discovery schedule and the need for a deposition arose suddenly); *RPM Pizza, LLC v. Argonaut Great Cent. Ins. Co.*, No. CIV.A. 10-684-BAJ, 2014 WL 258784, at *1 (M.D. La. Jan. 23, 2014) (due to district judge granting defendant leave to take two depositions and extending the discovery completion deadline, greater than 7 days' notice to plaintiff would have been impossible).

[17] *See S.E.C. v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y.1992) (quoting *Mitsui & Co. (U.S.A.) v. Puerto Rico Water Resources Authority*, 93 F.R.D. 62, 67 (D.P.R.1981)).

[18] *See Tyler v. City of San Diego*, No. 14-CV-01179-GPC-JLB, 2015 WL 1956434, at *2 (S.D. Cal. Apr. 29, 2015) (reasonable notice is used as a defense against compliance with a 30(b)(6) notice). *See also Gulf Prod. Co. v. Hoover Oilfield Supply, Inc.*, No. CIV.A. 08-5016, 2011 WL 891027, at *2 (E.D. La. Mar. 11, 2011).

[19] *PNC Bank, Nat'l Ass'n v. MBS Realty Inv'rs, Ltd.*, No. CIV. A. 07-09052, 2008 WL 686886, at *3 (E.D. La. Mar. 5, 2008) (denying motion to quash, but requiring deposition to be rescheduled at a "mutually-agreeable time"). *See also DHL Express (USA), Inc. v. Express Save Indus. Inc.*, No. 09-60276-CIV-COHN, 2009 WL 3418148, at *5 (S.D. Fla. Oct. 19, 2009) (plaintiff ordered to produce 30(b)(6) witness, but on a date and time mutually convenient to the parties as long as the deposition occurred before a date set by the court).

[20] *In re Aramark Sports & Entm't Servs. LLC*, No. 2:09-CV-637-TC-PMW, 2011 WL 5024436, at *1 n. 3 (D. Utah Oct. 20, 2011) (citing Utah state court rule stating that "[l]awyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times").

[21] *Ogbonna v. Usplabs, LLC*, No. EP-13-CV-347-KC, 2014 WL 12489696, at *5 (W.D. Tex. Sept. 10, 2014).

IV. RULE 30(b)(6) SHOULD DEFINE A PRESUMPTIVE NUMBER OF TOPICS—NO MORE THAN TEN—AND REQUIRE DETAILED SPECIFICITY.

Organization representatives deposed pursuant to Rule 30(b)(6) must be "adequately prepared" to testify on the subject matters in the notice (even if the topic is beyond the personal knowledge of anyone at the organization).[22] Often, however, 30(b)(6) notices include an excessive number of topics with vague descriptions.[23]

To ensure that a deposition under Rule 30(b)(6) is sufficiently limited in scope to allow an organization's deponent(s) to prepare adequately—and to ensure "proportionality" as required by Rule 26(b)(1)[24]—Rule 30(b)(6) should be amended to include a presumptive limit on the number of topics that can be covered in the organization's deposition. That presumptive limit should be no higher than ten (a presumptive limit of five would be appropriate for most cases), subject of course to increase by agreement between the parties or by order of the court.

A presumptive limit on the number of topics is consistent with other limitations in the FRCP that have been successful in promoting proportionality, including the presumptive limits on interrogatories and depositions. A presumptive limit is especially important for 30(b)(6) depositions because, unlike other types of discovery (interrogatories, requests for admissions and requests for production), the proportionality of 30(b)(6) notices do not come before the court absent a motion to quash or for a protective order. If an organization refuses to attend a deposition with unreasonable topics and/or number of topics, it risks sanctions.

As with other limitations on discovery, presumptive limits on the number of topics to be addressed in 30(b)(6) depositions would help focus both the requesting and producing parties on the claims and defenses in the case. In conjunction with the Rule 16 and 26 amendments proposed above, a presumptive limit would result in 30(b)(6) depositions being taken when the

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[22] *See e.g., QBE Ins. Corp. v. Jordan Enterprises, Inc.*, 277 F.R.D. 676, 681 (S.D. Fla. 2012) (barring a company from testifying at trial on any matters on which the company's selected deponent had been unable or unwilling to testify); *State Farm*, 250 F.R.D. at 217 (E.D. Pa. 2008) (compelling additional testimony and granting monetary sanctions where a company failed to adequately prepare its designated representative for deposition); *Wausau Underwriters Ins. Co. v. Danfoss, LLC*, 310 F.R.D. 683, 687 (S.D. Fla.), aff'd, 310 F.R.D. 689 (S.D. Fla. 2015) (barring a company from testifying at trial on any matters on which the company's selected deponent had been unable or unwilling testify); *Martin Cty. Coal Corp. v. Universal Underwriters Ins. Servs., Inc.*, No. CIV.A. 08-93-ART, 2010 WL 4629761, at *4 (E.D. Ky. Nov. 8, 2010) (threatening sanctions where a deponent was "unprepared"); *Clapper v. American Realty Investors, Inc.*, No. 3:14-CV-2970-D (N.D. Tex. Nov. 9, 2016) (requiring a second deposition, at the deponent company's expense, where the deponent was unfamiliar with several areas of inquiry).

[23] *See e.g., Krasney v. Nationwide Mut. Ins. Co.*, No. 3:06 CV 1164 JBA, 2007 WL 4365677, at *3 (D. Conn. Dec. 11, 2007) (holding that a notice that listed forty separate topics and would require twenty separate company employees to be produced where only three employees were needed to explore the issues directly related to the action in question violated the "reasonable particularity" requirement); *Heller v. HRB Tax Grp., Inc.*, 287 F.R.D. 483, 485 (E.D. Mo. 2012) (involving Rule 30(b)(6) deposition dispute where plaintiff sought to cover topics involving thousands of company offices where plaintiff's complaint was not national in scope).

[24] *See* FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is . . . proportional to the needs of the case."). *See also Patient A v. Vermont Agency of Human Servs.*, No. 5:14-CV-000206, 2016 WL 880036, *2 (D. Vt. Mar. 1, 2016) (finding that certain topics included in a party's Rule 30(b)(6) notice were not "proportional to the needs of the case."); *Hooker v. Norfolk S. Ry. Co.*, 204 F.R.D. 124, 126 (S.D. Ind. 2001) (holding that Rule 26 was applicable to a dispute concerning the scope of a Rule 30(b)(6) deposition).

issues are well defined and the need for organizational information on a particular issue is clear, thus promoting proportionality by avoiding unnecessary and wasteful discovery, or discovery that is posed merely for tactical or vexatious reasons.

The presumptive limit should be accompanied by the following provisions:

- A ten-topic deposition lasting no more than seven hours should presumptively be counted as one deposition for the purposes of the presumptive limits on depositions.

- The court should have express discretion to allocate expenses where the topics exceed ten or go beyond seven hours.

- The party noticing the deposition should have the express right to provide, in advance, copies of exhibits to be used during the deposition.

In addition, requiring Rule 30(b)(6) notices to set forth topics with "reasonable particularity and detailed specificity" would facilitate cooperation, early case management and proportionality. [25] This is particularly true because case law is divided on whether an organization's representative witness can be forced to answer questions beyond the scope of the deposition notice[26] and requesting parties often seek to punish responding organizations and their counsel for being insufficiently prepared.[27] A meaningful specificity requirement would serve everyone's interests

[25] S*ee e.g.*, *Nippo Corp./Int'l Bridge Corp. v. AMEC Earth & Envtl., Inc.*, No. CIV.A. 09-CV-0956, 2010 WL 571771, at *2 (E.D. Pa. Feb. 12, 2010) (holding that the "reasonable particularity" requirement "merely requires that the requesting party describe topics with enough specificity to enable the responding party to designate and prepare one or more deponents*."*). *See also Janko Enterprises, Inc. v. Long John Silver's, Inc.*, No. 3:12-CV-345-S, 2014 WL 11152378, at *3 (W.D. Ky. Apr. 3, 2014).

[26] *Crawford v. Franklin Credit Mgmt. Corp.*, 261 F.R.D. 34, 38 (S.D.N.Y.2009) (the stated areas of inquiry are the "minimum" about which the designated representative must speak, not the "maximum"); *Employers Ins. Co. of Wausau v. Nationwide Mut. Fire Ins. Co.*, No. CV 2005-0620(JFB)(MD, 2006 WL 1120632, at *1 (E.D.N.Y. Apr. 26, 2006) (scope of questions to 30(b)(6) witness is not defined by the notice but by Rule 26(b)(1)); *Green v. Wing Enterprises, Inc*., No. 1:14-CV-01913- RDB, 2015 WL 506194, at *8 (D. Md. Feb. 5, 2015) (the scope of examination at a 30(b)(6) deposition is not limited to the areas of inquiry in the notice, but only by the scope of discovery under Rule 26, though answers to questions beyond the scope of the enumerated areas are individual testimony, not corporate testimony); *Fed. Trade Comm'n v. Vantage Point Servs.*, LLC., No. 15-CV-6S(SR), 2016 WL 3397717, at *2 (W.D.N.Y. June 20, 2016) (a 30(b)(6) witness may provide individual testimony about additional relevant topics, with the caveat that unless the witness is also an officer or managing agent of the firm, that testimony should not normally be considered to be offered on behalf of the corporation). *But see Soroof Trading Dev. Co. v. GE Fuel Cell Sys., LLC*, No. 10 CIV. 1391 LGS JCF, 2013 WL 1286078, at *4 (S.D.N.Y. Mar. 28, 2013) (party must notice deposition of witness personally and separately from 30(b)(6) notice if it seeks testimony in the witness's personal capacity); *E.E.O.C. v. Freeman*, 288 F.R.D. 92, 99 (D. Md. 2012) (questions beyond scope do not bind the company at all); *New Jersey Mfrs. Insurance Grp. v. Electrolux Home Prod., Inc.*, No. CIV. 10-1597, 2013 WL 1750019, at *3 (D.N.J. Apr. 23, 2013) (duty to prepare a witness is "limited to information called for by the deposition notice"); *State Farm*, 250 F.R.D. at 216 ("If a Rule 30(b)(6) witness is asked a question concerning a subject that was not noticed for deposition . . . the witness need not answer the question."); *King v. Pratt & Whitney, a Div. of United Techs. Corp.*, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (if the examining party asks questions outside the scope of the matters described in the notice and if the deponent does not know the answer to questions outside the scope of the notice that is the examining party's problem).

[27] *See e.g.*, *QBE Ins. Corp.*, 277 F.R.D. at 700 (barring a company from testifying at trial on any matters on which the company's selected deponent had been unable or unwilling testify); *State Farm*, 250 F.R.D. at 217 (compelling

by providing sufficient notice to the responding organization of the information sought, therefore helping ensure that appropriate witnesses are selected and prepared on each topic.[28]

V. TO FACILITATE PROPORTIONALITY AND EFFICIENCY, RULE 30(b)(6) SHOULD BE AMENDED TO PROHIBIT DUPLICATION.

In many instances, Rule 30(b)(6) depositions are a supplemental tool rather than a primary means of discovery.[29] Indeed, if depositions of individuals with direct knowledge of the matters at issue have already been taken or if written discovery has already produced relevant and responsive information, a 30(b)(6) deposition becomes superfluous. Accordingly, 30(b)(6) depositions should not be allowed, or at a minimum should be limited, if there are more efficient ways to streamline the discovery process and avoid duplicative depositions or discovery.[30] An appropriate amendment to Rule 30(b)(6) could be as follows:

> "A deposition should generally not be taken pursuant to this paragraph if a party has deposed individuals with direct knowledge of the matters at issue or obtained adequate discovery through other means."

Such an amendment would be consistent with the amendments to Rules 16 and 26 suggested above, and would facilitate Rule 26(b)(1)'s requirement that discovery be "proportional to the needs of the case."

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additional testimony and granting monetary sanctions where a company failed to adequately prepare its designated representative for deposition); *Wausau Underwriters Ins. Co.* 310 F.R.D. at 687 (barring a company from testifying at trial on any matters on which the company's selected deponent had been unable or unwilling testify); *Martin Cty. Coal Corp.*, 2010 WL 4629761 at *12 (threatening sanctions where a deponent was "unprepared"); *Clapper v. American Realty Investors, Inc*., No. 3:14-CV-2970-D (N.D. Tex. Nov. 9, 2016) (requiring a second deposition, at the deponent company's expense, where the deponent was unfamiliar with several areas of inquiry) (citing *Brazos River Auth. V. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006)). Taken together, this has the possible effect of requiring companies and their counsel to waste time and resources over-preparing a deponent to respond to inquiries that lack specificity in order to avoid later claims of and sanctions for inadequate preparation. *See e.g.*, *Crawford*, 261 F.R.D. at 38 ("[A] notice of deposition . . . constitutes the minimum, not the maximum, about which a deponent must be prepared to speak.")

[28] *See Koninklijke Philips N.V. v. ZOLL LifeCor Corp.*, No. 2:12-CV-1369, 2014 WL 4660338, at *4 (W.D. Pa. Aug. 22, 2014), report and recommendation adopted in part, rejected in part sub nom. *Koninklijke Philips Elecs. N.V. v. ZOLL LifeCor Corp.*, No. CIV. 12-1369, 2014 WL 4660539 (W.D. Pa. Sept. 17, 2014) (finding that a Rule 30(b)(6) deposition notice should allow the producing party "to reasonably identify the metes and bounds of the listed topics.").

[29] *See e.g., Presse v. Morel*, No. 10 CIV. 2730 WHP MHD, 2011 WL 5129716, at *2 (S.D.N.Y. Oct. 28, 2011) (holding that company deponent who had previously testified in individual capacity could be designated as company representative for purposes of Rule 30(b)(6) in order to avoid waste of re-producing the same witness). *See also Patient A*, 2016 WL 880036, at *2 (finding that certain topics included in a party's Rule 30(b)(6) notice were not "proportional to the needs of the case."); *Hooker*, 204 F.R.D. at 126 (holding that Rule 26 was applicable to a dispute concerning the scope of a Rule 30(b)(1) deposition).

[30] *See Dongguk Univ. v. Yale Univ.*, 270 F.R.D. 70, 74 (D. Conn. 2010) (finding a Rule 30(b)(6) notice to be unduly burdensome where it would solicit duplicative information); *Presse*, 2011 WL 5129716, at *2 (holding that company deponent who had previously testified in individual capacity could be designated as company representative for purposes of Rule 30(b)(6) in order to avoid waste of re-producing the same witness). *See also* FED. R. CIV. P. 26(b)(1).

VI. RULE 30(b)(6) SHOULD ESTABLISH A CLEAR PROCEDURE FOR OBJECTING TO TOPICS ENUMERATED IN THE NOTICE AND FOR RESPONDING THAT THE ORGANIZATION HAS NO KNOWLEDGE ON A PARTICULAR TOPIC.

Rule 30(b)(6) provides no specific means for objecting to the enumerated topics for inquiry or categories of documents requested as set forth in the deposition notice, or for responding that the organization reasonably lacks knowledge on one or more topics. In order to allow for consistency in the discovery process, Rule 30(b)(6) should be amended to include a procedure for objecting to the notice, having objections ruled upon if needed, and a means to proceed with the deposition as to those topics or issues agreed to by the parties.

Rule 45 provides an excellent model of how Rule 30(b)(6) should handle objections to a subpoena. Rule 45 sets forth the obligation of the receiving party to object within the time for compliance or within 14 days, whichever is earlier. The same timing for objections should be applicable to a 30(b)(6) notice. Rule 45 places the burden on the requesting party to move the court to compel production/compliance with the subpoena. Likewise, the party requesting a deposition under 30(b)(6) should have the burden to move the court for a ruling on any objection he or she feels is not well taken. If the requesting party does not pursue a ruling on the objections, the deposition shall proceed on the topics to which no objection is raised.

This process should also accommodate instances in which organizations have no knowledge on particular topics. Although Rule 30(b)(6) contemplates knowledge held by an organization, case law is unclear on whether the organization can be required to obtain knowledge it does not have at the time of the deposition notice by seeking out and interviewing former employees.[31]

Providing a process for objections relieves the party receiving the notice from the burden of filing a motion for protective order and securing a ruling on the motion before the deposition. It will therefore likely reduce the number of motions filed while still allowing objections to be preserved and the deposition to proceed on a lesser number of topics. Ultimately, the amendment would allow the parties to complete their discovery on a more proportional basis and continue to advance the case to conclusion.

[31] *QBE Ins. Corp.*, 277 F.R.D. at 689 (corporation must interview former employees if no present employee has knowledge); *Great Am. Ins. Co. of N.Y. v. Vegas Const. Co*., 251 F.R.D. 534, 539 (D. Nev. 2008) (that a corporation no longer employs a person with knowledge does not relieve it of the duty to prepare a properly educated Rule 30(b)(6) designee); *but see FDIC v. 26 Flamingo, LLC,* No. *2*:11-cv-01936-JCM, 2013 WL 3975006, at *6 (D. Nev. Aug. 1, 2013) (requiring entity to prepare a Rule 30(b)(6) witness as to ex-employees' knowledge of the underlying transaction was unreasonable).

VII. RULE 30(b)(6) SHOULD EXPRESSLY EXCLUDE QUESTIONING ABOUT MATERIALS REVIEWED IN PREPARATION FOR THE DEPOSITION AND ABOUT THE PARTY'S LEGAL CONTENTIONS.

A. Materials Reviewed in Preparation for the Deposition Are Protected and Are Not an Appropriate Subject of Questioning.

Communications between attorney and client in preparation of a legal proceeding are privileged as attorney-client communications and work product that should be protected from disclosure.[32] Whether a questioning party can ask Rule 30(b)(6) representatives about the documents they reviewed with counsel to prepare for their testimony, however, is not always clear.[33] The selection and compilation of documents by counsel in preparation for pretrial discovery is "not universally accepted" as falling within the highly protected category of opinion work product.[34] Rule 30(b)(6) should be clarified to state that the materials reviewed in order to prepare for a deposition pursuant to Rule 30(b)(6) are protected by the attorney-client privilege and work-product doctrine.

It is common practice in Rule 30(b)(6) depositions to question organization representatives about the precise sources of information they relied on in preparing for their deposition. Given that counsel must make informed, strategic selections of documents from the larger discovery pool in order to meet their obligation to prepare their 30(b)(6) witnesses to address the topics noticed, identification of such documents impinges upon both attorney-client privilege and attorney work product.[35] The objective of such questioning is not to obtain the documents themselves, as those will have already been provided in discovery, but to learn the opposing counsel's litigation strategy and theory of the case.

Some courts have correctly recognized that work product includes not only "legal strategy . . . but also the selection and compilation of documents by counsel," and therefore, a deposing party may not ask Rule 30(b)(6) witnesses to identify documents they reviewed in preparation for the

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[32] *Montgomery Cty. v. MicroVote Corp*., 175 F.3d 296, 303 (3d Cir. 1999).

[33] *QBE Ins. Corp.*, 277 F.R.D. at 688 (witness is required to provide corporate contentions); *Cooley v. Lincoln Elec. Co*., 693 F. Supp. 2d 767, 791 (N.D. Ohio 2010) (corporate representative's authority to testify extends beyond facts to subjective beliefs and opinions); *AMP, Inc. v. Fujitsu Microelectronics, Inc.*, 853 F. Supp. 808, 831 (M.D. Pa. 1994) (granting motion to compel a Rule 30(b)(6) deposition covering "topics [that] deal largely with the contentions and affirmative defenses detailed in [the d]efendants' answer and counterclaim"). *But see SmithKline Beecham Corp. v. Apotex Corp.*, No. 00-CV-1393, 2004 WL 739959, at *3 (E.D. Pa. Mar. 23, 2004) (objection to 30(b)(6) notice sustained on basis that proponent was improperly attempting to use a Rule 30(b)(6) deposition to obtain legal contentions and expert testimony where contention interrogatories would be the better discovery device); *Wilson v. Lakner*, 228 F.R.D. 524, 529 n.8 (D. Md. 2005) (contention interrogatories should be used instead of attempting to make a corporate representative testify as to legal contentions); *see also BB & T Corp. v. United States*, 233 F.R.D. 447, 448 (M.D.N.C. 2006) ; *Kinetic Concepts, Inc. v. Convatec, Inc.*, 268 F.R.D. 255, 256 (M.D.N.C. 2010) (granting defendants' motion for protective order barring plaintiffs' 30(b)(6) depositions as to topics seeking testimony regarding the basis for all of Defendants' defenses and counterclaims").

[34] *Evergreen Trading, LLC v. United States*, 80 Fed. Cl. 122, 136 (Fed. Cl. 2007) (analyzing the Sporck rule).

[35] *Sporck v. Peil*, 759 F.2d 312, 318 (3d Cir. 1985) (noting respondent's counsel sought "identification of all documents reviewed by petitioner prior to asking petitioner any questions concerning the subject matter of the deposition").

deposition.[36] These courts consider preparation material work product because "[p]roper preparation of a client's case demands that a lawyer assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."[37] Questions pertaining to such preparation are inevitably intended to expose that strategy.[38]

Clarifying that the attorney-client privilege and work-product doctrine apply to questioning about the sources of information relied upon in preparing for Rule 30(b)(6) depositions would reduce acrimony between the parties and motion practice. Such an amendment would not prevent a party from obtaining non-privileged information by other, legitimate means, but rather would appropriately address improper attempts to invade the attorney-client privilege or obtain work product by identifying which documents the corporation's counsel, pursuant to their litigation strategy, thought sufficiently important to present to the representative.

B. The Bases for a Party's Legal Contentions Are Inappropriate for Questioning.

The purpose of Rule 30(b)(6) is to allow discovery of "information known or reasonably available to the organization." Depositions under this rule "are designed to discover facts."[39] Organization representatives should not be asked to express an opinion or contention that relates to the application of law to fact, particularly with respect to contentions in the lawsuit.

Some courts, however, permit deposing parties to seek not only facts but also legal positions, requiring organization representatives to testify to a "corporation's position, beliefs and opinions."[40] This permits deposing parties to abuse Rule 30(b)(6) to create oral contention interrogatories in the form of an "impromptu oral examination to questions that require [the corporation's] designated witness to 'state all support and theories' for myriad contentions in a complex case."[41] Forcing a representative to answer legal contention questions requires them to "synthesize complex legal and factual positions . . . best left to the contention interrogatories."[42]

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[36] *Id* at 316-17. *See also S.E.C. v. SBM Inv. Certificates, Inc.*, No. CIV A DKC 2006-0866, 2007 WL 609888, at *22 (D. Md. Feb. 23, 2007) (finding materials created in preparation for litigation are protected under Fed. R. Civ. P. 26(b)(3)); In re Allen, 106 F.3d 582 (4th Cir. 1997); *Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986).
[37] *Sporck*, 759 F.2d at 316.
[38] *See e.g. In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Relevant Prod. Liab. Litig.*, No. 3:09-MD-02100-DRH, 2011 WL 2580764, at *1 (S.D. Ill. June 29, 2011) (finding *Sporck* "is consistent with the Seventh Circuit's view of the purpose and scope of the work-product doctrine"); *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 408 (S.D.N.Y. 2009) ("The Second Circuit has [also] recognized that the selection and compilation of documents may fall within the protection accorded to attorney work product, despite the general availability of documents from both parties and non-parties during discovery."); *Shelton*, 805 F.2d at 1329 ("the selection and compilation of documents . . . reflects [counsel's] legal theories and thought processes, which are protected as work product.").
[39] *JPMorgan Chase Bank v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 362 (S.D.N.Y 2002) ("Fed. R. Civ. P. 30(b)(6) depositions, are designed to discover facts, not contentions or legal theories . . .").
[40] *QBE Ins. Corp.*, 277 F.R.D. at 689. *See also Cooley v. Lincoln Elec. Co.*, 693 F. Supp. 2d 767, 791 (N.D. Ohio 2010).
[41] Kent Sinclair & Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms*, 50 ALA. L. REV. 651, 652 (1999).
[42] James C. Winton, *Corporate Representative Depositions Revisited*, 65 BAYL. LAW REV. 938, 984 (2013).

Contention interrogatories are better suited to the task because interrogatories can receive the necessary input from both attorneys and informed individuals.[43] It "would be very difficult for a non-attorney witness to take a legal position with respect to certain statements in [a corporation's] patents," and a "better method would be for [the corporation] to respond to interrogatories because then it would be able to receive input from both its attorneys and other persons familiar with its patents."[44] "Some inquiries are better answered through contention interrogatories wherein the client can have the assistance of the attorney in answering complicated questions involving legal issues."[45]

Because Rule 30(b)(6) depositions are deemed to bind the organization, the rule should not allow contention questions to non-lawyer deponents in a deposition setting.[46] Not only does this practice create friction between the parties and provide a wide avenue for gamesmanship, it also frequently results in depositions being extended, more expensive and invasive.[47] Rule 30(b)(6) should be amended to preclude questions seeking the basis for a party's legal contentions, claims or defenses.

VIII. CONCLUSION

We strongly support the Committee's decision to examine Rule 30(b)(6) and the Subcommittee's work to develop potential amendments. Rule 30(b)(6) creates frequent, recurring problems that cause acrimony, expense and delay. The remedies proposed in this Comment are straightforward and will be easy to implement. Accordingly, we encourage the Subcommittee to proceed with drafting amendments to incorporate Rule 30(b)(6) into the rules that impact management activities and to reform Rule 30(b)(6) itself. Rules 16 and 26(f) should be amended to expressly include Rule 30(b)(6) in party conferences, pretrial conferences and scheduling orders. Rule 26(e) should be amended to facilitate supplementation of 30(b)(6) depositions. In addition, Rule 30(b)(6) should be amended to require at least 30 days' notice and the specific delineation of topics, as well as to provide a mechanism for objections. Rule 30(b)(6) should also be amended to prohibit contention questions and questions about protected materials. Rule 30(b)(6) notices should be expressly subject to proportionality, which means a presumptive limit on the number of topics—no more than ten—and an express acknowledgement that depositions may not be necessary where other evidence exists or where the organization has no knowledge. These changes will provide the tools Rule 30(b)(6) needs to accomplish its goal, and will have a dramatic impact on the cost and burdens of litigation by encouraging cooperation, proportionality and early case management.

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[43] *See SmithKline Beecham Corp*., 2004 WL 739959, at *3 ; *United States v. Taylor*, 166 F.R.D. 356, 362 (1996) aff'd, 166 F.R.D. 367 (M.D.N.C. 1996).

[44] *SmithKline Beecham Corp.*, 2004 WL 739959, at *3; *see also TV Interactive Data Corp. v. Sony Corp.*, 2012 WL1413368 (N.D. Cal. Apr. 23, 2012) (holding that contention interrogatories are proper because of the technical nature of the patent claims).

[45] *Taylor*, 166 F.R.D. at 363 n.7.

[46] *See In re Neurontin Antitrust Litig.*, No. CIV.A. 02-1390 FSH, 2011 WL 253434, at *7 (D.N.J. Jan. 25, 2011), aff'd, No. 02-1390, 2011 WL 2357793 (D.N.J. June 9, 2011) (noting a representative's testimony is binding and that the representative should be prepared to speak as to the corporations subjective beliefs and opinions).

[47] *Exxon Research & Eng'g Co. v. United States*, 44 Fed. Cl. 597, 601 (1999) (holding contention interrogatories are more appropriate, in part, because "contention interrogatories should be a less expensive method and are a less invasive method of letting [defendant] learn the required information").