



Proposed Changes to Rule 30(b)(6)

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Sirs,

Thank you for your thoughtful consideration of changes to Rule 30(b)(6) of the Federal Rules of Civil Procedure. The purpose of this e-mail is to provide comments on possible issues regarding Rule 30(b)(6) as invited by your May 1, 2017, post.

Inclusion of specific reference to Rule 30(b)(6) among the topics for discussion at the Rule 26(f) conference, and in the report to the court under Rule 16:

In most cases, a number of 30(b)(6) topics will be known at the outset of the case. However, in every case, additional topics for 30(b)(6) depositions are disclosed through discovery responses. Accordingly, either the proposed change should not be enacted because it could cut off important discovery, or it should be enacted with the express ability to include additional 30(b)(6) topics without the time and expense of requesting permission from the Court.

Judicial admissions:

The proposed change to non-binding testimony is opposed. In fact, as Court's have been ruling more and more frequently with regard to a parties deposition answers, "[A] deposition is not a take home exam...." where substantive answers can be changed. *Lee v. Zam Clarendon, L.P.*, 689 F. Supp. 2d 814, 819 (E.D. Va. 2010) at 816 n.3, citing *Wyth v. Lupin LTD*, 252 F.R.D. 295, 296-97 (D. Md. 2008). The proposed Rule change would provide corporations the ability to change answers with no consequence when parties to the litigation cannot. In fact, I request the committee change to the Rule so that corporations are not allowed to contradict the testimony of the person they provide at the deposition who is supposed to be their most knowledgeable person on that subject. That individuals answers should be judicial admissions.

Requiring and permitting supplementation of Rule 30(b)(6) testimony:

Again, this proposed change would provide corporations with the ability to change testimony when the parties do not have that ability. It would also render the deposition useless because all information given would be subject to change. The committee should therefore reject this proposal.

Forbidding contention questions in Rule 30(b)(6) depositions:

This appears to be yet another attempt to prevent the designated witness' testimony from binding the corporation. The Rules already contain a procedure for dealing with this issue. The attorney at the deposition can object to the question, but the question must be answered. The corporation can then move the Court to allow amendment to the answer because the question is a contention question, and the Court will be in the best position to determine whether the answer date should be deferred "until designated discovery is complete, or until a pretrial conference or some other time."

Adding a provision for objections to Rule 30(b)(6):

This proposed change appears to be ripe for abuse. Certainly if the proposed change is approved, the amended Rule should require specific objections and mandatory sanctions for frivolous objections.

Amending the rule to address the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions:

This proposed change has some merit, but should not be limited to 30(b)(6) witnesses. Whatever limitations are imposed should be applicable to all depositions to prevent discovery abuse.

Another topic that could be addressed by the committee is the problems with deposing 30(b)(6) witnesses who are also fact witnesses. In many states, like New Mexico, it often turns out that an LLC is comprised of 1 or 2 members who are also fact witnesses. In keeping with the idea of limiting depositions and duration of depositions, problems are created in determining whether the witness is being questioned as a fact witness or as a corporate representative. The suggestion that each question should be prefaced with a delineation is too cumbersome a solution. The actual solution appears to be separate depositions but the Rule should clearly state that all questions must be answered subject to objection, *unless* a privilege for not answering is invoked.

Thank you for your consideration of my comments.

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