

**PUBLIC HEARING ON
PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE**

**JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON CIVIL RULES**

**Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington DC 20544
February 8, 2019**

**List of Confirmed Witnesses for the
Public Hearing on Proposed Amendments to the
Federal Rules of Civil Procedure
Judicial Conference Advisory Committee on Civil Rules
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Washington DC 20544
February 8, 2019**

| | Witness Name | Organization | Testimony / Comment |
|----|----------------------------|--|-------------------------------|
| 1 | Keith Altman | Excolo Law, PLLC | No testimony/comment received |
| 2 | Lauren Barnes | Hagens Berman Sobol Shapiro LLP | Tab 1 |
| 3 | Mark Behrens | International Association of Defense Counsel | Tab 2 |
| 4 | John H. Beisner | Skadden, Arps, Slate, Meagher & Flom LLP | No testimony/comment received |
| 5 | Richard B. Benenson | Brownstein Hyatt Farber Schreck, LLP | No testimony/comment received |
| 6 | Paul Bland | Public Justice | Tab 3 |
| 7 | Edward Blizzard | Blizzard Law, PLLC | Tab 4 |
| 8 | Kathy Byrne | Cooney & Conway | No testimony/comment received |
| 9 | Sharon L. Caffrey | Duane Morris, LLP | Tab 33 |
| 10 | Mark Chalos | Lieff Cabraser Heimann & Bernstein LLP | Tab 5 |
| 11 | Susannah Chester-Schindler | Waters & Kraus, LLP | Tab 6 |
| 12 | Andrew B. Cooke | Flaherty Sensabaugh Bonasso PLLC | Tab 7 |
| 13 | William J. Conroy | Campbell, Conroy & O'Neil | No testimony/comment received |
| 14 | Alex Dahl | Lawyers for Civil Justice | Tab 8 |
| 15 | Philippa Ellis | Owen Gleaton Egan Jones & Sweeney | No testimony/comment received |
| 16 | Peter J. Fazio | Aaronson Rappaport Feinstein & Deutsch LLP | No testimony/comment received |
| 17 | John S. Guttman | Beveridge & Diamond | Tab 9 |
| 18 | Dion W. Hayes | McGuire Woods LLP | No testimony/comment received |
| 19 | Jill Jacobson | Husqvarna Professional Products, Inc. | No testimony/comment received |
| 20 | Toyja E. Kelley | DRI-The Voice of the Defense Bar | Tab 10 |
| 21 | Jessica M. Kennedy | McDonald Toole Wiggins, PA | Tab 11 |
| 22 | D. Sterling Kidd | Baker, Donelson, Bearman, Caldwell & Berkowitz, PC | No testimony/comment received |
| 23 | Jennifer I. Klar | Relman, Dane & Colfax PLLC | Tab 12 |
| 24 | Mark R. Kosieradzki | Kosieradzki Smith Law Firm, LLC | Tab 13 |
| 25 | Craig A. Leslie | Philips Lytle, LLP | No testimony/comment received |
| 26 | Chad M. Lieberman | Brousseau Bartlett Lieberman LLC | Tab 14 |
| 27 | Altom M. Maglio | Maglio Christopher & Toale, PA | Tab 15 |

| | Witness Name | Organization | Testimony / Comment |
|----|-----------------------------|--|-------------------------------|
| 28 | Brad Marsh | Swift, Currie, McGhee & Hiers, LLP | No testimony/comment received |
| 29 | Robert W. Maxwell | Bernard, Cassisa, Elliott & Davis | No testimony/comment received |
| 30 | Tobias L. Millrood | American Association for Justice | Tab 16 |
| 31 | Michael L. Neff | Neff Law | Tab 17 |
| 32 | Michael Nelson | Eversheds Sutherland (US) LLP | Tab 18 |
| 33 | Mary T. Novacheck | Bowman and Brooke, LLP | Tab 19 |
| 34 | Terry O'Neill | National Employment Lawyers Association | Tab 20 |
| 35 | Bruce R. Parker | Venable LLP | Tab 21 |
| 36 | Thomas W. Pirtle | Laminack, Pirtle & Martines | No testimony/comment received |
| 37 | S. Virginia Bondurant Price | McGuire Woods LLP | No testimony/comment received |
| 38 | Jonathan M. Redgrave | Redgrave LLP | No testimony/comment received |
| 39 | Patrick Regan | Regan Zambri Long, PLLC | No testimony/comment received |
| 40 | Thomas C. Regan | LeClair Ryan | Tab 31 |
| 41 | Terri Reiskin | Dykema Gossett PLLC | Tab 32 |
| 42 | Ira Rheingold | National Association of Consumer Advocates | Tab 22 |
| 43 | Sherry Rozell | McAfee & Taft | No testimony/comment received |
| 44 | Greg Schuck | Huie Fernambucq & Stewart, LLP | No testimony/comment received |
| 45 | Brittany M. Schultz | Ford Motor Company | Tab 23 |
| 46 | Patrick Seyferth | Bush Seyferth & Paige PLLC | Tab 24 |
| 47 | Michael L. Slack | Slack Davis Sanger LLP | Tab 25 |
| 48 | Donald H. Slavik | Slavik Law Firm LLC | Tab 26 |
| 49 | Andrew J. Trask | | Tab 27 |
| 50 | Christine E. Webber | Cohen Milstein Sellers & Toll PLLC | See Tab 20 |
| 51 | Mike Weston | Lederer Weston Craig, PLC | No testimony/comment received |
| 52 | Ben Whitman | Clark Fountain | No testimony/comment received |
| 53 | Julie G. Yap | Seyfarth Shaw LLP | Tab 28 |
| 54 | Hassan A. Zavareei | Tycko & Zavareei LLP | Tab 29 |
| 55 | Terrence M.R. Zic | Whiteford Taylor Preston | Tab 30 |

TAB 1

TESTIMONY OF

LAUREN G. BARNES
HAGENS BERMAN SOBOL SHAPIRO LLP


HAGENS BERMAN

Lauren G. Barnes
HAGENS BERMAN SOBOL SHAPIRO LLP
 55 CAMBRIDGE PARKWAY, SUITE 301
 CAMBRIDGE, MA 02142
 www.hbsslaw.com
 Direct 617 475 1957
 lauren@hbsslaw.com

January 24, 2019

Via Email

RulesCommittee_Secretary@ao.uscourts.gov

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

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

Dear Committee Secretary and Members,

My name is Lauren Barnes and I am a partner with Hagens Berman Sobol Shapiro LLP. I appreciate the opportunity to address the Committee on the proposed changes to FRCP 30(b)(6) on February 8, 2019.¹ Below, I provide a brief outline of the issues I expect to cover in my testimony and will provide fuller written testimony before February 8.

My practice for the last dozen years has focused on pharmaceutical marketing and antitrust litigation, alleging unlawful and/or anticompetitive conduct by pharmaceutical manufacturers and seeking recovery on behalf of private and public purchasers in class and complex litigation. The defendants in our cases are typically corporations; so too are the representatives of the plaintiff classes. I have also had the honor of helping represent state Attorneys General in related litigation.

Our cases are large, often involving damage estimates exceeding hundreds of millions of dollars, millions of pages of discovery, and good faith work by counsel to juggle the demands of numerous depositions, including multiple Rule 30(b)(6) depositions. In these cases, efficiency is key.

The changes proposed by the Committee articulate the routine (and common sense) set of negotiations by counsel that already occur. Discussions to clarify topics and advance identification of the Rule 30(b)(6) witness or witnesses by both sides happen almost without exception, in my experience, and serve this important goal of efficiency. Both plaintiff and defense counsel in our cases must cull through mountains of ESI to identify a relevant and useable set of deposition exhibits. Ensuring the parties share, as best as possible, an

¹ The views expressed here are my own and not necessarily those of my partners or my firm.

January 24, 2019

Page 2

understanding of the issues to be covered and the identity and knowledge base of the deponent(s) smooths the process for everyone.

Arbitrary, one-size-fits-all limitations on the number of topics, how they will be treated, and how and when notices must be served and negotiated serve no efficient purpose and may instead simply result in more trips to the court over issues that can and should be negotiated by counsel. What is appropriate in the cases I pursue may make no sense for many other cases. In our practice, lawyers operating as zealous advocates for their clients but in good faith work within the Rule as currently drafted and are able to sharpen their pencils and agree on the appropriate treatment and interpretation of deposition notices and topics, seeking the court's guidance only when truly necessary. That is how it should remain.

I look forward to testifying before the Committee on February 8, 2019.

Sincerely,

/s/ Lauren G. Barnes

Lauren G. Barnes

TAB 2

COMMENT OF

INTERNATIONAL ASSOCIATION
OF DEFENSE COUNSEL



COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES

PROPOSED RULE 30(B)(6) IS PROBLEMATIC AND SHOULD BE REVISED TO ADDRESS PROBLEMS IN RULE 30(B)(6) PRACTICE

January 24, 2019

The International Association of Defense Counsel (“IADC”)¹ respectfully submits this Comment to the Civil Rules Advisory Committee on the proposed amendment to Rule 30(b)(6).

I. A Conferral Requirement About the Identify of the Witness is Problematic

The IADC opposes any requirement that the parties confer about “the identity of each person the organization will designate to testify.” We appreciate that, through this language and the Committee Notes, the Committee has tried to clarify that an organization retains the right to select its spokesperson. Nevertheless, the proposed rule is still problematic because it would mandate conferral over the identity of the witness. Instead of promoting cooperation, the proposal will lead to disagreements and increase litigation costs.

A change in the rule will lead to attempts to reshape settled law that a noticing party has no right to dictate the witness speaking for the organization. Further, as the IADC noted in a June 2018 comment, aggressive plaintiff lawyers will use the rule to try to gain a litigation advantage, such as by trying to block or challenge a witness that has a reputation for being an effective spokesperson for the organization. Witness identification at the conference also may restrict the organization’s flexibility to change its proposed designee.

In addition, the proposed amendment puts an unfair burden on organizations and places them in a catch-22. An organization cannot identify the persons it will designate to testify until there is clarity as to the “matters for examination” and an opportunity to vet potential witnesses. Yet, under the rule, opposing counsel could challenge a perceived delay in the organization’s witness identification as violating the amendment’s “good faith” requirement.

The Committee should remove the proposed “black letter” requirement that parties confer about the “identity of each person the organization will designate to testify.” Committee Notes fall short.

¹ The IADC is an invitation-only, peer-reviewed membership organization of approximately 2,500 of the world’s leading lawyers who primarily represent the interest of defendants in civil litigation. The IADC has been serving its members since the 1920s. Its activities benefit the civil justice system and the legal profession. The IADC has substantive committees that cover over 20 different areas of law. This comment reflects their broad input.

II. A Witness Disclosure Requirement Would Also be Problematic and is Unnecessary

At the Committee's January 4, 2019, public hearing, some members questioned whether defense concerns might be addressed by replacing the meet and confer requirement with language that would require organizations to identify each person the organization will designate to testify. This would be an improvement over the current proposed rule as it would address the possibility that some might mistakenly conclude that a conferral requirement presupposes some level of input by the noticing party with regard to witness selection.

As several defense practitioners testified, however, a witness disclosure requirement would create its own set of problems. These include the opportunity for some plaintiff counsel to "weaponize" the rule by conducting social media research to question the witness about his or her background and engage in personal attacks. Other than very basic information, such questions are not appropriate for a Rule 30(b)(6) deposition. Giving plaintiff counsel the name of the witness in advance of the deposition inherently invites this kind of questioning. Counsel will, of course, do the research and, once they have the information, the temptation to use it is just too great. What comes next: the resume, CV, an attempt to learn the rationale as to why the person was selected?

There is good case law that the name of the individual is irrelevant because the organization is speaking. But under the proposed rule, the proceeding may focus on the individual and his or her history, connection to the disputed issues, and expertise or experience within and outside the organization. This focus on the identity of the witness detracts from the unique nature of the Rule 30(b)(6) proceeding.

In addition, new discovery fights could erupt should the organization change witnesses for any reason between the initial disclosure and deposition. The Committee heard testimony that this has happened in some cases when defense counsel have tried to be cooperative and disclosed the name of the spokesperson in advance of the deposition.

We appreciate that many defendants do identify their client's spokesperson in advance of a deposition. Our concern is with a rigid "one size fits all" requirement. The decision to disclose the identity of the witness may depend on whether a particular plaintiffs' counsel has a reputation for cooperation or gamesmanship. The timing of any disclosure may vary for practical reasons.

The Committee should continue to give organizations the discretion to determine whether and when to identify a spokesperson in advance of a deposition. This is particularly true where, as here, it does not appear that district judges and magistrates are reporting that disputes are occurring over witness identification issues.

III. The Committee Should Reconsider the Amendment and Find a Better Way

At the January 4 public hearing, it seemed that the Committee's interest in proposing a change to Rule 30(b)(6) may be driven by an assertion by some plaintiff counsel that not all witnesses are showing up at deposition fully prepared to answer all questions. We do not share this perspective, but if this is a problem, it appears to be isolated and can be addressed by existing provisions for sanctions. Identification of the witness in advance of deposition, whether as part of a meet and confer or through a disclosure requirement, would not fix the alleged preparation issue.

The rule should provide a framework for a meaningful meet and confer as to the "number and description" of the matters to be examined and clarify what happens when that process breaks down. Meeting and conferring is widely practiced and often beneficial, but simply mandating a conference, without more, will not address the problems that led the Committee to take up the rule.

The proposed rule does not provide specific guidance as to what is to be discussed in the meet and confer (the “number and description” verbiage is vague). Who decides when the meet and confer ends or whether it was in good faith? What happens if it fails? The proposed rule poses more questions than it answers in our view. The rule has the potential to become a tactical weapon for requesting parties to accuse responding parties of not acting in good faith. Another possibility is that the meet and confer turns into a mere “check the box,” making the change superfluous.

In addition to recommending more clarity as to the “number and description” meet and confer language, we believe the Committee should adopt other ideas that may help address the alleged preparation concerns stated by some Committee members, among other issues. A new rule should:

- **Set forth a clear notice requirement.** A definitive requirement (e.g., 30 days notice) for an organization to respond to a Rule 30(b)(6) notice would reduce acrimony between counsel and promote adequate (as opposed to rushed) preparation.
- **Establish a clear procedure for objecting to a Rule 30(b)(6) notice.** Courts have not been uniform in their treatment of objections. Some courts hold that the organization must seek a protective order under Rule 26(c), while others take the position that the parties must not involve the court prior to the deposition. Uniformity would be helpful to achieve.
- **Identify reasonable presumptive limits on the number of deposition topics.** A 2015 amendment to Rule 26(b)(1) improved the discovery process by making discovery “proportional to the needs of the case.” Something similar, such as a presumptive limit on the number of topics for a Rule 30(b)(6) deposition (e.g., 10 topics), would give the parties a framework for discussion and further the goal of adequate preparation.
- **Clarify how Rule 30(b)(6) depositions count towards the presumptive number and duration of depositions.** Rule 30(d) limits depositions to one day of seven hours absent leave of court, but the 2000 Committee Note indicates that “the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition.” Amending Rule 30(b)(6) to make clear that the presumptive seven-hour limit applies when more than one witness is designated will incentivize defendants to designate multiple specialized witnesses rather than make available a single witness for as many topics as possible.
- **Allow a written response when the organization has no knowledge on a topic.** Depositions about events distant in time obligate an organization to “create” a Rule 30(b)(6) witness by having persons with no actual knowledge review pertinent corporate records. The witness may add nothing to the information contained in the documents. When no employee with percipient knowledge exists, Rule 30(b)(6) should allow the organization to produce the documents constituting its knowledge on the specified topics.
- **Prohibit asking legal contention questions or inquiry into what materials witnesses reviewed to prepare for their depositions.** Rule 30(b)(6) has resulted in confusion with respect to whether an organization’s deposition is designed to discover only facts or may also include inquiry into the organization’s legal positions, beliefs, and opinions. A related emerging issue in Rule 30(b)(6) practice is whether a noticing party may inquire about the materials the Rule 30(b)(6) witness reviewed to prepare for the deposition, which may implicate the organization’s legal strategy and privileged communications. Rule 30(b)(6) would benefit from a clear statement prohibiting these types of inquiries.

TAB 3

TESTIMONY AND COMMENT OF

PAUL BLAND
PUBLIC JUSTICE



January 24, 2019
Advisory Committee on Civil Rules
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Room 7-240
Washington, DC 20544

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

Dear Members of the Civil Rules Advisory Committee:

I am the Executive Director of Public Justice, a national public interest law firm based in Washington, D.C. and supported by the non-profit Public Justice Foundation. Public Justice (www.publicjustice.net) pursues high impact lawsuits to combat social and economic injustice, protect the Earth's sustainability, and challenge predatory corporate conduct and government abuses. I oversee Public Justice's docket of consumer, environmental, and civil rights cases, and I myself have argued and won more than 40 reported decisions from federal and state courts across the nation.

I look forward to testifying in-person at the February 8, 2019 public hearing in Washington, D.C. My testimony will generally track the written comments submitted on behalf of Public Justice on January 24, 2018. The comments are available at: <https://www.regulations.gov/document?D=USC-RULES-CV-2018-0003-0172>.

As discussed in my written comments, Public Justice supports the proposed amendment to Rule 30(b)(6) because it ensures 30(b)(6) depositions will remain an invaluable discovery tool that empowers individuals to efficiently access the facts and evidence that are in a defendant-organization's exclusive control.

At Public Justice, the preservation of Rule 30(b)(6) is essential to our public interest work in a diverse array of litigation contexts. Among many other settings, for example, we have relied on the Rule to protect farmers from anticompetitive and exploitative labor practices, consumers from deceptive advertising, local communities from polluted waterways, and sexual assault survivors from deliberately indifferent schools. In each context, the power and flexibility of Rule 30(b)(6), based on good faith cooperation instead of one-size-fits-all limits and procedures, makes discovery fairer and more efficient.

We support a duty to confer about the identity of designated witnesses, but not the number of topics. That's because the number of topics does not actually control the substantive scope of the deposition, and an artificial limit on the number of topics may cause counsel to define topics more broadly, making it more difficult for witnesses to prepare and leading to more disputes as to whether a notice described topics with reasonable particularity.



Finally, we strongly oppose the continued calls for (1) a procedure for pre-deposition objections that would force courts into prospectively resolving details of issues that might or might not arise prior to having a context in which to fairly evaluate them, producing unnecessary litigation prior to issues even arising; (2) a one-size-fits-all notice requirement that would be both unfair and inefficient, and (3) limits on the number of topics, and the number and duration of depositions, that would have the potential to gut Rule 30(b)(6), promote gamesmanship, and result in endless discovery disputes.

We want to thank the Committee for the amount of time and careful consideration it has put into the process of evaluating potential amendments to Rule 30(b)(6). The Rule is critical to our public interest litigation efforts because it balances the playing field in the discovery process. Any change that weakens or limits the Rule would harm our clients. We're grateful that the committee has proceeded with caution and taken the time to consider all interests at stake.

Sincerely,

Paul Bland
Executive Director
Public Justice



COMMENT OF PUBLIC JUSTICE

TO THE CIVIL RULES ADVISORY COMMITTEE ON THE PROPOSED AMENDMENT TO FEDERAL RULE OF CIVIL PROCEDURE 30(b)(6)

Rule 30(b)(6): Empowering Efficient Litigation in the Public Interest

January 24, 2018

Public Justice, P.C. and the Public Justice Foundation (collectively, “Public Justice”) respectfully submit this Comment to the Advisory Committee on Civil Rules in response to the Request for Comment on the proposed amendment to Federal Rule of Civil Procedure 30(b)(6).

INTRODUCTION

Public Justice, P.C. is a national public interest law firm that pursues impact litigation to combat social and economic injustice, protect the environment, and challenge predatory corporate conduct and government abuses. We have one of the most diverse public interest litigation portfolios in the country. We protect consumers, employees, civil rights, and the environment. We litigate to stop sexual assault and bullying in schools, to promote a more sustainable and safe food system, to safeguard water sources from pollution, and to provide consumers and employees with access to the courts. The list goes on, but our litigation has one common theme: it aims to protect the underprivileged and the powerless. As a result, we’ve seen firsthand the role Rule 30(b)(6) depositions play in a diverse range of litigation contexts where an individual with limited resources is trying to hold a larger, more powerful organization—be it a corporation, a government agency, or a school district—accountable.

The Public Justice Foundation is a not-for-profit charitable membership organization that supports the work of Public Justice, P.C. and educates lawyers, judges, and the broader public about critical social and economic issues that affect the public interest. Its almost 2,800 members, from all fifty states, represent plaintiffs in a broad range of personal injury, employment discrimination and wage and hour cases, consumer, tort (both mass and individual), antitrust and securities fraud, commercial, and civil rights cases. Public Justice is dedicated to ensuring that the justice system is accessible to and protects all individuals who’ve been harmed by illegal conduct.

Public Justice supports the proposed amendment to Rule 30(b)(6) because it preserves the fundamental purpose of the Rule: to ensure organizations receive no special advantages that enable them to avoid or delay legitimate discovery.¹ With the proposed amendment, 30(b)(6) depositions will remain an invaluable discovery tool that empowers individuals to efficiently access the facts and evidence that are in a defendant-organization’s exclusive control.

¹ Subcommittee Report: Rule 30(b)(6), Advisory Committee on Civil Rules, at 241 (April 25–26, 2017), http://www.uscourts.gov/sites/default/files/2017-04-civil-agenda_book.pdf (explaining Rule 30(b)(6) was introduced in 1970 to stop organizational litigants from making it difficult for the opposing party to “nail down organizational information”).

At Public Justice, the preservation of Rule 30(b)(6) is essential to our public interest work in a diverse array of litigation contexts. In this Comment, we begin by highlighting a few examples from some areas of our own litigation. We explain how Public Justice uses Rule 30(b)(6) depositions to protect farmers from anticompetitive and exploitative labor practices, consumers from deceptive advertising, local communities from polluted waterways, and sexual assault survivors from deliberately indifferent schools. In each context, the power and flexibility of Rule 30(b)(6), based on good faith cooperation instead of one-size-fits-all limits and procedures, makes discovery fairer and more efficient.

Next, we explain why Public Justice supports the proposed amendment's addition of a duty to confer in good faith. Beyond preserving the power and flexibility of Rule 30(b)(6), the amendment ensures the parties will cooperate to resolve issues outside of the court room. Public Justice strongly believes that the duty to confer about the identity of designated witnesses should stay in the Rule. We do, however, recommend that the committee remove any duty to confer about the number of topics and clarify, in the Committee Note, that the duty to confer should not become an excuse to further delay discovery.

Finally, we strongly oppose the continued calls for (1) an unnecessary procedure for pre-deposition objections that will only further delay discovery, (2) an unfair and inefficient one-size-fits-all notice requirement, and (3) limits on the number of topics, and the number and duration of depositions, that would gut Rule 30(b)(6), promote gamesmanship, and result in endless discovery disputes. The committee should not reconsider these radical proposals.

I. THE PROPOSED AMENDMENT PRESERVES RULE 30(b)(6) AS A POWERFUL AND FLEXIBLE DISCOVERY DEVICE ESSENTIAL TO PUBLIC JUSTICE'S WORK.

As with all discovery, judicial efficiency is best served through cooperative dialogue between the parties outside of court. That's exactly what the proposed amendment requires. Instead of adding new standards, limits, and procedures that will over-complicate the process and cause parties to repeatedly turn to the court to resolve discovery issues, the proposed amendment encourages parties to resolve issues on their own, keeping them out of court. By requiring parties to confer about the matters for examination and the identity of the designated witnesses, the proposed amendment ensures Rule 30(b)(6) remains an efficient and productive discovery tool for all litigants.

Public Justice attorneys regularly rely on Rule 30(b)(6) to hold large, powerful organizations accountable, including, among others, exploitive corporate employers, deceptive food producers, reckless polluters, and schools indifferent to gender-based violence. To help the committee understand how important Rule 30(b)(6) is to public-serving litigation, we highlight four concrete examples. Each example is different from the next, but in each, Rule 30(b)(6) makes discovery fairer and more efficient, empowering individuals to bring lawsuits that hold powerful organizations accountable and advance the public interest.

A. Protecting Farmers from Exploitative Labor Practices

Public Justice uses Rule 30(b)(6) to protect farmers trapped in unfair and anticompetitive agreements with big agricultural companies. *Morris v. Tyson* is an ongoing multi-plaintiff action

brought on behalf of poultry farmers, alleging that Tyson Chicken, Inc.’s system of mass poultry production, specifically related to how it pays its growers, violates antitrust laws and exploits farmers.² A major issue in the case is whether Tyson manipulates its compensation system to suppress farmers’ wages. Tyson calculates its farmers’ wages based on how they perform compared to other Tyson farmers, but Tyson gives each farmer a different set of tools (different kinds of birds, veterinary services, bird feed, etc).

When discovery started, Tyson produced tens of thousands of pages of undifferentiated scanned hard copy documents related to its compensation system—such as feed tickets demonstrating the feed received by particular farmers. This form of production created a time-wasting and obfuscatory system where counsel for the farmers were required to laboriously go through these documents and create tables for what each farmer received.

Plaintiffs then conducted an electronic discovery 30(b)(6) deposition to determine what kind of information Tyson stores electronically, what type of platform the information is stored on, and how to retrieve it.³ Through the 30(b)(6) deposition, Plaintiffs learned that much of what Tyson produced as scanned PDFs was available electronically in a much more user-friendly format that would save Plaintiffs a significant amount of time and resources in the discovery process. Without Rule 30(b)(6), Tyson would have been able to make it time-consuming and wasteful for the farmers to access this essential information, and pointlessly increase the costs of discovery.

Plaintiffs also conducted a factual Rule 30(b)(6) deposition about how the compensation system operates and how Tyson selects what inputs (type of bird, type of feed) each farmer receives. With a clear record of Tyson’s practices, the court will have the information it needs to evaluate our clients’ allegations that the system is designed or operated in an anti-competitive and exploitive way. If Rule 30(b)(6) was weakened, Tyson would have been able to avoid or delay legitimate discovery related to its compensation system; Plaintiffs would be forced to swallow the costs of the prolonged, inefficient process; and poultry farmers would be denied fair and efficient access to justice.

B. Protecting Consumers from Deceptive Advertising

Public Justice is also relying on Rule 30(b)(6) depositions in another ongoing case—one about deceptive advertising. In *Animal Legal Defense Fund v. Hormel Foods Corporation*, ALDF alleges that Hormel’s “Natural Choice” advertising is deceptive and misleading because animals processed into Natural Choice deli meats are actually raised in factory farms with standard industrial feed. Hormel also adds preservatives and nitrates to the final product.⁴

In this case, *both* parties have benefitted from Rule 30(b)(6) to build their respective cases. The plaintiffs conducted 30(b)(6) depositions to learn what Hormel intended to

² See *Morris v. Tyson Chicken, Inc.*, No. 4:15-cv-00077 (W.D. Ky.).

³ See *Manual for Complex Litigation, Fourth* § 11.446 (2004) (“Any discovery plan must address issues relating to [electronic] information, including the search for it and its location, retrieval, form of production, inspection, preservation, and use at trial.”); Electronic Resources Public Consortium, *Identification Guide* (Nov. 3, 2010) (explaining that electronic storage of information differs with each organization as each has different hardware, software, and storage protocols).

⁴ See *Animal Legal Defense Fund v. Hormel Foods Corp.*, No. 2016 CA 004744 B (D.C. Super. Ct.).

communicate with its advertisements, and its policies and practices regarding the treatment and slaughter of animals. Likewise, Hormel took a 30(b)(6) deposition of the Animal Legal Defense Fund to determine, for standing purposes, if ALDF has been harmed by Hormel's advertising. Hormel probed ALDF's agenda, activities, and how it spends its resources. This case illustrates how Rule 30(b)(6) is an invaluable discovery device whenever an organization—plaintiff or defendant—is a party to a case.

Hormel also illustrates the importance of ensuring that Rule 30(b)(6) remains flexible, without arbitrary limits on the number or duration of depositions. Hormel decided to designate five different witnesses in response to a single 30(b)(6) notice, and as a result, the depositions took four days. Presumably, this was the least burdensome way for Hormel to provide a prepared witness for each topic area. However, if there were restrictions on the number or duration of depositions, Hormel's prudential decision would become a strategic one. Instead of determining the least burdensome way to provide the information requested, parties would likely select the number of witnesses that would best limit the opposition's discovery.

With the facts and evidence obtained through flexible, comprehensive 30(b)(6) depositions, Public Justice can advocate for consumers who want to know how their food is produced. We can fight for an open, transparent market that protects the consumer's right to choose safe, healthy, and humane products.

C. Protecting Local Communities from Water Pollution

Public Justice, representing several environmental organizations, successfully sued coal mine operators in West Virginia for violating the Clean Water Act.⁵ Rule 30(b)(6) was essential to this effort. To prove the coal mines had violated water quality standards, Public Justice had to establish that the mines were discharging dissolved salts into streams in amounts that greatly exceeded pre-mining baseline amounts. In each case, Public Justice had a large amount of circumstantial evidence in the form of hundreds of pages of maps, permit records, and monitoring data to support its experts' opinions that the discharges were causing violations of water quality standards.

Most courts impose such tight limits on interrogatories and requests for admissions that it is difficult or impossible to resolve disputes involving large data sets. In addition, it is inefficient and time-consuming to have the court review and process these data sets at trial. In such cases, Rule 30(b)(6) provides a workable and efficient alternative. Public Justice drafted a Rule 30(b)(6) notice asking the defendant to produce a designated representative for deposition who would testify to the factual accuracy of an attached summary statement of the data and the authenticity and truthfulness of the supporting documents. In a statement accompanying the notice, Public Justice informed the coal company that it could, alternatively, just stipulate to the factual statement and documents.⁶ Each time, the coal company negotiated and agreed to stipulate to the statement of facts, which meant that Public Justice didn't have to burden the trial

⁵ See *Ohio Valley Env'tl. Coal., Inc. v. Fola Coal Co.*, 845 F.3d 133 (4th Cir. 2017); *Ohio Valley Env'tl. Coal., Inc. v. Fola Coal Co.*, 120 F. Supp. 3d 509 (S.D. W. Va. 2015); *Ohio Valley Env'tl. Coal. v. Elk Run Coal Co.*, 24 F. Supp. 3d 532 (S.D. W. Va. 2014).

⁶ See, e.g., *Ohio Valley Env't'l Coal. v. Fola Coal Co.*, Civil No. 2:13-21588 (S.D. W.Va.), Docket No. 53.

judge with hundreds of pages of raw data and the court could focus its attention on the expert testimony.

The coal companies agreed to stipulate to the statement of facts because they knew it was the same information Public Justice could establish through a Rule 30(b)(6) deposition. If the Rule didn't exist or was substantially weakened, then coal companies would likely refuse to stipulate to any facts, no matter how objective or undisputed they were. But because Rule 30(b)(6) requires companies to disclose facts known to them, just like any other party to a lawsuit, the companies are motivated to cooperate with plaintiffs and promote an efficient discovery process.

These coal mining cases also highlight the importance of ensuring Rule 30(b)(6) depositions remain a flexible, cooperative process. If a coal company had refused to stipulate to a statement of facts, establishing these facts through standard fact depositions would have wasted scores of hours with repetitive testimony. Public Justice would have needed to establish facts based on hundreds of data points, which would have required an arduous process of asking the company how it interprets an enormous amount of raw data. If there were strict limits on the topics covered, or the number or duration of 30(b)(6) depositions, Public Justice wouldn't have been able to get through all the data and establish the necessary factual background. Public Justice would be forced to bring the raw data to trial and waste everyone's time extracting basic facts from the hundreds of data points. Thus, artificial, one-size-fits-all limits on 30(b)(6) depositions would interfere with legitimate discovery and complicate trials.

Even worse, limits on the duration of 30(b)(6) depositions would motivate companies to refuse to stipulate to clearly understood facts, no matter what could be established through a 30(b)(6) deposition, because going through every data point would help companies run out the clock. If every hour spent reviewing undisputed data points is an hour not answering questions about the company's policies and practices, why stipulate to anything?

But under the proposed amendment, requiring parties to confer in good faith, all parties have an incentive to make discovery more efficient. The Rule ensures productive discovery, empowering local communities and environmental organizations to hold coal companies accountable. In each of these West Virginia coal mining cases, the court held that the coal mine was discharging excessive amounts of ionic pollution, damaging the aquatic ecosystem in violation of the Clean Water Act and federal mining laws. The West Virginia streams polluted by coal mines are "relied upon by West Virginians for drinking water, fishing, recreation, and important economic uses."⁷ Rule 30(b)(6) was essential to Public Justice's efforts to protect the safety and well-being of West Virginians.

D. Protecting Sexual Assault Survivors from Deliberately Indifferent Schools

Rule 30(b)(6) helps students hold schools accountable for failing to take appropriate steps to prevent and respond to gender-based violence. Public Justice litigates Title IX cases against primary and secondary schools, as well as colleges and universities. For example, Public Justice is currently litigating a Title IX lawsuit against Virginia's Fairfax County School Board for violating the rights of a sixteen-year-old student survivor of sexual assault. In response to the

⁷ *Ohio Valley*, 24 F. Supp. 3d at 579.

reported assault, the school threatened to punish the student survivor, interrogated her, and discouraged her from contacting the police—all without contacting her parents. The school failed to appropriately discipline the assailant or ensure the survivor’s well-being. The complaint alleges the school’s treatment of this one survivor is part of a pattern of ignoring and minimizing student-on-student sexual harassment in Fairfax County.

Attorneys litigating Title IX cases frequently rely on Rule 30(b)(6) depositions. To start, 30(b)(6) depositions are the most efficient way of establishing whether a school receives federal financial assistance and thus whether Title IX even applies. Attorneys also can use 30(b)(6) depositions to uncover the school’s policies and procedures for investigating complaints of sexual harassment or assault. This is much more efficient than fishing around for all university personnel ever involved in crafting or editing the schools’ sexual harassment and assault policies, especially when the policies have changed over time.

And a clear understanding of the school’s policies and procedures is essential to building a Title IX case. Once plaintiffs determine whether the school has policies in place and what those policies are, the plaintiffs can determine whether there are deficiencies in those policies or highlight the ways in which the school failed, in practice, to follow its own policies. In cases where the school has operated with deliberate indifference, this discovery is essential to establishing these facts. The school can’t claim that it just didn’t know how to respond to a complaint when the school’s very own policies explain what response is necessary to hold assailants accountable and keep student survivors emotionally and physically safe.

If Rule 30(b)(6) were limited or weakened, it would make it more difficult for students to hold their schools accountable under Title IX, thwarting nationwide efforts to ensure students, regardless of their sex, receive an education free of harassment or violence. Rule 30(b)(6) ensures schools cannot escape liability under Title IX by hiding behind their complex organizational structures, filled with teachers and administrators trying to pass the buck. It ensures student survivors of sexual harassment or assault receive the support and education to which they are entitled.

II. PUBLIC JUSTICE SUPPORTS THE PROPOSED AMENDMENT, WITH A FEW MINOR CHANGES.

Public Justice supports the proposed amendment’s requirement that parties confer in good faith about the description of the matters for examination and the identity of each person the organization will designate to testify. We strongly encourage the committee to retain the duty to confer about the identity of designated witnesses. However, the committee should remove the duty to confer about the number of topics for examination. Finally, the committee should clarify in the Committee Note that this new duty to confer should not be used to delay discovery.

A. The Duty to Confer about the Identity of an Organization’s Designated Witness Should Stay in the Rule.

Under current practice, when parties receive 30(b)(6) notices, they generally inform the requesting party about the identity of the person or persons who will be testifying. This common practice should be codified in the Rule because it helps ensure the organization is choosing an appropriate witness and makes the process more efficient. While the organization is not required

to designate witnesses with personal knowledge about the matters for examination, they often do. It's more efficient to designate an already knowledgeable witness than prepare a witness from scratch.⁸ And a witness with personal knowledge often provides the most comprehensive and reliable information. This is especially true with respect to highly technical topics that may be difficult for a layperson to learn for a deposition.⁹

By requiring the parties to confer about the identity of the designated witnesses and the matters for examination, the parties can work together to ensure the organization provides well-prepared witnesses. Further, the duty to confer about the identity of designated witnesses serves efficient case management. Once a witness is identified, the parties can start planning the logistics of the deposition based on the witness's availability and location.

B. The Duty to Confer about the Number of Topics for Examination Should be Removed.

Parties should confer about the matters for examination without getting caught up in technicalities such as the number of topics. Communicating about the substantive topics, not the *number* of topics, ensures the organization has notice of the scope of the deposition and can adequately prepare its witnesses. The number of topics does not control the scope of the matters for examination. If parties agree to a limited number of topics, then counsel seeking discovery may make each topic broader than necessary. This makes it *more* difficult for witnesses to prepare and would lead to more disputes about whether topics describe matters with reasonable particularity.

Furthermore, a duty to confer about the number of topics suggests that the parties have to agree to a set number. But during a 30(b)(6) deposition, a party may learn about another topic that it needs to ask questions about. The majority rule is that 30(b)(6) testimony is not limited by the topics in the notice and that the scope of the deposition is determined solely by relevance.¹⁰ Requiring parties to confer about a particular number of topics would undermine the majority rule and create confusion in the law.

Thus, conferring about the number of topics—as opposed to just the substantive matters for examination—serves no purpose; it's a meaningless guidepost. And worse, it may cause counsel to put forth overly broad topics in an attempt to cooperate with the opposing party's preference regarding the number of topics. The requirement to confer about the “number of topics” should be removed from the proposed amendment.

⁸ See David L. Johnson and Kyle Young, A Primer on 30(b)(6) Depositions: A Defense Perspective, MILLER & MARTIN PLLC (2011), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/134.authcheckdam.pdf.

⁹ See Practical Considerations in Identifying and Preparing Your Rule 30(b)(6) Witnesses, ARNALL GOLDEN GREGORY LLP (Oct. 6, 2015).

¹⁰ See Eric Kinder & Walt Auvil, *Rule 30(b)(6) at 45: Is It Still Your Friend?*, A.B.A. SEC. OF LITIG – PRETRIAL PRAC. & DISCOVERY (Dec. 3, 2015) (citing *Bracco Diagnostics Inc. v. Amersham Health Inc.*, No. 03-6025 (SRC), 2005 WL 6714281 (D.N.J. Nov. 7, 2005); *Cabot Corp. v. Yamulla Enters.*, 194 F.R.D. 499 (M.D. Pa. 2000); *Detoy v. City & Cty. of S.F.*, 196 F.R.D. 362 (N.D. Cal. 2000)).

C. The Committee Note Should Clarify That the Duty to Confer is Not an Excuse to Stall Discovery.

While Public Justice supports the proposed amendment, we are concerned that recipients of 30(b)(6) notices might use the new duty to confer in good faith to further delay discovery. Another required step in the discovery process is another opportunity for organizations to drag their feet, prolonging the process to hike up costs and avoid liability. The committee could alleviate this concern by clarifying, in the Committee Note, that the duty to confer may be a single conference or a series of discussions, and that the duty is not an excuse to slow down the discovery process and take more time to respond to 30(b)(6) requests. The duty to confer should serve efficient case management and, if anything, speed up the discovery process.

III. PUBLIC JUSTICE STRONGLY OPPOSES EFFORTS TO WEAKEN RULE 30(b)(6).

Some comments continue to call for additional amendments that would harm efficiency and undermine the purpose of Rule 30(b)(6). Adding more obstacles and restrictions to 30(b)(6) depositions would give organizations a special litigation advantage over individuals and make it harder and more costly for human beings of modest means to obtain justice. Below, we address three proposals that would make discovery less efficient and less fair.

A. A Formalized 30(b)(6) Objection Process Would Unnecessarily Delay Discovery.

A new formal objection procedure for Rule 30(b)(6) serves no purpose and would significantly delay the discovery process. Instead of letting attorneys confer in good faith and cooperatively resolve discovery disputes on their own, some comments suggest a formalized objection process that would force courts to consider and resolve preemptive battles about the scope and nature of discovery from the get-go. Because the discovery process often starts with a Rule 30(b)(6) deposition, a formalized 30(b)(6) objection procedure would encourage organizations to bog down and delay discovery from the outset of a case.

And all for nothing. There are existing procedures to oppose truly abusive Rule 30(b)(6) requests. For example, parties can always move for a protective order under Rule 26.¹¹ There's no evidence that protective orders fail to protect parties from abusive 30(b)(6) requests.

Other comments suggest the committee should adopt an objection procedure akin to Rule 45, which imposes restrictions on subpoenas of *non-parties*. Rule 45 exists because we don't want to impose undue burdens and expenses on non-parties, and the Rule already protects non-party organizations. To adopt a similar procedure for parties that just happen to be organizations would give organizations a unique discovery advantage denied to human beings. This is exactly what Rule 30(b)(6) was designed to prevent in the first place.

¹¹ See, e.g., *Ingersoll v. Farmland Foods, Inc.*, No. 10-6046-CV-SJ-FJG, 2011 WL 1131129, at *8 (W.D. Mo. Mar. 28, 2011); *Murray v. Tyson Foods, Inc.*, No. 08-4001, 2010 WL 744302, at *6 (C.D. Ill. Feb. 24, 2010); *Doe v. District of Columbia*, 230 F.R.D. 47, 56 (D.D.C. 2005).

B. A One-Size-Fits-All Notice Requirement Would Only Generate More Disputes and Deny Parties Legitimate Discovery.

No amendment to impose a new and more burdensome notice requirement is necessary for Rule 30(b)(6) depositions. Rule 30(b)(1) already requires parties have reasonable written notice of any depositions. “There has been very little controversy as to what constitutes a ‘reasonable’ time” and “[o]bviously no fixed rule can be laid down because much will depend on the other circumstances of the particular case.”¹² There is no reason the standard that has long applied to all parties, without issue, should change for parties that happen to be organizations. Not only is a one-size-fits-all notice requirement unnecessary and unworkable, but it would, again, give organizations—frequently large, powerful corporations—a unique advantage.

Finally, there’s no evidence that attorneys often spring Rule 30(b)(6) notices on organizations at the last minute, causing undue burdens. That’s because it’s in every party’s interest to ensure the organization has enough time to provide a well-prepared witness. The reasonable notice requirement, in conjunction with an obligation to confer in good faith, ensures flexibility, allowing parties to schedule depositions in the most efficient and effective way based on the unique circumstances of their case.

C. Limits on the Number of Topics, or the Number or Duration of 30(b)(6) Depositions, Would Cripple the Rule, Enabling Gamesmanship and Endless Discovery Disputes.

Imposing new limits on the number of topics a 30(b)(6) deposition can address—or on the number or duration of 30(b)(6) party depositions that can be taken—would dramatically weaken this powerful and efficient discovery tool for many types of cases. Some cases are bigger or more complex than others. Some require discovery about many different aspects of an organization whereas others require an exploration of just a handful of topics. Arbitrary limits, applicable to all cases, would blindly limit discovery of relevant facts. Parties are perfectly capable of conferring and working out an appropriate plan on their own. And if there is a dispute, a trial judge familiar with the specific case will be in the best position to determine the appropriate limits.

Furthermore, limits would disincentivize a phased discovery process, which is far more efficient and less costly for everyone. An initial 30(b)(6) deposition is often taken to develop a better understanding of the available documents and witnesses, including what kind of data is electronically stored and how it’s organized. With this information, attorneys can then go collect and review all relevant documents and data, and develop a much narrower, targeted line of questioning for a second 30(b)(6) deposition focused on the facts of the case. If attorneys are limited in the number or duration of 30(b)(6) depositions, they will forgo this process. If attorneys are limited to just one deposition, they’ll be forced to indiscriminately gather all the information they can in one fell swoop. In fact, any limit will deter a phased-discovery process because attorneys will feel like they need to conserve the number of topics and depositions they have left in case a need for additional discovery arises.

¹² 8A Fed. Prac. & Proc. Civ. § 2111 (3d ed.).

Finally, as discussed above in context of *Hormel*, the party that receives a Rule 30(b)(6) notice gets to choose how many witnesses to produce. Often an organization will designate multiple witnesses to cover different topics or different time periods, presumably because different people know more about different topics, and relatedly, it's less burdensome than preparing one witness with all of the information. The party seeking a 30(b)(6) deposition should not be forced to use extra depositions just because the organization chooses to designate multiple witnesses. If that were the case, there's no doubt that many organizations would strategically appoint numerous witnesses to limit the overall discovery of relevant facts.

Limits on the number of topics, the number of depositions, or the duration of depositions will only create opportunities for gamesmanship which will, in turn, drag courts into endless discovery disputes from the very start. By contrast, requiring parties to confer in good faith about these issues allows the parties to develop context-specific plans that ensure fair and efficient discovery of relevant facts, without wasting the court's time and resources. The proposed amendment trusts that attorneys are capable of acting like professional adults and working out their issues. And in the rare circumstance where they can't work out an issue, a trial judge can make a context-specific decision about what kind of discovery is necessary.¹³

CONCLUSION

The proposed amendment preserves Rule 30(b)(6) as a powerful, efficient discovery device in public interest litigation. In Public Justice's experience, the Rule is invaluable to its efforts to hold large, powerful organizations accountable in a variety of contexts. Whether its exploitive corporate employers, deceptive food companies, polluting coal companies, or schools that fail to protect their students from sexual violence—Rule 30(b)(6) ensures that individuals can access the facts and evidence they need to seek justice. With respect to the specific language of the amendment, Public Justice strongly encourages the committee to keep the duty to confer about the identity of designated witnesses in the Rule. However, Public Justice does recommend that the committee remove the duty to confer about the number of topics and clarify that the duty is not an excuse to further delay the discovery process. Finally, Public Justice continues to oppose calls for radical changes that would prevent efficient and legitimate discovery and give organizations a special litigation advantage.

Amending Rule 30(b)(6) is a daunting task. A lot is at stake. The Rule has long served as an effective discovery tool, empowering organizations like Public Justice to hold large organizations accountable and promote social and economic justice in different contexts. But the proposed amendment rises to the occasion. It preserves the power and flexibility of the Rule while further encouraging cooperation. If adopted with the minor suggested changes, the proposed amendment will make discovery fairer and more efficient, expanding access to justice.

¹³ See, e.g., *Murphy v. Kmart Corp.*, 255 F.R.D. 497 (D.S.D. 2009) (court determined appropriate limits on scope of 30(b)(6) notice based on nature of claims and defendant-organization).

TAB 4

TESTIMONY/COMMENT OF

EDWARD BLIZZARD
BLIZZARD LAW, PLLC



5020 Montrose Blvd. Ste. 410
Houston, TX 77006-6550
Phone: 713-844-3750
Fax: 713-844-3755
www.blizzardlaw.com

January 23, 2019

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

Re: Proposed Amendments to FRCP 30(b)(6)

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

My name is Ed Blizzard. I am an attorney with the firm of Blizzard Law, LLC in Houston Texas. I have been practicing law since 1978 and have specialized in representing plaintiffs in pharmaceutical and medical device litigation for 30 years. I have served on numerous Plaintiff's Steering Committees, including the Pelvic Mesh Litigation MDLs, and specifically the MDL involving mesh products sold by Boston Scientific Corporation ("BSC").

My comments and testimony are in response to the testimony of Daniel Pratt, the former General Counsel for BSC. Mr. Pratt testified at the hearing held in Phoenix, Arizona on January 4, 2019, and advocated for a change to Rule 30(b)(6) that would establish a limit on the number of topics that could be designated by a noticing party, citing BSC's experience in the mesh litigation. I will offer proof that such a change is not justified by the BSC mesh litigation experience,

First, the pelvic mesh litigation is unique. The BSC MDL (MDL No. 2326), was one of six (6) mesh MDLs managed by the Honorable Joseph R. Goodwin, United States District Court for the Southern District of West Virginia. The BSC MDL alone involved more than 26,000 women. That number does not consider the women's cases filed in consolidated state court litigations in California and Massachusetts. The depositions that were taken in the MDL were largely coordinated with the state court proceedings, providing economy to BSC.

The litigation also involved thirteen (13) different BSC products. As Mr. Pratt testified, initially there were thirty-six (36) individual depositions taken of current or former employees of BSC. After the Court scheduled 200 cases to be fully worked up for trial on an accelerated schedule, the PSC issued two 30(b)(6) notices to have the corporation speak to matters that were likely to be issues in the individual trials. The parties met and conferred on the need for the depositions and the breadth of the notices, but not all issues in dispute were resolved. As a result, BSC filed a Motion to Quash and for Protection and the PSC filed a Response. Attached as Exhibit A is Magistrate Judge Cheryl A. Eifert's Order granting the Motion to Quash and for Protection in part and denying it in part.

It is important to note that the relief requested by Mr. Pratt here, that is a limit on the number of topics that can be designated in a notice, was not the relief requested by BSC or the relief ordered by the Court.

In addition, Judge Eifert's opinion clearly indicates that Plaintiffs are entitled to take 30(b)(6) depositions because the previous employees deposed were speaking only in their individual capacities and were limited by time frame and product.

As is demonstrated in this case, the "meet and confer" process has limitations. Sometimes the parties are unable to reach resolution, but the 30(b)(6) deposition itself results in efficiencies for the Court and the parties. In Magistrate Eifert's order she states,

"Considering that Plaintiffs have different theories, legal requirements, evidentiary burdens, products, and time frames to address in the 200 cases currently being worked up for trial, their need for the requested information far outweighs the purported burden to BSC to prepare its witnesses for deposition." (p. 4)

The order goes on to direct BSC to designate prior individual testimony that BSC adopts as its corporate position on that topic, or with the name of a corporate representative who will appear at deposition. This was a reasonable response by Judge Eifert, that balanced plaintiffs need for the testimony with the burden imposed upon BSC. The Advisory Committee's draft rule is an equally reasonable response.

In conclusion, nothing in the BSC mesh experience, involving over 13 different products and thousands of women, supports Mr. Pratt's request to limit the number of topics a noticing party may designate under Rule 30(b)(6)

Sincerely,

A handwritten signature in black ink, appearing to read 'Edward Blizzard', with a stylized, flowing script.

Edward Blizzard

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

**IN RE: BOSTON SCIENTIFIC CORP.
PELVIC REPAIR SYSTEMS
PRODUCT LIABILITY LITIGATION**

MDL No. 2326

THIS DOCUMENT RELATES TO ALL CASES

PRETRIAL ORDER #114

(Motion of Boston Scientific Corporation to Quash and
For Entry of a Protective Order Related to Rule 30(b)(6) Depositions)

Currently pending is the motion of Boston Scientific Corporation to quash amended notices of Rule 30(b)(6) depositions and to enter a protective order prohibiting Plaintiffs from taking depositions of corporate designees on topics that Defendant describes as “irrelevant, overbroad, vague, ambiguous, improperly duplicative of discovery Boston Scientific has already produced in MDL 2326, and unduly burdensome.” (ECF No. 874). Plaintiffs have filed a response in opposition to the motion, and Boston Scientific has replied. (ECF Nos. 877, 885). After consulting with the parties and determining that a hearing was not required, the undersigned carefully considered the materials submitted.

For the reasons that follow, the court **DENIES** Defendant’s motion to quash and **GRANTS**, in part, and **DENIES**, in part, Defendant’s motion for a protective order as set forth below.

I. Relevant Facts

This multidistrict litigation (“MDL”) involves the design, manufacturing, marketing, and distribution of eleven¹ different pelvic mesh products by Defendant Boston Scientific Corporation (“BSC”) over a period of more than a decade. For approximately the past two years, the parties have engaged in discovery, which has resulted in BSC producing more than 490,000 documents and 36 former and current employees for deposition. On May 27, 2014, this court entered a docket control order requiring the parties to have 200 cases fully discovered by mid-January 2015. (ECF No. 794). Thus, the parties are diligently working to complete discovery involving a variety of products and claims in cases pending in different jurisdictions across the country. In addition, the parties are in the process of preparing consolidated cases for November trials in both Florida and West Virginia.

On April 18, 2014, Plaintiffs served Notices of Rule 30(b)(6) Deposition on BSC. Shortly thereafter, the parties met and conferred on several occasions regarding the scope of the depositions. Plaintiffs issued amended notices in July, but BSC continued to object to their scope as being overly burdensome and impossibly broad. Additional “meet and confer” sessions failed to resolve the disagreements. Accordingly, BSC filed the instant motion to quash and for a protective order.

II. Positions of the Parties

On July 31, 2014, Plaintiffs filed two Notices of Rule 30(b)(6) Deposition. (ECF Nos. 846, 847). One notice requires BSC to produce a corporate designee to testify about

¹ Eight products are named in the Master Long Form Complaint. Three additional products have been written in by Plaintiffs. (ECF No. 877 at 2-3). However, at other places in the memoranda, the parties assert that as many as thirteen products are being discovered. Indeed, the Notice of Rule 30(b)(6) Deposition pertaining to product development and manufacturing activities lists thirteen products. (See ECF No. 877 at 7, ECF No. 885 at 1, ECF No. 846).

the “[a]spects of the manufacturing and testing of the mesh components” of thirteen pelvic mesh products distributed by BSC. (ECF No. 846 at 2). The notice further specifies what is meant by the term “aspects,” which ranges from activities such as product conceptualization, development, assembly, testing, and validation to product characteristics, such as porosity, density, weight, burst strength, and tear resistance. In addition, the notice requires a designee who can speak to BSC’s relationship with various corporations and vendors. The second notice requires a corporate designee to testify regarding physician training, as well as BSC’s training of its sales representatives. (ECF No. 847). BSC objects to these notices on three grounds. First, the notices seek information that is irrelevant to the claims at issue in the litigation. Second, much of the information sought has already been provided to Plaintiffs in the documents produced by BSC. Lastly, Plaintiffs have already taken lengthy and detailed depositions of corporate employees, some of whom were Rule 30(b)(6) representatives, on many of the topics outlined in the notices. (ECF No. 875 at 2). Moreover, BSC argues that it will be forced to incur great time and expense preparing corporate designees for depositions that cover such broad topics and time periods. (ECF No. 885 at 10-12).

In response, Plaintiffs address BSC’s third argument first, pointing out that the only Rule 30(b)(6) witness depositions taken to date were cross-noticed in a Texas state court case. Therefore, they were limited to one product, Obtryx, and they were restricted to the time frame of that particular litigation. (ECF No. 877 at 7). Given that Plaintiffs must now obtain testimony relevant to twelve additional products spanning a much longer time period, the prior depositions are insufficient to meet Plaintiffs’ current discovery needs. Plaintiffs further assert that they cannot rely on BSC’s document production as a substitute for Rule 30(b)(6) depositions, in part because BSC has not

been forthcoming with all relevant documents. Plaintiffs also contend that while their notices request BSC's testimony on a variety of topics, all of the topics are relevant when bearing in mind the broad parameters of the MDL. Considering that Plaintiffs have different theories, legal requirements, evidentiary burdens, products, and time frames to address in the 200 cases currently being worked up for trial, their need for the requested information far outweighs the purported burden to BSC to prepare its witnesses for deposition. (*Id.* at 11-14).

III. Relevant Legal Principles

Federal Rule of Civil Procedure 26(b)(1) provides that “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter ... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Although the Federal Rules of Civil Procedure do not define what is “relevant,” Rule 26(b)(1) makes clear that relevancy in discovery is broader than relevancy for purposes of admissibility at trial.² *Caton v. Green Tree Services, LLC*, Case No. 3:06-cv-75, 2007 WL 2220281, at *2 (N.D.W.Va. Aug. 2, 2007) (the “test for relevancy under the discovery rules is necessarily broader than the test for relevancy under Rule 402 of the Federal Rules of Evidence”); *Carr v. Double T Diner*, 272 F.R.D. 431, 433 (D.Md. 2010) (“The scope of relevancy under discovery rules is

² Under the Federal Rules of Evidence, relevant evidence is ‘evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’ *Boykin Anchor Co., Inc. v. Wong*, Case No. 5:10-cv-591-FL, 2011 WL 5599283 at * 2 (E.D.N.C. Nov. 17, 2011) (citing *United Oil Co., v. Parts Assocs., Inc.*, 227 F.R.D. 404, 409 (D.Md. 2005)).

broad, such that relevancy encompasses any matter that bears or may bear on any issue that is or may be in the case”). For purposes of discovery, information is relevant, and thus discoverable, if it “bears on, or ... reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case. Although ‘the pleadings are the starting point from which relevancy and discovery are determined ... [r]elevancy is not limited by the exact issues identified in the pleadings, the merits of the case, or the admissibility of discovered information.’ Rather, the general subject matter of the litigation governs the scope of relevant information for discovery purposes.” *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 193, 199 (N.D.W.Va. 2000) (internal citations omitted). The party resisting discovery, not the party seeking discovery, bears the burden of persuasion. *See Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 243–44 (M.D.N.C. 2010)(citing *Wagner v. St. Paul Fire & Marine Ins. Co.*, 238 F.R.D. 418, 424–25 (N.D.W.Va. 2006)).

Simply because information is discoverable under Rule 26, however, “does not mean that discovery must be had.” *Schaaf v. SmithKline Beecham Corp.*, 233 F.R.D. 451, 453 (E.D.N.C. 2005) (citing *Nicholas v. Wyndham Int’l, Inc.*, 373 F.3d 537, 543 (4th Cir. 2004)). For good cause shown under Rule 26(c), the court may restrict or prohibit discovery that seeks relevant information when necessary to protect a person or party from annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Civ. P. 26(c). To succeed under the “good cause” standard of Rule 26(c), a party moving to resist discovery on the grounds of burdensomeness and oppression must do more to carry its burden than make conclusory and unsubstantiated allegations. *Convertino v. United States Department of Justice*, 565 F. Supp.2d 10, 14 (D.D.C. 2008) (the court will only consider an unduly burdensome objection when the objecting party

demonstrates how discovery is overly broad, burdensome, and oppressive by submitting affidavits or other evidence revealing the nature of the burden); *Cory v. Aztec Steel Building, Inc.*, 225 F.R.D. 667, 672 (D. Kan. 2005) (the party opposing discovery on the ground of burdensomeness must submit detailed facts regarding the anticipated time and expense involved in responding to the discovery which justifies the objection); *Bank of Mongolia v. M & P Global Financial Services, Inc.*, 258 F.R.D. 514, 519 (S.D. Fla.2009) (“A party objecting must explain the specific and particular way in which a request is vague, overly broad, or unduly burdensome. In addition, claims of undue burden should be supported by a statement (generally an affidavit) with specific information demonstrating how the request is overly burdensome.”).

Furthermore, Rule 26(b)(2)(C) requires the court, on motion or on its own, to limit the frequency and extent of discovery, when (1) “the discovery sought is unreasonably cumulative or duplicative;” (2) the discovery “can be obtained from some other source that is more convenient, less burdensome, or less expensive;” (3) “the party seeking the discovery has already had ample opportunity to collect the requested information by discovery in the action;” or (4) “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii). This rule “cautions that all permissible discovery must be measured against the yardstick of proportionality.” *Lynn v. Monarch Recovery Management, Inc.*, 285 F.R.D. 350, 355 (D. Md. 2012) (quoting *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010)). As every case has, to some degree, its own unique characteristics, the trial court has “substantial discretion” in managing issues related to

discovery. *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 929 (4th Cir. 1995).

IV. Discussion

Initially, the undersigned considers BSC's motion to quash the notices of deposition. Clearly, BSC fails to state sufficient grounds to support such a motion. Plaintiffs are entitled to take the deposition of BSC under Rule 30(b)(6), and having taken depositions of various BSC employees in their individual capacities is simply not the same as deposing an employee who has been designated to speak on behalf of the corporation. *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996) (Stating that when a corporate employee testifies in his individual capacity, he provides only his personal knowledge, perceptions, and opinions; when a 30(b)(6) designee testifies, he provides the knowledge, perceptions, and opinions of the corporation). While some Rule 30(b)(6) depositions have been taken, BSC does not dispute that they were limited by product and time frame. (ECF No. 885 at 5). Therefore, the motion to quash is **DENIED**.

On the other hand, principles of proportionality mandate the imposition of some restrictions on the taking of Rule 30(b)(6) depositions. The undersigned finds these restrictions necessary for several reasons. There has already been a substantial number of current and former BSC employees deposed. Consequently, Plaintiffs have had ample opportunity to collect a significant portion of the requested information by discovery in this MDL. Additionally, a least one case has been tried to verdict against BSC, and other pelvic mesh cases have been tried against other manufacturers, giving Plaintiffs, at a minimum, a rough blueprint of what information they need to focus on in their current discovery efforts. Equally as important, the parties have limited time remaining in which

to complete discovery in 200 cases. There simply is not enough time to engage in longwinded, duplicative and cumulative depositions. Along that line, the court has made it abundantly clear that it will not permit cumulative testimony at trial whether it comes from the one witness or different witnesses. Accordingly, depositions taken largely for trial purposes should not duplicate testimony already intended to be offered into evidence.

Therefore, as to the scope of the deposition notices, the court **DENIES** BSC's motion to limit the topics outlined in the notices. (ECF Nos. 846, 847). Although the topics are broad, the undersigned agrees with Plaintiffs that the unique nature of the MDL justifies the breadth of the topics. Taking into account that the parties agreed to a deposition protocol, (ECF No. 327), which limits each deposition to one seven-hour day of testimony, unless the parties agree to a different time limitation, and prohibits a second deposition of the same witness on the same subject matter, absent exigent circumstances, it is fair to expect that the protocol will naturally curtail Plaintiffs from going too far afield in non-essential topics.

In addition, the court **DENIES** BSC's motion to limit the scope of topics related to manufacturing and product development to a certain set of corporate documents. Once again, the court agrees with Plaintiffs that they should not be limited to a set of documents that BSC believes to be the most relevant.

However, the court **GRANTS** the motion to allow BSC to designate existing testimony by former or current employees as Rule 30(b)(6) testimony for some portions of the topics outlined in one of Plaintiffs' notices of deposition. Having reviewed the testimony supplied by BSC with its memoranda, the undersigned notes that particularly in the area of physician/employee training, Plaintiffs' counsel asked BSC's management

employees many questions typically posed to corporate representatives in the context of a Rule 30(b)(6) deposition; for example, questions regarding company practices, policies, and customs. Therefore, rather than duplicating this testimony, the better course is to allow BSC to adopt sections of these depositions as its corporate testimony. Accordingly, it is hereby **ORDERED** as follows:

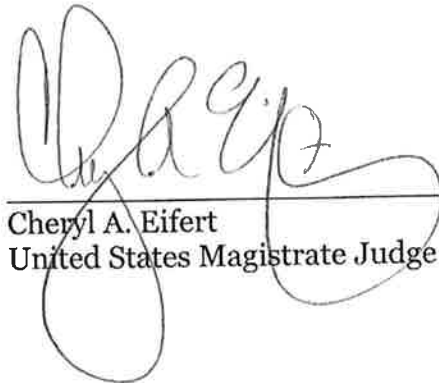
1. On or before **October 3, 2014**, BSC shall review each topic listed in the Notice identified as ECF No. 847 and provide Plaintiffs with either a designation of the prior testimony (by deponent, date, transcript page and line number) that BSC adopts as its corporate position on that topic, or with the name of a corporate representative who will appear at deposition. To the extent that the witnesses did not provide testimony reflecting BSC's corporate knowledge and opinions, or did not supply complete testimony, Plaintiffs shall be permitted to proceed with Rule 30(b)(6) depositions regarding that topic or unanswered portions of that topic. Plaintiffs shall supply BSC with a revised Notice specifying what topics or portions of topics remain to be covered at a deposition.

2. In regard to the Notice identified as ECF No. 846, the court understands that a corporate designee, Mr. Jim Goddard, previously provided testimony regarding some of the topics contained in the Notice as they relate to one product, Obtryx. Because Mr. Goddard's testimony already constitutes Rule 30(b)(6) testimony, BSC need not designate it as such. Plaintiffs are reminded they may not repeat any area of questioning already addressed by Mr. Goddard when they depose a corporate designee pursuant to the July Notice of Rule 30(b)(6) Deposition.

The court **DIRECTS** the Clerk to file a copy of this order in 2:12-md-2326, and it shall apply to each member related case previously transferred to, removed to, or filed in

this district, which includes counsel in all member cases up to and including civil action number 2:14-cv-26227. In cases subsequently filed in this district, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action at the time of filing of the complaint. In cases subsequently removed or transferred to this court, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action upon removal or transfer. It shall be the responsibility of the parties to review and abide by all pretrial orders previously entered by the court. The orders may be accessed through the CM/ECF system or the court's website at <http://www.wvsc.uscourts.gov>.

ENTERED: September 29, 2014



Cheryl A. Eifert
United States Magistrate Judge

TAB 5

TESTIMONY OF

MARK CHALOS

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

January 24, 2019

Mark P. Chalos
Partner
mchalos@lchb.com

VIA E-MAIL

rulescommittee_secretary@ao.uscourts.gov

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

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

Dear Committee Secretary and Members:

Thank you for the opportunity to testify before the Committee on February 8, 2019. I am a partner in Lieff, Cabraser, Heimann & Bernstein in Nashville, Tennessee. We represent consumers, employees, and businesses in class and individual cases nationwide. I am submitting written comments and testimony in my individual capacity and on behalf of the Tennessee Trial Lawyers Association, an organization of which I serve as an officer. While I will be submitting more detailed comments in advance of the hearing, I write today to identify the topics I intend to cover during my testimony. In specific, I intend to discuss the following topics:

1. Disclosing the identity of witnesses in advance of depositions promotes efficiency and is consistent with the letter and spirit of the Federal Rules of Civil Procedure;
2. Limiting the number of topics to be covered during a 30(b)(6) deposition is unnecessary, would potentially lead to inefficiencies, and would be unfair.
3. The explicit statement in the Committee Note that the parties have an ongoing obligation to meet and confer, but which process must be completed within a reasonable time, promotes efficient resolution of disputes.

Thank you.

Sincerely,



Mark P. Chalos

TAB 6

TESTIMONY OUTLINE

SUSANNAH CHESTER-SCHINDLER
WATERS & KRAUS, LLP

From: [Susannah Chester-Schindler](#)
To: [RulesCommittee Secretary](#)
Subject: Federal Rule of Civil Procedure 30(b)(6) - Outline of Testimony
Date: Thursday, January 24, 2019 1:29:58 PM

Rules Committee Members and Staff,

Thank you for allowing me the opportunity to share my perspective regarding the proposed changes to Federal Rule of Civil Procedure 30(b)(6) and the associated notes. Below is a brief summary of the topics I will address during the course of my testimony. I anticipate that I may also offer commentary regarding the testimony of fellow members of the bar, who may testify before my assigned time and, of course, respond to any questions the Members may have regarding my comments.

Thank you again for your diligence and hard work in this regard.

Susannah Balentine Chester-Schindler

Summary

1. Numerical Limitation on Matters for Examination

It is my understanding that several members of the bar have suggested a numerical limitation should be imposed on the matters for examination. While the addition of a numerical limitation on the matters may seem efficient at first blush, in practice the limitation will necessarily be arbitrary and may trigger additional, unnecessary motions practice.

2. Identity of the Witness

I have also been advised that several members of the bar oppose the comment in the notes encouraging the conference to include discussion regarding the identity of the witness.

Knowing the identity of the witness, however, is critical in conducting an efficient deposition pursuant to FRCP 30(b)(6). This is true in all types of cases - including those involving individuals suffering from latent diseases.

3. Identifying Documents to be Utilized in the Deposition.

This language in the current draft of the notes seems superfluous. From a purely logistical perspective, experience has shown me that the vast majority of attorneys on both sides of the bar bring courtesy copies of all documents to their depositions for the witness and attorney present.

Further, a preliminary production seems unnecessary and somewhat burdensome on smaller firms whose attorneys have limited "bandwidth" as it were. The matters for examination essentially provide a road map for the course of the deposition. Modern discovery (if executed properly) should leave little room for surprise. Thus, while a "24 hour notice" rule for identifying exhibits is useful in trial to ensure that a party may timely raise objections to material it believes should be excluded from the jury's consideration, it is misplaced in a deposition.

Sent from my iPad

This electronic message contains information from WATERS & KRAUS, LLP that may be privileged and confidential attorney work product or attorney/client communication. The information is intended to be for the use of the addressee only. If you are not the addressee, note that any disclosure, copying, distribution or use of the contents of this message is prohibited. If you received this message in error, please notify the sender immediately.

TAB 7

COMMENT OF

ANDREW B. COOKE
FLAHERTY SENSABAUGH BONASSO PLLC

January 17, 2019

The Honorable Advisory Committee for Civil Rules
Administrative Office of the United States Courts
One Columbus Circle NE, Suite 7-240
Washington, D.C. 20544

Re: Proposed Amendment of Rule 30(b)(6)

Dear Members of the Civil Rules Advisory Committee:

This letter is submitted on my behalf as a trial lawyer for about two and half decades. My practice involves trying civil cases in District Courts and state courts, where the preparation of those matters frequently involves propounding and responding to Rule 30(b)(6) requests. I appreciate the opportunity to share my perspective on Rule 30(b)(6), and I thank the Advisory Committee for requesting input from the bar and the public at large.

I agree with the many individual practitioners and legal organizations that Rule 30(b)(6) is misused by many attorneys due to its unusual lack of structure or guidance and its overly broad terms. When coupled with a judicial inclination for liberal, rather than proportional, discovery, responding parties confront extraordinary and disproportionate burdens.

The present proposed rule change does nothing to remedy the flaws in the rule as it provides no structure or guidance for the use of the rule. It leaves the rule's overly broad language completely untouched. Arguably, by adding a requirement to identify the identity of the witness(es), it makes the rule much worse and I respectfully request that you abandon the proposed amendment.

In my practice, I try to work toward practical solutions. Consistent with that focus, and in consultation with other similarly situated practitioners, in consultation with other members of the bar, I have set forth below several solutions that would provide the much-needed structure and guidance to the rule and result in meaningful, constructive change.

- 1) Add language that makes it clear a party may object to a 30(b)(6) deposition but that requires specification as to the reason for the objection. The service of objections would frame the dialogue on the nature and extent of the scope of deposition. A formal meet and confer requirement would be the result, prior to motion practice;
- 2) Allow a party that has already given ten or more depositions on the same subject, to submit prior 30(b)(6) transcripts in lieu of further 30(b)(6) depositions or at a minimum establish a rebuttable presumption that further deposition is not required on that topic;
- 3) Limit a 30(b)(6) deposition to seven (7) hours without further leave of the court;



FLAHERTY | SENSABAUGH | BONASSO PLLC

- 4) Limit the number of topics, including subparts, for a 30(b)(6) deposition to 10 without a meet and confer process or, if necessary, leave of court;
- 5) Consider cost-shifting for depositions that seek extraordinary discovery beyond the primary structure of the rule;
- 6) Make clear the Rule 26(e) supplementation is applicable to Rule 30(b)(6) deposition testimony.

These six changes would provide the necessary structure and guidance to the rule that would curb much of the misuse, and in some cases, abuse of Rule 30(b)(6). If adopted, these proposed amendments will benefit not only federal courts, but also state courts that look to federal practice for guidance in applying state rule analogs to 30(b)(6). The result would be a positive nationwide impact on the entire legal profession similar to the success this Committee accomplished with the rules relating to e-Discovery.

The absence of any framework or structure to Rule 30(b)(6) leads to frequent complaints about the rule. In contrast to the other discovery rules, Rule 30(b)(6) offers a broad invitation to disproportional demands, gamesmanship and abusive tactics. The bar needs meaningful, practical guidance from the Committee. The proposed amendment fails to provide that guidance.

I respect, appreciate and support your efforts to review Rule 30(b)(6) and to develop meaningful and practical amendments. Thank you for your consideration of my concern regarding the proposed amendment.

Sincerely,

A handwritten signature in black ink that reads "Andrew B. Cooke". The signature is written in a cursive, slightly stylized script.

Andrew B. Cooke

TAB 8

COMMENT OF

LAWYERS FOR CIVIL JUSTICE



**COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES**

**FIXING WHAT'S BROKEN: A CALL FOR STRAIGHTFORWARD ANSWERS TO
THE QUESTIONS THAT REGULARLY CONFOUND RULE 30(b)(6) PRACTICE**

September 12, 2018

Lawyers for Civil Justice (“LCJ”)¹ respectfully submits this Comment to the Civil Rules Advisory Committee (“Committee”) in response to the Request for Comment² on the proposed amendment to Federal Rule of Civil Procedure 30(b)(6) (“Proposed Amendment”).

INTRODUCTION

The Committee receives frequent correspondence about the problems with Rule 30(b)(6), including the letter from members of the ABA Section of Litigation Federal Practice Task Force³ that convinced the Committee to revisit this important topic in April 2016. Prior to this public comment period, practitioners and parties presented the Rule 30(b)(6) Subcommittee with roughly a dozen meaningful reforms that would improve practice under the rule by fixing what’s broken. The Proposed Amendment incorporates none of them. We now urge the Committee to reevaluate the best of those improvements and draft a different amendment. But in any event, we implore the Committee to reexamine our concerns with the Proposed Amendment, which would not only fail to improve the rule, but would make a failing rule worse.

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 30 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. Although LCJ’s corporate members are often defendants, they are plaintiffs as well. They not only respond to many discovery requests, they also seek discovery. They receive many 30(b)(6) notices but also, on occasion, serve them and expect meaningful compliance. LCJ wants Rule 30(b)(6), like the rest of the FRCP, to be fair and efficient for everyone, regardless of their position in any particular lawsuit.

² Available at

http://www.uscourts.gov/sites/default/files/2018_proposed_rules_amendments_published_for_public_comment_0.pdf.

³ Available at http://www.uscourts.gov/sites/default/files/16-cv-a-suggestion_aba_0.pdf

The corporate and defense bars strongly oppose the Proposed Amendment’s radical mandate to confer about “the identity of each person the organization will designate to testify.”⁴ Such a mandate would violate the Committee’s informal Hippocratic Oath of rulemaking, that an amendment to the Federal Rules of Civil Procedure (“FRCP”) should, “first, do no harm.” By undermining the well-settled and well-grounded principle that responding organizations have the sole right to choose the witnesses who speak on their behalf, the Proposed Amendment would expand collateral litigation and increase the costs and contentiousness of discovery while placing a new burden on the courts. The mandate would increase gamesmanship by enabling even more disputes about the propriety of an organization’s witness selection. In short, the Proposed Amendment will backfire.

Although well-intended, the Proposed Amendment does not address the real causes of dissatisfaction with Rule 30(b)(6). It is not a coincidence that the Committee hears more about Rule 30(b)(6) than other discovery rules—and it’s not because lawyers meet and confer more frequently about the other types of discovery. Rule 30(b)(6) does not provide a sufficient framework for lawyers to reach agreements on the questions that arise over and over, including: How much notice is required? How does a 30(b)(6) deposition count towards the limit on the number and duration of depositions? What is a reasonable presumptive limit on the number of topics? How should an organization object to the scope of a notice? Are contention questions permitted? Must witnesses reveal what materials they reviewed in preparation for the depositions? What should occur when the organization has no knowledge on a topic?

Providing answers to these questions—not mandating a nebulous and controversial conference—will remedy the problems that practitioners and parties have been bringing to the Committee’s attention. Indeed, guidance on such questions is a material reason why the other FRCP discovery rules work better in practice. For example, presumptive limits on various categories of discovery provide lawyers reasonable common ground from which they are comfortable making modifications as warranted. In contrast, reaching agreement on the number of topics for a Rule 30(b)(6) deposition is much more difficult because the rule sets no baseline for the discussion—in fact, it doesn’t even acknowledge that there should be any limits. Lawyers would find it much easier to modify a presumptive limit on the number of topics if one existed, but the rule lacks a starting point for that discussion.

The Rule 30(b)(6) Subcommittee’s fear that “injecting more specifics into the rule could actually generate disputes rather than avoid them”⁵ is unfounded. In fact, the opposite is true: Specific

⁴ See Comment from Lawyers for Civil Justice, May 18, 2018, http://www.uscourts.gov/sites/default/files/18-cv-m-suggestion_lcj_re_30b6_0.pdf; Letter from John H. Beisner on behalf of the U.S. Chamber Institute for Legal Reform, June 11, 2018, http://www.uscourts.gov/sites/default/files/18-cv-u-suggestion_ilr_re_30b6_0.pdf; Comment from the International Association of Defense Counsel, June 6, 2018, http://www.uscourts.gov/sites/default/files/18-cv-m-suggestion_lcj_re_30b6_0.pdf; Letter from the American Tort Reform Association, June 8, 2018, http://www.uscourts.gov/sites/default/files/18-cv-o-suggestion_atra_re_30b6_0.pdf; Letter from Kenneth J. Reilly, June 6, 2018, http://www.uscourts.gov/sites/default/files/18-cv-r-suggestion_reilly_re_rule_30b6_0.pdf; and Letter from Victor Schwartz, June 7, 2018, http://www.uscourts.gov/sites/default/files/18-cv-p-suggestion_schwartz_re_rule_30b6_0.pdf.

⁵ Conference call January 19, 2018, April Agenda Book at 124.

guidance is exactly what practitioners and parties need and are asking the Committee to provide. Clarity will foster the cooperative discussions the Proposed Amendment seeks to force.

It's not too late for the Committee to respond to the pleas to fix Rule 30(b)(6) with an amendment that addresses the true need. Although it is unusual for the Committee to reformulate a proposed amendment during a public comment period, it can and should do so now. The public comment period is not a rubber stamp, and utilizing it as an opportunity to develop a better solution is not a failure. Fortunately, there is no need to go back to square one because the Committee already has received a number of pragmatic and fair proposals⁶ that derive from well-tested and well-accepted features of other FRCP discovery rules. The Committee should remove from consideration the incendiary idea of mandating conferral over the identity of witnesses and utilize this public comment period to re-examine a handful of the best proposals that address practitioners' need for clarity and prepare a new amendment for public comment next year.

I. THE PROPOSED AMENDMENT WILL BACKFIRE BY CAUSING MORE LITIGATION, CONFUSION AND ANGST THAN THE CURRENT RULE.

A. The Radical Mandate to Confer About Witness Selection Would Upset Well-Settled Law and Spark Contentious Discovery Battles for Courts to Decide.

The case law is clear: Rule 30(b)(6) places the authority for selecting witnesses exclusively with the organization responding to the deposition notice.⁷ The noticing party has no right to demand any input in the responding organization's decision to select its witness.⁸ This principle is well-

⁶ For a discussion of ways to improve Rule 30(b)(6), see Lawyers for Civil Justice, "Advantageous to Both Sides": *Reforming the Rule 30(b)(6) Process to Improve Fairness and Efficiency for All Parties* (July 5, 2017), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_response_to_invitation_for_comment_on_rule_30_b_6_7-5-17.pdf; Lawyers for Civil Justice, *Not Up To the Task: Rule 30(b)(6) and the Need for Amendments that Facilitate Cooperation, Case Management and Proportionality* 6-8 (Dec. 21, 2016), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_30_b_6_12-21-2016.pdf, and Lawyers for Civil Justice, "Give Them Something to Talk About: Drafting a Rule 30(b)(6) Consultation Requirement with Sufficient Parameters to Ensure Meaningful Results" 2-3 (December 15, 2017), http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_comment_on_30_b_6_consultation_requirement_final_12-15-17.pdf.

⁷ See, e.g., *Resolution Tr. Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993) ("[Rule 30(b)(6)] places the burden of identifying responsive witnesses for a corporation on the corporation"); *Quilez-Velar v. Ox Bodies, Inc.*, Civ. No. 12-1780(GAG/SCC), 2014 WL 12725818, at *1 (D.P.R. Jan. 3, 2014) ("the noticed corporation alone determines the individuals who will testify on those subjects."); *Kendall Lakes Towers Condo. Ass'n, Inc. v. Pac. Ins. Co.*, No. 10-24310-CIV, 2011 WL 6190160, at *8 (S.D. Fla. Dec. 2, 2011) ("Rule 30(b)(6) imposes an obligation on the organization to select an individual to testify") (emphasis original); *Lizana v. State Farm Fire & Cas. Co.*, No. CIV.A.108CV501LTSMT, 2010 WL 445658, at *2 (S.D. Miss. Feb. 1, 2010) ("it is Defendant's choice to designate its corporate representative(s) who consent to testify on its behalf."). See also 7 JAMES WM. MOORE, ET AL., *MOORE'S FEDERAL PRACTICE* § 30.25[3](3d ed.2013) ("It is ultimately up to the organization to choose the Rule 30(b)(6) deponent").

⁸ See, e.g., *Ortiz v. Cybex Int'l, Inc.*, No. 15-2989 (PAD), 2018 WL 2448130, at *8 (D.P.R. May 30, 2018) ("[Plaintiffs] have not directed the court to any rule allowing a party that seeks to depose a corporation to unilaterally choose the corporate representative. Nor could they, for Rule 30(b)(6) does not allow such a move. ... As a consequence, Cybex was under no obligation to designate Vatsaas or Wendt as corporate representatives.") (citation omitted); *Progress Bulk Carriers v. American S.S. Owners Mut. Protection and Indem.*

grounded because the purpose of Rule 30(b)(6) is discovery of information reasonably available to an organization when the identity of knowledgeable witnesses is unknown.⁹ And it is the responding party alone who will be called to answer if the witness cannot satisfactorily testify about responsive information known or reasonably available to the organization.¹⁰ Because a Rule 30(b)(6) deposition records the organization's knowledge, not that of the individual testifying, many courts have ruled that the name of the corporate witness who will testify is not even relevant.¹¹

Even if the Committee does not intend it to do so, the Proposed Amendment would inevitably be seen as an invitation to break open this well-settled law and inject a new requirement that there must be give-and-take, with each party having the right not only to provide input but also to affect the witness selection. Indeed, the draft Committee Note opines that the parties' exchanges will facilitate "identifying the right person to testify" and qualifies an organization's right to select its designee with the word "ultimately." This mandate is sure invite tactical abuse because, under the guise of seeking the "right" witness, aggressive lawyers will use the rule to block or challenge the organizational witnesses perceived to be the most experienced, articulate or otherwise effective spokespeople for their organizations. The collateral litigation over the meaning of the mandate will impose costs on the parties, inflame tensions between counsel and add burdens to judicial workloads. This likely outcome will make the Proposed Amendment much worse for courts, parties and counsel than the current rule.

Ass'n, 939 F.Supp.2d 422, 430 (S.D.N.Y. 2013), *aff'd*, 2 F. Supp. 3d 499 (S.D.N.Y. 2014) ("The rule ... does not permit the party issuing the notice to select who will testify on the organization's behalf"); *Colwell v. Rite Aid Corp.*, No. 3:07cv502, 2008 WL 11336789, at *1 (M.D. Penn. Jan. 24, 2008) ("Nothing in the rule indicates that the party seeking the deposition can determine the identity of the person to be deposed. "); *Booker v. Massachusetts Dept. of Public Health*, 246 F.R.D 387, 389 (D.Mass. 2007) ("Plaintiff may not impose his belief on Defendants as to whom to designate as a 30(B)(6) witness."); *Dillman v. Indiana Ins. Co.*, No. 3:04-CV-576-S, 2007 WL 437730, at *1 (W.D. Ky. Feb. 1, 2007) (Rule 30(b)(6) "does not permit the plaintiff to designate a deponent to speak for the corporate defendants [and] the plaintiff's attempt to do so is not appropriate."). Leading federal courts commentators agree. See 8A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2103 (3d ed. 2013) ("[T]he party seeking discovery under [Rule 30(b)(6)] is not permitted to insist that it choose a specific person to testify[.]"); 7 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 30.25[3](3d ed.2013) ("the party requesting the deposition generally has no right to assert a preference if the designee is sufficiently knowledgeable on the subject matter.").

⁹ See, e.g., *Painter-Payne v. Vesta W. Bay, LLC*, No. 2:12-CV-00912, 2014 WL 1599505, at *3 (S.D. Ohio Apr. 21, 2014); *Progress Bulk Carriers*, 939 F. Supp. 2d at 430, .

¹⁰ See, e.g., *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 700 (S.D. Fla. 2012) (barring a company from introducing testimony at trial on any matters on which the company's selected deponent had been unable or unwilling testify); *State Farm Mut. Auto. Ins. Co. v. New HorizonT, Inc.*, 250 F.R.D. 203, 217 (E.D.Pa. 2008)(compelling additional testimony and granting monetary sanctions where a company failed to adequately prepare its designated representative for deposition).

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

B. Requiring the Rule 30(b)(6) Conferences to be “Continuing if Necessary” Would Add New Uncertainty to the Rule and Invite More Gamesmanship.

The Proposed Amendment language defining the duty to confer as “continuing if necessary” raises more questions than it answers and would invite additional gamesmanship into the rule. No doubt, there will often be one party who feels that more conferencing is necessary while the other side will be equally convinced that the obligation has been satisfied. The question will be asked: Is it necessary to continue conferring as long as one side hasn’t gotten what it wants? Who decides if it’s necessary to continue? Practitioners won’t know what is expected under the rule, and some will seek the opportunity for discovery sanctions by accusing the other side of prematurely terminating the conferring. This outcome is especially likely in the context of a brand new duty to confer over witness identity.

II. A NEW RULE 30(b)(6) AMENDMENT SHOULD ADDRESS PRACTITIONERS’ REPEATED REQUESTS FOR CLARITY ABOUT BASIC PROCESS.

A. Rule 30(b)(6) Should Establish a Clear Procedure for Objecting to the Notice and for Responding when the Organization Has No Knowledge on a Particular Topic.

Practitioners’ frustration with Rule 30(b)(6) would be substantially reduced if the rule were amended to include a procedure for objecting to the notice and a means for proceeding with the deposition as to those topics or issues agreed to by the parties. A clear, uniform process is needed because the case law on how to handle problematic Rule 30(b)(6) notices is chaotic. Some courts that acknowledge there is no mechanism for objecting to Rule 30(b)(6) notices¹² conclude that the only remedy is a motion for protective order under Rule 26(c).¹³ In such courts, the recipient must raise its disputes with the court before the deposition occurs¹⁴ and faces possible sanctions if it refuses to provide the requested testimony at the deposition and raises its

¹² See, e.g., *New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, 242 F.R.D. 164, 165-66 (D. Mass. 2007) (“Unlike the procedure with respect to interrogatories, requests for production of documents and requests for admissions, there is no provision in the rules which provides for a party whose deposition is noticed to serve objections so as to be able to avoid providing the requested discovery until an order compelling discovery is issued.”).

¹³ *Id.* at 166. See also *Ortiz*, 2018 WL 2448130, at *8 (“[The responding party] objected out-of-court to the Rule 30(b)(6) notice but did not seek a protective order. Confronted with a notice of deposition and absent agreement, a party who for one reason or another does not wish to comply with a notice of deposition must seek a protective order.”); *Beach Mart, Inc. v. L & L Wings, Inc.*, 302 F.R.D. 396, 406 (E.D.N.C. 2014) (“The proper procedure to object to a Rule 30(b)(6) deposition notice is not to serve objections on the opposing party, but to move for a protective order.”); *Robinson v. Quicken Loans, Inc.*, No 3:12-CV-00981, 2013 WL 1776100, at *3 (S.D. W.Va. Apr. 25, 2013) (“When a corporation objects to a notice of Rule 30(b)(6) deposition, the proper procedure is to file a motion for protective order.”).

¹⁴ *Robinson*, 2013 WL 1776100, at *3 (“[O]nce a Rule 30(b)(6) deposition notice is served, the corporation bears the burden of demonstrating to the court that the notice is objectionable or insufficient. Otherwise, the corporation must produce an appropriate representative prepared to address the subject matter described in the notice.”); *Int’l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc.*, No. 11-CV-02007-MSK-KLM, 2013 WL 627149, at *6 (D. Colo. Feb. 19, 2013) (“filing a pre-deposition motion is the appropriate course of action.”).

objections in response to a propounding party's motion to compel.¹⁵ Other courts take the diametrically opposite view that the parties must not involve the court prior to the deposition.¹⁶ Those courts find motions for protective order to be generally improper for addressing disputes with a Rule 30(b)(6) deposition notice,¹⁷ with some courts declaring that motions for protective orders are inapplicable to objections on the grounds of relevance and overbreadth.¹⁸ Instead, the responding party is left to assert objections to the notice, proceed with the deposition, and either provide the requested information despite the objections or refuse to do so and litigate the propounding party's motion to compel after the deposition.¹⁹ There's little wonder why practitioners keep asking the Committee for help.

Rule 45 provides a model for a useful Rule 30(b)(6) objection procedure. Rule 45 allows the receiving party to object within the time for compliance or within 14 days, whichever is earlier. Similar timing may suffice for objections to Rule 30(b)(6) notices, although 30 days would be consistent with the timing requirements in FRCP 33, 34 and 36. Under Rule 45, the requesting party can move the court to compel production/compliance with the subpoena; a similar provision in Rule 30(b)(6) would allow the requesting party to move the court for a ruling on any objection, otherwise the deposition proceeds on the topics to which no objection is raised.

Rule 30(b)(6) should also include a simple process for instances when organizations have no knowledge on particular topics. 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.²⁰ This situation frequently arises when the deposing party seeks

¹⁵ *New England Carpenters*, 242 F.R.D. at 166 ("What is not proper procedure is to refuse to comply with the notice, put the burden on the party noticing the deposition to file a motion to compel, and then seek to justify non-compliance in opposition to the motion to compel.").

¹⁶ See, e.g., *F.D.I.C. v. Brudnicki*, No. 5:12-CV-00398-RS-GRJ, 2013 WL 5814494, at *2 (N.D. Fla. Oct. 29, 2013) ("The proper operation of [Rule 30(b)(6)] does not require a process of objection and court intervention prior to the deposition regarding disputed topic designations."); *New World Network Ltd. v. W/V Norwegian Sea*, No. 05-22916-CIV, 2007 WL 1068124, at *4 (S.D. Fla. Apr. 6, 2007) ("the proper operation of the Rule does not require, and indeed does not justify, a process of objection and Court intervention prior to the schedule[d] deposition.").

¹⁷ See *McMillan v. Dept. of Corrections*, No. 5:13-CV-292-WS-GRJ, 2015 WL 5169214, at *3 (N.D. Fla. Sept. 3, 2015) ("Defendants' motion for protective order is not well-taken because it reflects a fundamental misunderstanding regarding the purpose of a Rule 30(b)(6) deposition and the Court's role in resolving disputes arising in connection with such depositions."); *Salzbach v. Hartford Ins. Co.*, No. 8:12-CV-01645-T-MAP, 2013 WL 12098763, at *2 (M.D. Fla. Apr. 19, 2013) ("a protective order is not the appropriate remedy for deciding relevancy of a topic before a 30(b)(6) deposition.").

¹⁸ See *Direct Gen. Ins. Co. v. Indian Harbor Ins. Co.*, No. 14-20050-CIV-COOKE/TORRES, 2015 WL 12745536, at *1 (S.D. Fla. Jan. 29, 2015) ("In situations where a particular noticed topic is alleged to be outside the scope of Rule 26 discovery, . . . the remedy is also clear and does not involve this Court preemptively reviewing arguments on relevance or overbreadth that may arise in a Rule 30(b)(6) notice[.]").

¹⁹ See *New World Network*, 2007 WL 1068124, at *4 ("[T]he better procedure to follow for the proper operation of [Rule 30(b)(6)] is for a corporate deponent to object to the designation topics that are believed to be improper and give notice to the requesting party of those objections, so that they can be either resolved in advance or otherwise. The requesting party has the obligation to reconsider its position, narrow the scope of the topic, or otherwise stand on its position and seek to compel additional answers if necessary, following the deposition.").

²⁰ *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.

to explore events that happened in the distant past or circumstances in which the responding entity had only peripheral involvement.²¹ Rule 30(b)(6) obligates the responding organization to “create” a witness by having persons with no actual knowledge review whatever corporate records are pertinent to the topics. Because such records are old or incomplete, depositions of this type frequently result in accusations of inadequate preparation.²² A responding entity faces the threat of sanctions if it fails to produce a prepared witness despite the fact that the witness adds nothing to the information contained in the documents.²³ All the witness can do is what the opposing counsel has presumably already done—read the documents and any prior deposition transcripts. A pointless deposition imposes burdens and invites hostility without advancing the case toward adjudication on the merits. Accordingly, Rule 30(b)(6) should permit an organization, when no employee with actual, percipient knowledge exists, to respond to a 30(b)(6) notice by producing the documents constituting the organization’s knowledge on the specified topics.²⁴

B. Rule 30(b)(6) Should Have a Clear Notice Requirement.

Many of the problems that practitioners bring to the Committee’s attention begin immediately upon service of a Rule 30(b)(6) notice—and that’s because the rule lacks a straightforward notice requirement. Receipt of a Rule 30(b)(6) notice automatically provokes disagreement about the sufficiency of time to respond, which of course brings up related issues concerning the scope of the deposition, the availability of witnesses and the adequacy of preparation. The parties’ unequal expectations about timing results in unnecessary scheduling difficulties, increased acrimony between counsel, wasted time and rushed witness preparation. The lack of guidance

Aug. 1, 2013) (requiring entity to prepare a Rule 30(b)(6) witness as to ex-employees’ knowledge of the underlying transaction was unreasonable).

²¹ See, e.g., *Ebonie S. v. Pueblo Sch. Dist.* 60, No. 09-CV-00858-CMA-MEH, 2010 WL 728516 (D. Colo. Feb. 25, 2010) (school district asserting it could not designate a Rule 30(b)(6) deponent because no knowledge remained accessible regarding the purchase of certain desks that “likely occurred more than 20 years ago.”); *Barron v. Caterpillar, Inc.*, 168 F.R.D. 175, 177 (E.D. Pa. 1996) (in product liability case involving equipment manufactured twenty-five years earlier, “both parties should anticipate the unavailability of certain information concerning the machine.”).

²² See, e.g., *United States v. Taylor*, 166 F.R.D. 356, 361-62 (M.D.N.C. 1996) (ordering corporation that had no employees with knowledge of the Rule 30(b)(6) deposition topics to “prepare deponents by having them review prior fact witness deposition testimony as well as documents and deposition testimony.”); *Ebonie S.*, 2010 WL 728516, at *3 (“while the District may not be able to locate documents or an individual having knowledge about the original purchase of the desks, the District remains obligated to provide a witness to testify as to information readily available to the District regarding the purchase, including the results of its investigation.”).

²³ See *Taylor*, 166 F.R.D. at 359 (even though corporation had no employees with any knowledge of the topic, if it did not present a witness it “could not offer any evidence, direct or rebuttal, or argument at trial as to that topic.”).

²⁴ See *Fish v. Air & Liquid Sys. Corp.*, No. GLR-16-496, 2017 WL 697663, at *11 (D. Md. Feb. 21, 2017) (“this [area of inquiry] fails because the witness would simply read the discovery responses, affidavits, pleadings, transcripts, and so on from potentially 40 plus lawsuits (if they are even available in Ford’s files). Plaintiffs do not need a witness to recite what is already stated in a document.”).

forces courts to step in to determine whether one-day notice is reasonable,²⁵ or ten days,²⁶ or whether in certain situations less than one week is sufficient.²⁷ Courts and lawyers alike would benefit greatly from a clear answer in the rule.

A 30-day notice provision would match the well-accepted requirements contained in other FRCP discovery rules.²⁸ It would help practitioners by providing shared expectations and sufficient time to vet the topics, understand the organization's information, identify and notify the right witnesses and prepare for the deposition. It would also provide a fixed framework in which to discuss and resolve any disputes untethered to any disagreement about the deadline for doing so.²⁹

C. Rule 30(B)(6) Should Define a Presumptive Limit on the Number of Topics.

Clear presumptive limits—which are uncontroversial features of several FRCP discovery rules—are useful case management tools that focus discovery³⁰ and promote proportionality.³¹ An express presumptive limit on the number of topics in a Rule 30(b)(6) deposition would have the same effects by providing a framework for discussion and agreement about the scope of organizational depositions.

The absence of a presumptive limit in Rule 30(b)(6) is a root cause of complaints to the Committee. In contrast to the other FRCP discovery rules, Rule 30(b)(6) implies a wide-open invitation to disproportional demands and abusive tactics. Indeed, it is not uncommon for

²⁵ 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). See 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”).

²⁶ 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); *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 327 (N.D. Ill. 2005)(“ten business days’ notice appeared to be reasonable”).

²⁷ 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).

²⁸ See Fed. R. Civ. Pro. 33, 34 and 36.

²⁹ 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).

³⁰ *Are we Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure*, Paul W. Grimm (“Sometimes courts limit the scope of discovery at the outset, but permit the parties to obtain additional discovery based on the initial results. This approach has the advantage of encouraging the requesting party to tailor the initial discovery requests to the most relevant information. By doing so, if it later seeks additional discovery, it will be able to demonstrate to the court that it should be allowed based on the relevance of the initial discovery served....”)

³¹ See Fed.R.Civ.Pro. 33, Notes of the Advisory Committee on Rules –1993 Amendment (“Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable. Moreover, because the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2), particularly in multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries....”).

deposition notices to contain 60³² or even over 100 topics,³³ concerning periods of time spanning 50 or even 80 years of time.³⁴

With a simple amendment, the Committee could respond to the practitioners and parties who are asking for guidance with a presumptive limit of 10 deposition topics, providing much-needed clarity while also establishing a real framework for the parties to discuss and agree upon what is really needed in the case.

D. The Committee Should Clarify how Rule 30(b)(6) Depositions Count Towards the Presumptive Number and Duration of Depositions.

Of all the issues that the Committee is being asked to address, perhaps the Committee should feel most compelled to solve this one: the pervasive confusion about how Rule 30(b)(6) depositions count toward the presumptive limits of 10 depositions and the duration of seven hours. This procedural problem stems directly from the text of the rule and the Committee Note, and it causes disputes in lots of cases and courts.

Rule 30(d) sets forth what appears to be a universally applicable rule: a deposition is limited to seven hours absent leave of court. But Rule 30(b)(6) depositions are often treated as if they are exempt from the rule. Indeed, the Committee Note provides what is perceived to be a separate rule: “For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition.”³⁵ The confusion caused by that Note has been the subject of numerous court decisions, several of which have allowed multiple 30(b)(6) depositions—seven hours each—on the basis that the clock “resets” each time a different corporate designee is deposed on different topics.³⁶ That approach has the perverse effect of penalizing organizations for designating specialized 30(b)(6) witnesses and incentivizing the use of a single witness for as many topics as possible. In many cases, particularly when there are several topics to be addressed, it is beneficial to both parties when several witnesses each address a discrete topic area based on their experience and expertise with the organization. A Rule 30(b)(6) amendment clarifying that the presumptive seven-hour limit applies when more than one witness is designated would not only end the uncertainty and result in better-prepared witnesses, but also would focus decisions on when to provide more time than the presumptive

³² See, e.g., *Siplin v. Carnival Corp.*, No. 17-CIV-23741, 2018 WL 3439452, at *4 (S.D. Fla. July 17, 2018) (“Plaintiff’s notice was quite extensive and voluminous. Sixty deposition topics seems quite over-the-top and cumulative in the context of this straightforward case.”)

³³ See Ford Motor Company’s Comment to the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules, July 31, 2017, at 3 (discussing recently received notices that included as many as 129 separate topics).

³⁴ See *id.* at 4 (discussing topic seeking information regarding corporate policies “from 1930 to the present.”). See also *id.* at 9, 10 (citing examples of deposition topics asking for a witness to address corporate knowledge dating to 1965, 1955, and even 1950).

³⁵ FED. R. CIV. P. 30 Advisory Committee’s note to 2000 amendment.

³⁶ *Am. Home Assur. Co. v. Greater Omaha Packing Co.*, No. 8:11CV270, 2013 WL 4875997, at *1 (D. Neb. Sept. 11, 2013); *Patterson v. N. Cent. Tel. Co-op. Corp.*, No. 2:11-0115, 2013 WL 5236645, at *4 (M.D. Tenn. Sept. 17, 2013). See also *In Re Rembrandt Tech.*, No. 09-CV-00691-WDM-KLM, 2009 WL 1258761, at *14 (D. Colo. May 4, 2009) (holding “[a] blanket rule permitting a seven-hour deposition of each designated deponent is unfair” because it rewards overly broad, cumulative deposition notices).

limit on whether a longer deposition is warranted by the topic rather than on whether more than one person is to be deposed.

E. Rule 30(b)(6) Should Prohibit Asking Witnesses What Materials They Reviewed to Prepare for their Depositions and Legal Contention Questions.

The Committee should clarify that Rule 30(b)(6) does not permit asking what materials were reviewed in preparation for the depositions or about the parties' legal contentions.

Much like the amendments prohibiting discovery of consulting experts and draft expert reports,³⁷ such an amendment to Rule 30(b)(6) is needed to protect work product and privileged communications. Although communications between attorney and client in preparation of a legal proceeding are privileged as attorney-client communications and work product,³⁸ it's not always clear whether a questioning party can ask Rule 30(b)(6) representatives about the documents they reviewed with counsel to prepare for their testimony. 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,³⁹ and 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.⁴⁰ 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 deposition.⁴¹ Those 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."⁴² Questions pertaining to such preparation are inevitably intended to expose that strategy.⁴³ The uncertainty on this issue creates needless trouble for practitioners and parties, and an amendment to Rule 30(b)(6) clarifying the law would be a great help.

³⁷ See Fed.R.Civ.Pro. 26(a)(2) and (b)(4).

³⁸ *Montgomery Cty. v. MicroVote Corp.*, 175 F.3d 296, 303 (3d Cir. 1999).

³⁹ *Evergreen Trading, LLC v. United States*, 80 Fed. Cl. 122, 136 (Fed. Cl. 2007) (analyzing the *Sporck* rule).

⁴⁰ *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").

⁴¹ *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).

⁴² *Sporck*, 759 F.2d at 316.

⁴³ 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.").

Rule 30(b)(6) should also address confusion as to whether Rule 30(b)(6) depositions “are designed to discover facts”⁴⁴ or legal contentions. Some courts allow deposing parties to seek legal positions, requiring organization representatives to testify to a “corporation’s position, beliefs and opinions,”⁴⁵ but the case law is highly unsettled.⁴⁶ Allowing contention questions is an abuse of 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.”⁴⁷ Forcing a representative to answer legal contention questions requires them to “synthesize complex legal and factual positions . . . best left to the contention interrogatories”⁴⁸ or other discovery. Contention interrogatories are better suited to that task because interrogatories can incorporate the necessary input from both attorneys and informed individuals.⁴⁹ “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.”⁵⁰ A Rule 30(b)(6) amendment should make clear that the rule is not a tool for seeking the basis for a party’s legal contentions, claims or defenses.

⁴⁴ *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 . . .”).

⁴⁵ *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).

⁴⁶ *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”).

⁴⁷ 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).

⁴⁸ James C. Winton, *Corporate Representative Depositions Revisited*, 65 BAYL. LAW REV. 938, 984 (2013).

⁴⁹ *See SmithKline Beecham Corp. v. Apotex Corp.*, No. 00-CV-1393, 2004 WL 739959, at *3 (E.D. Pa. Mar. 23, 2004); *United States v. Taylor*, 166 F.R.D. 356, 362 (1996), *aff’d*, 166 F.R.D. 367 (M.D.N.C. 1996).

⁵⁰ *Taylor*, 166 F.R.D. at 363 n.7.

CONCLUSION

The Proposed Amendment's requirement to confer over witness identification is certain to backfire, opening a Pandora's box of collateral litigation, increased costs, inappropriate gamesmanship and tension-filled disputes. The Committee should not proceed with the Proposed Amendment.

Instead, the Committee can and should re-boot the effort to respond to the bar's call for Rule 30(b)(6) reform. The Committee receives more requests to reform Rule 30(b)(6) than the other FRCP discovery rules because Rule 30(b)(6) is failing to provide sufficient answers to a handful of oft-repeating procedural questions. Only by providing guidance on those questions will the Committee address practitioners' and parties' concerns and achieve the goal of fostering cooperation by counsel on Rule 30(b)(6) depositions.

This public comment period presents an opportunity of to reexamine a handful of straightforward suggestions that are already on the table. The best ones are applications of well-tested and well-accepted features in other FRCP discovery rules. A new amendment should respond to the bar's need for: a clear process for objecting to the notice and resolving those objections; a mechanism for responding without a deposition when the organization has no witness with knowledge of a particular topic; a defined notice requirement; a presumptive number of topics; a straightforward definition of how 30(b)(6) depositions count toward the presumptive limits on the number and duration of depositions; and clarity that Rule 30(b)(6) does not allow questioning witnesses about what materials they reviewed in preparation for their depositions or about the legal contentions in the case.

TAB 9

COMMENT OF

JOHN S. GUTTMANN
BEVERIDGE & DIAMOND

January 24, 2019

VIA U.S. MAIL AND EMAIL

Advisory Committee on Civil Rules
Administrative Office of the United States Courts
One Columbus Circle, NE, Suite 7-240
Washington, D.C. 20544

Re: Proposed Amendments to F.R.C.P. 30(b)(6)

Dear Members of the Civil Rules Advisory Committee:

I write to submit written comments in advance of the hearing on the proposed amendments to Civil Rule 30(b)(6) that is scheduled for February 8, 2019. Thank you for considering these comments and the testimony that I will provide at the upcoming hearing.

By way of background, I have been practicing civil litigation, primarily on the defense side, since 1980. Most of my work has been in the environmental and toxic tort areas. I have litigated cases in over two dozen federal and state courts around the United States including serving as lead trial counsel in multiple jurisdictions. My practice includes cases in multi-district litigation in which Rule 30(b)(6) depositions are used extensively and one such deposition is relevant to many cases. I am currently a member of the Board of Directors of DRI – The Voice of the Defense Bar as well as a member of its Litigation Skills, Toxic Tort & Environmental Law and Product Liability Committees. My goal here is not to repeat comments that DRI has already submitted through other representatives including its President Toyja E. Kelley. Instead, I hope to offer points that come from my own practice of almost four decades. I have also obtained input from colleagues at my firm.

Parties take Rule 30(b)(6) depositions in most of the federal civil cases my colleagues and I work on. These depositions are very important and valuable to the parties. In many cases, Rule 30(b)(6) depositions streamline discovery. They can help focus cases on the critical questions by enabling the parties to deal with issues that are not in dispute during early discovery.



This is not to say that the Rule cannot be improved. Here are three possible improvements.

(1) Rule 30(b)(6) depositions are sometimes used to circumvent limits on the number and length of depositions. Some Rule 30(b)(6) notices cover many topics and require the party that receives the notice to produce an unreasonable number of witnesses in response to a single notice. Although these abuses are policed today, primarily by Magistrate Judges, they do occur. Amendments of the rule that would set reasonable limits on the scope and number of 30(b)(6) notices would both reduce the number of disputes that are taken to the judiciary and further the principle that discovery should be proportional to the nature and size of a case.

(2) The addition of a procedure for objecting to the scope of a Rule 30(b)(6) notice would help litigants by eliminating situations in which objections are raised only during the deposition itself and then elevated to the Magistrate Judge. It benefits everyone when such disputes are resolved before a deposition starts.

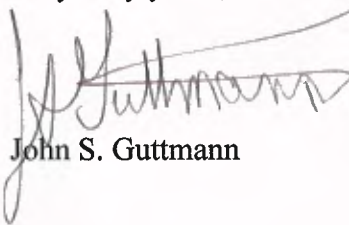
(3) The addition of a mechanism by which the recipient of the notice could inform the noticing party that it has no witnesses available with knowledge that goes beyond its documents would eliminate unnecessary depositions. In my practice, this issue comes up frequently because many of the cases on which we work turn on events that took place decades ago and no one with personal knowledge can be found, not even a retiree.

The proposal contains one aspect that I respectfully suggest is very ill advised and would increase the number of disputes taken to Magistrate Judges. A meet and confer process about the identity of 30(b)(6) witnesses - as distinct from the topics to be covered - would accomplish nothing positive and would increase the number of disputes. The party producing the 30(b)(6) witness is bound by that witness's testimony in a way that it is bound by no other testimony. The rule as it exists today, and as it is proposed to be amended, leaves the decision as to the identity of the 30(b)(6) witness to the party that will be bound by his or her testimony. That is as it should be. A mandatory meet and confer process about the identity of the witnesses would, however, be used in many cases to undercut the producing party's choice.

Even today, parties noticing 30(b)(6) depositions sometimes push opposing parties that are producing witnesses to utilize people who are already known from individual depositions as weak witnesses. In every case, each party noticing a 30(b)(6) deposition would want the producing party to put forth witnesses who would offer testimony that helps the noticing party. Adding to the rule a meet and confer process about the identity of the witnesses will inevitably result in numerous situations in which the noticing party will claim that the noticed party has not conferred in a meaningful way because it has not agreed to produce a witness of the noticing party's choosing. Disputes concerning whether the witness being produced is actually the appropriate witness will end up before Magistrate Judges. However, that is not how the rule is supposed to work.

Meet and confer requirements in litigation are a good thing, particularly on subjects related to discovery. They typically narrow and eliminate disputes without burdening the courts. In this instance, however, a mandatory meet and confer process would have exactly the opposite effect. The choice of the 30(b)(6) designee lies with the producing party alone. A meet and confer process would add nothing to the producing party's decision making about the identity of the witness it produces while at the same time inevitably resulting in more disputes, additional costs to the parties and increased burdens on the courts.

Very truly yours,



John S. Guttman

TAB 10

COMMENT OF

TOYJA E. KELLEY
DRI-THE VOICE OF THE DEFENSE BAR

PRESIDENT
Toyja E. Kelley
Baltimore, Maryland

PRESIDENT-ELECT
Philip L. Willman
Saint Louis, Missouri

FIRST VICE PRESIDENT
Emily G. Coughlin
Boston, Massachusetts

SECOND VICE PRESIDENT
Douglas K. Burrell
Atlanta, Georgia

IMMEDIATE PAST PRESIDENT
John F. Kuppens
Columbia, South Carolina

SECRETARY-TREASURER
Lana A. Olson
Birmingham, Alabama

DIRECTORS
David M. Axelrad
Burbank, California

Lori V. Berke
Phoenix, Arizona

Joseph D. Cohen
Houston, Texas

June J. Essis
Philadelphia, Pennsylvania

Amy Sherry Fischer
Oklahoma City, Oklahoma

Mark A. Fredrickson
Minneapolis, Minnesota

Theodore Freeman
Atlanta, Georgia

Thomas E. Ganucheau
Houston, Texas

Gary L. Grubler
Columbus, Ohio

John S. Guttman
Washington, District of Columbia

Alex J. Hagan
Raleigh, North Carolina

Jason B. Hendren
Rogers, Arkansas

James D. Holland
Jackson, Mississippi

Thomas J. Hurney, Jr.
Charleston, West Virginia

Lloyd R. Jones
Salt Lake City, Utah

Matthew P. Keris
Moosic, Pennsylvania

Andrew Kopon, Jr.
Chicago, Illinois

James Scott Kreamer
Kansas City, Missouri

Leonor M. Lagomasino
Miami, Florida

Elizabeth F. Lorell
Florham Park, New Jersey

R. Jeffrey Lowe
New Albany, Indiana

Donald L. Myles, Jr.
Phoenix, Arizona

John R. Owen
Glen Allen, Virginia

Diane Pradat Pumphrey
Jackson, Mississippi

Melissa K. Roeder
Seattle, Washington

Heather A. Sanderson
Calgary, Alberta, Canada

Ninos Saroukhani
Woodland Hills, California

Audrey A. Seeley
West Valley, New York

Anne M. Talcott
Portland, Oregon

Jodi V. Terranova
Washington, District of Columbia

Craig A. Thompson
Baltimore, Maryland

J. Carter Thompson, Jr.
Jackson, Mississippi

Richard D. Tucker
Bangor, Maine

EXECUTIVE DIRECTOR
John R. Kouris

November 20, 2018

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

Dear Members of the Civil Rules Advisory Committee:

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

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

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

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

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

November 20, 2018

Page Two

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

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

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

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

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

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

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

Sincerely,

A handwritten signature in dark ink, appearing to read 'Toyja E. Kelley', with a stylized, looping flourish at the end.

Toyja E. Kelley
DRI President

TAB 11

COMMENT OF

McDONALD TOOLE WIGGINS, P.A.



MCDONALD TOOLE WIGGINS, P.A.
ATTORNEYS AT LAW

November 29, 2018

Submitted electronically:

Hon. John D. Bates, Senior Judge
Chair, Advisory Committee on Civil Rules
United States District Court for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 2001

Re: Proposed Amendment to Federal Rule of Civil Procedure 30(b)(6)

Dear Judge Bates:

This letter is submitted on behalf of McDonald Toole Wiggins, P.A., a civil trial firm in Orlando, Florida. Our attorneys have over 100 years of combined advocacy experience. Moreover, our firm has defended countless Rule 30(b)(6) depositions on behalf of numerous corporations, and we respectfully submit these comments about the Proposed Amendment to the rule, as well as our concerns with the rule as currently written that were not captured by the proposed revisions. In short, the proposal mandating a meet and confer regarding the identity of the proposed 30(b)(6) witness is, in our view, unnecessary and unwarranted. More consistent with considerations of proportionality and reasonable discovery, we believe the meet and confer process would be more beneficial to address the number and scope of topics at issue in a 30(b)(6) deposition, not the identity of the chosen witness. We respectfully ask the Committee to reject the Proposed Amendment and reexamine other submissions for amendments submitted prior to the publication of the Proposed Amendment, such as limitations on topics and duration, limitations on the scope of the 30(b)(6) notice, and limitations on discovery into deponent preparation.

***Shortcomings and Unintended Consequences of the Proposed Amendment
Regarding the Identification of Witnesses***

The Committee has made it clear that its goal in amending Rule 30(b)(6) is to resolve potential disputes before the deposition occurs and without the involvement of the courts. *See e.g.*, Rule 30(b)(6) Subcommittee Report to the Advisory Committee on Civil Rules, April 10, 2018. "Although the rule ultimately gives the organization the right to pick its designee,

conferring about that in advance might avoid later controversy.” *Id.* While we agree with the Committee’s goals of avoiding unnecessary disputes, we respectfully disagree about the likely impact of the Proposed Amendment. The Proposed Amendment is more likely to cause more discovery disputes than the current rule, resulting in increased costs for all parties.

It has been settled for some time that Rule 30(b)(6) gives the authority and responsibility for selecting witnesses to testify as to noticed topics solely to the organization being deposed. *See e.g., Resolution Tr. Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993). Rule 30(b)(6) “does not permit the party issuing the notice to select who will testify on the organization’s behalf.” *Progress Bulk Carriers v. American S.S. Owners Mut. Protection and Indem. Ass’n*, 939 F.Supp.2d 422, 430 (S.D.N.Y. 2013). This responsibility for selecting deponents is not merely a matter of custom -- the purpose of Rule 30(b)(6) is to allow a party opposing an organization in litigation to determine the knowledge and position *of the organization* rather than the knowledge of particular individuals. The responding party has the responsibility to prepare witnesses and bears the consequences if witnesses are not prepared to address designated topics. *See e.g., QBE Ins. Corp. v. Jorda Enters.*, 227 F.R.D. 676, 700 (S.D. Fla. 2012) (holding that a company was barred from introducing testimony at trial on any matters for which the organization’s 30(b)(6) designee was unable to testify).

By removing the clarity from well-settled law that corporations and other entities have the sole right to designate individuals to testify in 30(b)(6) depositions, the Proposed Amendment would expand collateral litigation and increase the already high costs of discovery, while placing a new burden on the courts. The Proposed Amendment would make the designation of 30(b)(6) deponents a matter that is up for negotiation in the lengthy discovery process. The draft Committee Note states that the exchanges between the parties will facilitate “identifying the right person to testify,” implying that this decision no longer rests squarely with the noticed organization. This change will almost certainly invite gamesmanship and abuse of the discovery process as a tool to challenge the designation of witnesses.

If a noticing party has a particular need to hear from a certain employee or representative of an organization, they are always able to notice the individual in his or her individual capacity, even without the Proposed Amendment.

We respectfully ask the Committee to reconsider the Proposed Amendment because of its potential to add more disputes in the discovery process, not less. Changes to the rules should have the promise of reducing time and expenses, not add to them. To be sure, changes in the framework of corporate discovery should lessen the burden on the courts, not increase them. We recommend that the Proposed Amendment be rejected.

***Limitations On The Scope And Number Of
Deposition Topics Should Be Included***

We would value the Committee's efforts regarding the inclusion of a meet and confer requirement related to the scope and number of deposition topics. Ultimately, the more conferencing on these issues, the more can be resolved without judicial intervention. However, a clearer mechanism in which to limit discovery disputes related to Rule 30(b)(6) would be to enact a constructive limit on deposition topics entirely.

Pursuant to Rule 30(b)(6), corporate representatives are to be "adequately prepared" to testify regarding the topics of the notice. However, all too often, the notice is voluminous, vague or duplicative of prior depositions. To ensure that 30(b)(6) notices are appropriately limited in scope to conform with the proportionality requirements outlined in Rule 26(b)(1), topics should be limited to no more than eight topics. Additionally, unless compelling reasons can be stated before notices are propounded, the deposition should be limited to one day, and not to exceed seven hours. A limitation of topics and duration is consistent with Rules 30 and 33 which set out similar limiting parameters for interrogatories and depositions.

Rule 30(b)(6) depositions should not be utilized as a fishing expedition or as a tactic for gamesmanship. To that end, the topics should be consistent with the nature of discovery that has already occurred in the case and should not seek to interject new areas of inquiry that were previously not discovered through less burdensome means. The use of corporate deponents to develop new theories is outside of the proper scope and intent of Rule 30(b)(6). *Blackwell v. City & Cty. of SF.*, No. C-07-4629 SBA (EMC), 2010 U.S. Dist. LEXIS 75453, at *6 (N.D. Cal. June 25, 2010) (denying a second 30(b)(6) deposition where the plaintiff sought to pursue a new theory); *Franklin v. Smith*, No. 15-12995, 2016 U.S. Dist. LEXIS 163029, at *3-4 (E.D. Mich. July 7, 2016) (denying defendant an additional deposition to inquire on new theories). Although understandably difficult to balance, a Rule 30(b)(6) notice should also not duplicate depositions of those with personal knowledge on the subject. Often deposition requests for corporate or organization employees with personal knowledge of the subject matter are served in conjunction with a Rule 30(b)(6) deposition request. Such a practice runs afoul with the proportionality factors expressed in the Advisory Committee Notes.

A preemptive limitation on topics and duration of a 30(b)(6) notice also avoids the pitfall of a lack of proper remedy by which to address a verbose, voluminous, or overbroad notice. The current remedies for addressing a poorly constructed notice require filing a Motion for Protective Order or Motion to Quash, neither of which are completely appropriate methods to resolve such a dispute. As suggested by the Committee, the inclusion of a specific reference to Rule 30(b)(6) about the number of deposition topics at the Rule 26(f) conference would be advantageous. Should the litigants determine that more than eight topics and seven hours of testimony is necessary due to the complexity of the case, such a concern can be raised early on to put the Court on notice of the issue.

Similarly, the Committee should give additional consideration to an amendment to the rule requiring that the scope of the 30(b)(6) notice only relate to information that is known or within the company's possession, custody, or control. A 30(b)(6) deposition should not be used to obtain information from non-party subsidiaries, parent companies or foreign entities outside of the subpoena power of the court.

An Objection Procedure Should Be Established

One of the areas in which Rule 30(b)(6) could be strengthened is the method by which a responding party can raise objections to topics contained within the notice. A clear and orderly objection process would greatly assist litigants. In the past, our firm has reached agreements with opposing counsel regarding the objection process and included those agreements in a joint case management order or other similar filing at the outset of the case. Often, judges have appreciated these processes and found them beneficial in narrowing or even eliminating discovery disputes. We have typically reached an agreement that the 30(b)(6) deposition will proceed subject to the objections. Should a dispute arise during or after the deposition, either party may seek a ruling on all or some of the objections related to information the party taking the deposition contends were not adequately addressed, or are needed to advance their claims or defenses. Reservation of costs to the disadvantaged party can also be included.

Discovery About Preparation Of The Witness Should Be Delineated As Privileged

Finally, an amendment limiting discovery into deponent preparation would clarify the protections of work product and attorney client privileges. Currently, courts are split on whether documents that are used to prepare a corporate designee for his or her 30(b)(6) deposition are protected as work product. This inconsistency presents recurring problems for corporations with litigation pending across the country in multiple districts, particularly in the context of pattern litigation. If preparation documents are not privileged in one federal district and must be produced, this may waive the protected status the documents would have received in other jurisdictions that would have otherwise protected them as work product. The selection and compilation of documents used to prepare a witness reflect the attorney's legal theories, strategies, and analysis.

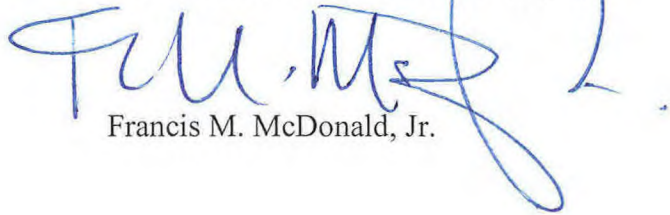
The Seventh Circuit has reasoned that "the purpose of the work-product doctrine is to establish a zone of privacy in which lawyers can analyze and prepare their client's case free from scrutiny or interference by an adversary." *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006). Thus, the required disclosure of the specific compilation of documents selected to prepare the witness "would implicitly reveal the thought process of the attorney that selected the documents." *In re Yasmin & Yaz (Drospirenone) Mktg., Sales & Relevant Prods. Liab. Litig.*, 2011 U.S. Dist. LEXIS 69711, at *5 (S.D. Ill. June 29, 2011).

Conclusion

Our firm strongly supports and applauds the Subcommittee's efforts to examine Rule 30(b)(6) and to develop potential amendments. We thank the Committee in advance for its consideration of the comments submitted.

Sincerely,

McDONALD TOOLE WIGGINS, P. A.

A handwritten signature in blue ink, appearing to read "F.M. McDonald, Jr.", with a large, stylized flourish extending from the end of the signature.

Francis M. McDonald, Jr.

FMM/WI

TAB 12

TESTIMONY OF

JENNIFER I. KLAR
RELMAN, DANE & CONFAX PLLC

RELMAN, DANE & COLFAX PLLC

1225 19TH STREET NW SUITE 600
WASHINGTON DC 20036-2456

TEL 202-728-1888

FAX 202-728-0848

WEBSITE WWW.RELMANLAW.COM

January 24, 2019

Via Email

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

Dear Members of the Civil Rules Advisory Committee:

I appreciate the opportunity to testify before the Committee on February 8, 2019. In order to facilitate my live testimony with the Committee, I provide the written testimony below. As recommended, I have reviewed the entirety of the transcript of the January 4, 2019 Public Hearing in Phoenix, Arizona.

In my firm's civil rights litigation practice, Federal Rule of Civil Procedure 30(b)(6) is an effective and efficient tool. I submit these comments both (1) in support of the addition of the recommended meet and confer requirement and (2) in support of the *rejection* of the myriad recommendations to sharply limit this effective tool.

I am a partner at Relman, Dane, and Colfax, PLLC, a Washington D.C.-based public interest law firm that litigates civil rights cases on behalf of plaintiffs in the areas of housing, lending, employment, and public accommodations. We represent individual and organizational plaintiffs and bring cases ranging from small single-plaintiff cases to nationwide class actions. The firm has twenty-two lawyers and litigates civil rights cases in federal courts across the country. I have been practicing law for sixteen years. In my practice, I take a Rule 30(b)(6) deposition in almost every case.

Rule 30(b)(6) Depositions are Efficient and Effective

In my practice, the 30(b)(6) deposition is the discovery tool that most supports Rule 1's goal of a "just, speedy, and inexpensive determination" of the action.

In our cases, 30(b)(6) depositions support the goal of deciding cases on the merits by allowing access to information directly from the defendant with the ability to explore that testimony in a

meaningful way. The back and forth of live testimony questions generates clear answers that allow focused and streamlined discovery.

The availability of a robust 30(b)(6) deposition reduces the overall number of depositions in my cases. Often, we do not know what individual has knowledge on the topics in the 30(b)(6) notice. Rule 30(b)(6) allows us to take a single deposition and receive the position of the defendant, rather than having to notice a series of depositions in order to determine which of many witnesses has the information sought. The requirement of education of a 30(b)(6) witness means that the Rules ensure we get the information sought without a series of unproductive depositions.

30(b)(6) depositions also streamline written discovery. A brief question and answer exchange in a 30(b)(6) deposition can replace piecing together the same information through countless documents that need to be requested, located, produced, and reviewed. In addition, I often notice a topic on a defendant's electronic and paper filing systems. Understanding what documents exist and how they are stored streamlines discovery because I can request what exists and is accessible and do not have to request an overly broad set of documents due to a lack of such knowledge. The ability to ask clarifying and follow-up questions on the position of the corporation itself is invaluable. Without the ability to ask robust questions of a 30(b)(6) deponent, we would need to not only take more depositions and request more documents, but also to serve more interrogatories. The cabined wording of interrogatory responses often does not provide the information needed to ascertain a defendant's position and the discovery needed to challenge it.

My bottom line is that Rule 30(b)(6) works. As was repeatedly noted in the January 4, 2019 Public Hearing in Phoenix, Arizona, courts do not hear many disputes on 30(b)(6) issues. This reflects my experience. Certainly, issues arise in 30(b)(6) deposition practice, but I am generally able to resolve those with opposing counsel in a collegial and creative way. We take breaks for witnesses to be educated, allow questions that could not be answered at the deposition to be supplemented with declarations, schedule topics at different times, and so on. As plaintiff's counsel, we simply want the information sought, and we work with defense counsel to try to get clear and complete answers. Should there be a breakdown, the existing tools of motions for protective orders or to compel (and the background concept of proportionality) are already available.

While I comment specifically on some of the suggestions to sharply limit 30(b)(6) depositions below, I ask the Committee generally to preserve Rule 30(b)(6) and not to chip away at this efficient and effective tool.

We Welcome the Meet and Confer Requirement

The proposed meet and confer requirement simply codifies what we already do, and what we understand most good practitioners to do.

In almost every case, after serving a 30(b)(6) notice, I have a discussion with opposing counsel regarding the meaning of 30(b)(6) topics and the amount of time needed for the defendant to prepare and provide an educated witness. Generally, we discuss length of time before the deposition, dates, number of witnesses, the group of topics on which a witness will testify (to allow grouping of topics), and the relationship between the individual capacity deposition of a 30(b)(6) witness and the 30(b)(6) deposition (e.g. coordinating dates). This open communication allows the depositions to be conducted effectively. Through these communications, I have at times clarified topics, edited topics, removed topics, and agreed to take different topics on different days.

In my experience, more communication between counsel, especially by phone instead of by letter, works to streamline discovery and avoid discovery disputes. While I have had the rare opposing counsel who attempted to abuse a meet and confer requirement (making himself unreasonably unavailable to confer and then indicating that we could not proceed because we had not met and conferred), I do not think such outliers justify not including a meet and confer rule.

The Committee Should Reject Attempts to Limit Rule 30(b)(6)

At the January 4, 2019 Public Hearing in Phoenix, Arizona, the sentiment was raised by attorneys who frequently defend corporations in 30(b)(6) depositions that “if it’s not broken, don’t fix it” or that the proposed changes are “a solution in search of a problem.” As noted above, I agree that Rule 30(b)(6) works. But, at the same time, suggested changes that will dramatically limit the effectiveness of Rule 30(b)(6) depositions continue to be pressed by counsel who defend corporations.

Corporations should not be able to indefinitely delay a 30(b)(6) deposition

The recommendation that corporations should be able to indefinitely delay a 30(b)(6) deposition by adding a requirement that all objections be resolved before the deposition is unnecessary, unworkable, and unreasonable.

First, the recommendation is unnecessary because if a 30(b)(6) notice is truly objectionable, the corporation can simply move for a protective order under the current Rules.

Second, the recommendation is unworkable because it means that discovery will essentially be stayed pending a court resolving all objections. This will flood the courts with discovery disputes and, given the courts’ busy dockets, delay discovery. 30(b)(6) depositions are often a building block of discovery that must happen before other discovery can proceed because they allow counsel to discover foundational information. Delaying a 30(b)(6) deposition will thus predictably elongate discovery. What’s more, this invites gamesmanship. Corporations will know that the deposition and the whole case will be delayed by simply objecting and thus halting the 30(b)(6) deposition.

Third, the recommendation is unreasonable because it elevates the rights of a corporate entity over the rights of any other deponent. The types of objections that can justify an instruction not to answer at a deposition are sharply limited, however this suggestion allows an entire corporate deposition to be stopped by any objection to the notice.

Setting a numerical limit on topics will reduce the clarity of notices

Where there are no numerical limits, as in the case for written document requests and 30(b)(6) deposition notice topics, there is every incentive to be precise, specific, and clear: it results in receiving more of the documents and information actually sought while avoiding discovery disputes. Setting a numerical limit on 30(b)(6) topics will increase disputes and attendant discovery litigation in a few ways. Topics will become more general, resulting in disputes over what is included in the topic and whether the witness was sufficiently educated. As with interrogatories, disputes will arise as to whether a topic should be counted as one or multiple topics and whether the party noticing the deposition has exceeded the numerical limits.

The outlier examples of abusive 30(b)(6) notices do not justify reducing the clarity of most notices and increasing attendant litigation. Corporate deponents can move for a protective order under the current Rules, and can certainly argue that any particularly offensive notice is inappropriate under the proportionality rule.

A deadline for noticing 30(b)(6) depositions is unnecessary

The suggestion of a timing restriction on noticing a 30(b)(6) deposition, such that one cannot be taken at the end of discovery, will be inefficient in practice.

In reality, individual depositions often continue through the end of discovery. This happens because of the time it takes to complete written discovery and receive documents, and coordination of counsel and witness schedules. As individual depositions are completed, it sometimes becomes clear that a focused 30(b)(6) deposition on a few discrete topics is necessary. This can occur for a few reasons, such as individual deponents raising new issues or not having anticipated knowledge on behalf of the party. In those instances, which are common, it is efficient and not burdensome to allow a 30(b)(6) deposition at the end of the discovery period. Restricting the timing of 30(b)(6) depositions would have the effect of either effectively shortening the discovery period or forcing broader 30(b)(6) depositions earlier instead of a streamlined later deposition. In addition, written discovery already cannot be served at the end of discovery and depositions have remained flexible throughout the end of discovery; this balance works. Instead of a one-size-fits all requirement, I suggest that the timing of the 30(b)(6) be discussed by counsel in the meet and confer, as is already done in my practice and by most counsel.

There should be no bar on questions regarding a party's contentions

In order to effectively litigate, a party has to be entitled to understand the other side's contentions—whether they be claims or defenses—in a real way. These are not legal questions,

but an understanding of the factual support for positions that will be taken at summary judgment and trial (e.g. “what are all the reasons you terminated the plaintiff,” “what are all the factors considered in rejecting the plaintiff”). The suggestion that a corporate deponent cannot be asked contention questions is a radical change that would make litigating not only less efficient but more of a guessing game. It would limit a party’s understanding of its opponent’s contentions to interrogatory responses, which – as I mentioned – are highly cabined and do not allow for clarifying or follow-up questions. In my practice, this would expand the necessity of motions to compel more robust interrogatory responses, and the use of party and court time on such discovery litigation.

Critically, such a rule would create an unwarranted and unfair imbalance between corporate and non-corporate litigants. A corporate party would be shielded from questions about that party’s contentions, while those very questions could be posed to individual and non-corporate parties in the same case. Perversely, such a change would shield those deponents in the best position to provide testimony on the party’s legal position (a deponent chosen by the party to testify on behalf of the party on a specific topic) while continuing to allow such questions of individual plaintiffs, who are often least qualified to answer such questions.

Finally, the suggested change will predictably create repeat discovery disputes regarding what questions are allowed and what questions count as improper contention questions. This will hamper and lengthen depositions and require increased court intervention, either during depositions or during suspended and re-started depositions. This is an inefficient result that will waste court, party, and deponent resources and delay discovery.

Requiring provision of exhibits in advance does not work

Requiring the provision of exhibits in advance will require unnecessary work by both parties and the deponent. Given the press of business and incentive to preserve their rights, the deposing party will predictably over-designate exhibits to allow flexibility later in deciding which exhibits to use. Consider the length of “will use” and “may use” exhibit lists in pretrial submissions versus the number of exhibits actually entered into evidence. Then, the deponent’s counsel will have to review the over-designated exhibits and prepare the deponent on the exhibits. Far from streamlining matters, such an exercise would make the 30(b)(6) process both more burdensome and more inefficient.

In practice, if a witness needs to be educated on an issue or an exhibit, the deponent can take a break to obtain that education. This happens frequently in my practice without incident. A Rule 30(b)(6) deposition is on behalf of the corporation, and such breaks should be anticipated since every question will not be known in advance.

A corporation already has more information about the nature of the questioning than any other witness because of the provision of the 30(b)(6) notice, which details the topics of examination. Requiring the provision of exhibits is therefore unnecessary to provide that information.

* * *

I sincerely appreciate the opportunity to submit comments and look forward to speaking with the Committee and answering any questions.

Regards,

/s/Jennifer I. Klar
Jennifer I. Klar

TAB 13

TESTIMONY OF

MARK R. KOSIERADZKI
KOSIERADZKI SMITH LAW FIRM LLC

January 24, 2019

Via Email

RulesCommittee_Secretary@ao.uscourts.gov

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

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

Dear Committee Secretary and Members,

I am Mark Kosieradzki. I represent persons throughout the United States in a variety of actions, primarily in the area of Elder Abuse and Nursing Home negligence. In the Nursing Home/Elder abuse practice, we are often faced with questions involving systemic institutional neglect. Those cases involve collective institutional decisions about how the facility formulates, adopts, and enforces adequate rules and policies necessary for quality patient care. The cases involve institutional decisions about the competence and sufficiency of the care staff, the supervision over the delivery of care, and whether the facility is diverting Medicare/Medicaid money from patient care. Often the management of the Nursing Home is not the license holder. Rather, the entities in actual control of operational decisions are buried in layers of holding companies and subsidiary corporations.

As a member of the bar for almost four decades, it has been my experience that Rule 30(b)(6) is the single most effective tool for efficiently discovering information held by institutions. Notwithstanding the prohibition of boilerplate objections and answers “subject to and without waiving objections”, such responses continue to be ubiquitous.

By using carefully crafted 30(b)(6) depositions, we are able to narrow which facts are actually in dispute and identify the positions of the parties early in the litigation. This in turn eliminates unnecessary depositions. In addition, custodial 30(b)(6) depositions enable us to learn the description, custody, location, and most economical search methods available for any documents or ESI.

For example, after a witness disclosed an e-mail that was dispositive to a deposition question, the institution claimed it would cost more than \$1Million to search the backup drives to locate that e-mail. By using a 30(b)(6) deposition, we were able to learn that the institution also had a previously undisclosed archive server that stored all e-mails and could be searched for a nominal cost.

If a motion is necessary to compel disclosure of information, it is done on a well vetted record rather than self-serving affidavits. The custodial 30(b)(6) deposition has eliminated countless hours of attorney time, delay in the advancement of cases, and unnecessary motions.

Rule 30(b)(6) works. When properly enforced, the Rule eliminates the bandying as intended. A recurrent problem that I find is that the responding entities do not properly prepare 30(b)(6) designees to respond to matters that are clearly identified in the notice. It is in those instances, that I am required to turn to the court to enforce the Rule and advance the litigation in an efficient and professional fashion. Conversely, I am often able to get to the heart of the matter with a few depositions when dealing with attorneys who are knowledgeable in the law surrounding 30(b)(6). In other words, the problem is not with the Rule or the law interpreting it; rather, the problem results from the attorneys' lack of knowledge or disregard of the Rule's procedure. The proposed Rule changes will not correct this problem.

I would like to share my thoughts on two issues in the proposed Rule change.

First, the requirement that the serving party and the responding organization must confer in good faith about the number and description of the matters for examination will result in unwarranted cost and delay. Attorneys working together professionally is always a good thing. The Rules already provide for a meet and confer process if any part of the notice is objectional. I am concerned that the proposal's requirement that all notices be subject to a meet and confer process regardless of any problems will increase discovery disputes, not lessen them. It creates an unwarranted presumption that the notice's requests are defective. The proposed Rule change will incentivize the responding entity and its attorney to treat valid matters for examination in the 30(b)(6) notice as a transactional negotiation. Everything will be subjected to compromise in the name of "good faith" negotiations. The proposed Rule change will produce a whole new level of delay, obstruction, and cost as a result of "fixing" a discovery process that is not broken.

I am concerned about any limitation of the number and description of the matters for examination. Each case is different in the number of issues that need to be resolved. Unfortunately, we have learned that requests for information through written discovery result in limitations, boilerplate objections, and other sorts of evasion. I certainly understand that the rules prohibit such mischief. However, I also recognize that a properly vetted record is necessary to enable the Courts to fairly resolve discovery disputes. Over the years I have found that if I create a clear record through the custodial 30(b)(6) depositions, motions are seldom necessary because the factual record mitigates the improper gamesmanship. Therefore, I urge the Committee not to invite more disputes through by requiring a meet and confer process when there are no legitimate disputes to resolve. Good lawyers already do it with the existing Rules.

With regard to the second issue with the proposed Rule change, I support a requirement that the responding institution disclose the identity of each person designated in response to the notice. Knowing when an institution will produce multiple designees in response to the 30(b)(6) notice improves the organization of the questioning. The most efficient depositions are those that are well organized. Knowing who will testify about which topics enables the examiner to prepare and organize the documents and categories of questions into an efficient outline for each designee. Therefore, I encourage the Committee to adopt the disclosure of the designees with sufficient time to enable the examiner to properly prepare for each designee.

Thank you for the opportunity to share my thoughts with this Committee.

Very truly yours,

A handwritten signature in black ink, consisting of a series of horizontal strokes followed by a sharp upward curve and a final downward stroke.

Mark R. Kosieradzki
Attorney at Law
Email: mark@koslawfirm.com
Phone: (763) 746-7800

MRK/nn

TAB 14

TESTIMONY OF

CHAD M. LIEBERMAN
BROSSEAU BARTLETT LIEBERMAN LLC



January 23, 2019

Sent via email to: RulesCommittee_Secretary@ao.uscourts.gov

Rules Committee Secretary
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building

Re: Written testimony of Chad Lieberman regarding the proposed amendment to Federal Rule of Civil Procedure 30(b)(6)

Dear Rules Committee Secretary:

I respectfully submit this testimony regarding the proposed amendment to Federal Rule of Civil Procedure 30(b)(6). I have reviewed the transcript from the January 4, 2019, public hearing and a plethora of written submissions. I have been an attorney for the last 13 years. My practice has always involved litigation and trial work on behalf of both plaintiffs and defendants. Currently my practice is primarily defense-oriented, and while my caseload spans the country, my client-base extends to Japan, Canada and Europe. Throughout my career I have presented and deposed a variety of 30(b)(6) witnesses. Thank you for the opportunity to present my thoughts and answer your questions.

1. Conferral in General

I support the inclusion of a mandatory conferral within the proposed amendment. In my experience, lawyers regularly confer about the scope and timing of a 30(b)(6) witness. The proposed comments from the committee regarding the conferral being iterative is merely a reflection of reality. All of my prior conferrals have been iterative in nature and, more often than not, resolve the parties' disputes.

2. Conferral Regarding the Scope of the 30(b)(6) Notice

I consider the "scope" of a 30(b)(6) notice to include both the quantitative and qualitative nature of a deposition notice. The proposed amendment requires a conferral, which is a good step, but not far enough. A simple presumptive limit on the number of topics would address most issues related to scope – much like the presumptive limits that currently exist for written discovery requests. Rule 30(b)(6) already requires that the topics be identified with "reasonable particularity" and thus a presumptive limit of 15 topics would require the requesting party to narrow the scope of the deposition to the issues which are truly relevant. Overly-broad requests will always occur, but a limitation will significantly focus the parties, narrow the issues, lessen expenses, streamline the disagreements and facilitate faster resolutions. The rule could permit the presumptive limit be modified via stipulation of the parties or upon order of court – just as permitted under Rule 33.

3. Procedure for Notice, Objection and Resolution

I believe the issues associated with 30(b)(6) depositions can be separated into two categories: (a) the scope of the deposition; and (b) the preparation of the witness. Respectfully, the proposed amendment does not address or remedy either of these issues.

a. Scope of the Deposition

Conferral on the scope of a 30(b)(6) deposition does not always resolve the parties' dispute. 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. Lawyers and clients crave a framework in which to operate and an outline for that framework can be found within Rule 45. It is perplexing that the notice and objection procedures of Rule 45 are applicable to a 30(b)(6) deposition noticed for a non-party but not for a party. I often hear that judges despise discovery disputes – but so do lawyers. Much of the frustration can be avoided by creating a simple procedure to handle the timing, objection and resolution of issues pertaining to the proposed scope of a 30(b)(6) deposition.

Rule 37 does not adequately address this issue for two reasons. First, the language of Rule 37 is principally tailored to issues concerning written discovery responses and disclosure requirements. Nothing within Rule 37 directly addresses disputes concerning the scope of a 30(b)(6) deposition. Second, Rule 37 principally addresses past discovery violations. A dispute about the scope of a 30(b)(6) notice concerns the nature of how a deposition may proceed in the future. A typical motion for a protective order under Rule 37 is oftentimes impractical and inefficient. With the lack of a unified procedure, many courts have adopted a variety of methods to address these issues. The lack of uniformity results in a host of incongruent and inconsistent case law being reported across the country.

b. Preparation of the Witness

This issue conceptually arises post-deposition. I say “conceptually” because I have never encountered an issue regarding the adequacy of a 30(b)(6) witness's preparation. I do not believe any amendment can eliminate bad lawyering or a rogue witness. The rule already requires the responding party to produce a witness with the ability to testify “about information known or reasonably available to the organization.” A party's failure to do so is subjective and best left for the courts to analyze. Logistically, such an issue would amount to a past discovery abuse and thus fall more squarely under Rule 37.

4. Identity of the Witness

The identity of a 30(b)(6) witness has never been an issue in my career. Sometimes the name is disclosed and sometimes not. I find the identity of the corporate witness to be irrelevant because the deponent is the company, not the human speaking for the company. Moreover, I fail to see how disclosure of the witness's identity does anything to facilitate the process or resolve any pre-deposition disputes.

Of concern to me, and many others who have testified, is the language of the proposed amendment. A mandatory “conferral” implies a give-and-take and thus has given rise to the concern that the proposed language is vague and implicitly chips away at the longstanding right of the responding party to choose unilaterally its witness. Likewise, the required “identity” of the witness is undefined and invites disputes and motion practice over what needs to be disclosed at the proposed conferral stage.

I echo the testimony of others regarding the unnecessary nature of the proposed amendment. Respectfully, the proposed amendment does not solve a problem, but rather creates a nebulous conferral requirement likely to result in additional disputes, protracted litigation and increased costs.

Sincerely,

BROSSEAU BARTLETT LIEBERMAN, LLC



Chad M. Lieberman

TAB 15

TESTIMONY OF

ALTOM M. MAGLIO
MAGLIO CHRISTOPHER & TOALE

MAGLIO CHRISTOPHER & TOALE

National Complex Litigation Attorneys

F. John Caldwell, Jr.: NY, NJ, FL, 3rd Cir., Fed. Cir., M.D.Fla., S.D.N.Y., D.N.J., Fed.Cl. ♦ **William G. Christopher,** Of Counsel: Board Certified Construction Law, FL, TX, VA, DC, 2nd Cir., 4th Cir., 6th Cir., D.C. Cir., Fed.Cir., U.S. Tax Ct., Fed.Cl. ♦ **Michael J. Cowgill:** FL, OR, 9th Cir., U.S. Dist.Ct. OR ♦ **Brenton Elswick:** WA, MN, 8th Cir., Fed.Cl. ♦ **Alison H. Haskins:** FL, M.D.Fla., Fed.Cl. ♦ **Theodore J. Hong:** WA, Fed.Cl. ♦ **Isaiah R. Kalinowski:** VA, NY, DC, E.D.Va., S.D.N.Y., Fed.Cl. ♦ **Altom M. Maglio:** FL, DC, NY, WA, MD, 11th Cir., Fed.Cir., D.D.C., M.D.Fla., N.D.Fla., S.D.Fla., E.D. Mich., N.D. Ohio, D. Colo., W.D. Okla., N.D. Tex., N.D. Ill., W.D. Wash., W.D. Wisc., Fed.Cl. ♦ **Jennifer Anne Gore Maglio:** FL, DC, WA, NY, 2nd Cir., 6th Cir., 7th Cir., 11th Cir., Fed.Cir., M.D.Fla., N.D.Fla., S.D.Fla., S.D.N.Y., Fed.Cl. ♦ **Jessica Olins:** DC, Fed.Cl. ♦ **Ilyas Sayeg:** FL, DC, M.D.Fla., S.D.Fla., N.D. Tex., Fed.Cl. ♦ **Diana L. Stadelnikas:** FL, M.D.Fla., Fed.Cl. ♦ **Michele S. Stephan:** FL, M.D.Fla. ♦ **Danielle A. Strait:** WA, CA, DC, Fed.Cl. ♦ **Anne Carrión Toale:** FL, 11th Cir., Fed.Cir., M.D.Fla., Fed.Cl. ♦ **Christina E. Unkel:** FL, DC, M.D.Fla., D.P.R., Fed.Cl. ♦ **Joseph A. Vuckovich:** DC, D.D.C., D.Md., Fed.Cl. ♦ **Amber D. Wilson:** Ph.D.: FL, DC, Fed.Cl.

mctlawyers.com | 888.952.5242

OFFICES: SARASOTA, FL - WASHINGTON, DC - SEATTLE, WA

January 24, 2019

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

Re: 30(b)(6) Proposed Rule Changes


Dear Advisory Committee on Civil Rules:

I typically represent individuals involved in litigation against corporations. In such a situation, the individual is at a distinct disadvantage. The individual is clearly bound by the individual's actions and testimony. In contrast, whether an action, statement, or testimony is that of a corporation or just one of its employees is very much open to dispute. Who speaks for the corporation? Was that employee authorized to take that action? Was the employee acting on behalf of the corporation, or was the employee just a bad actor? Does the deposition testimony of a corporate employee, even one who is an officer or director of a corporation, bind the corporation? The only time when it is unequivocal that an employee is speaking on behalf of a corporation is with a 30(b)(6) deposition. Therefore, 30(b)(6) depositions are extremely important to obtaining justice in any litigation involving corporations.

One of the most common problems encountered in 30(b)(6) depositions are witnesses who either can't or won't speak for the corporation even on noticed topics. The proposed meet and confer requirement should assist in limiting that problem. Likewise, codifying in the rule the standard practice of identifying the designated witness in advance helps alert the noticing party when a problematic representative selection is made and makes the meet and confer process more fruitful. In contrast, arbitrary limits on the number of topics that would discourage efficient depositions was wisely avoided by the committee.

In conclusion, any changes that enhance 30(b)(6) depositions are a step in the right direction. I look forward to testifying before the committee on February 8th.

Sincerely,



Altom M. Maglio
amm@mctlawyers.com

TAB 16

TESTIMONY OF

ELISE SANGUINETTI
AMERICAN ASSOCIATION FOR JUSTICE



January 24, 2019

Rules Committee Staff
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

**Re: AAJ Proposed Testimony for February 8, 2019 Hearing on Amendments to
FRCP 30(b)(6)**

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

The American Association for Justice ["AAJ"] hereby submits its proposed testimony in advance of the February 8, 2019 hearing on the amendments to Federal Rule of Civil Procedure 30(b)(6) ["Proposed Amendments"].

AAJ, with members in United States, Canada, and abroad, works to preserve the constitutional right to trial by jury and access to justice when people are injured by the negligence or misconduct of others. AAJ advocates to ensure that all plaintiffs, including those involved in cases against powerful corporations that are subject to Rule 30(b)(6) depositions, receive proper access to the courts under fair and reasonable rules of procedure.

1. AAJ Comments on Proposed Amendments

- A. A Fair and Balanced Rule Must Include Conferring About the Identity of the Witness Designated to Testify.
- (i) The Proposed Amendments impose on the organization that is receiving the notice of deposition a duty to confer about "the identity of each person the organization will designate to testify." This language is vital to the success of the Rule.
 - (ii) Conferring about the identity of the witness ensures that the witness is prepared to address the matters for examination.

B. Textual Recommendations to Ensure a Fair and Balanced Rule.

- (i) AAJ recommends changes to the current text of the Rule and Committee Note. AAJ believes that these changes will help better clarify the balance that this Rule intends to strike.
- (ii) The textual recommendations are related to the following:
 1. “*Number and*”: AAJ suggests that the words “number and” be removed from the Proposed Amendments.
 2. “*Before or promptly after*”: AAJ suggests that the phrase “before or promptly after the notice or subpoena is served, and continue conferring as necessary” be moved to the end of the same sentence, as follows:

~~Before or promptly after the notice or subpoena is served, and continuing as necessary, the~~ **The** serving party and the organization 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 **on each matter before or promptly after the notice or subpoena is served, and continue conferring as necessary.**
 3. *Changes to Committee Note*: There are additional textual changes that AAJ recommends to the Committee Note accompanying the Rule.

2. In Response to Defense Comments

- A. AAJ members representing clients on a contingent fee basis want to control costs, and a formalized “meet and confer” process may help those situations where the defense is uncooperative and/or seeks to drag out litigation. If “meet and confer” is the process that most attorneys already engage in, then it is unlikely that the Proposed Amendments would change how 30(b)(6) depositions are conducted.
- B. AAJ opposes any proposal that the Rule should contain a presumptive limit on the number of topics, as well as defense suggestions that the Committee return to an earlier version of the Rule. AAJ believes that were this Committee to address the myriad topics suggested by the defense bar, it would need to revisit this proposed Rule entirely, an unnecessarily duplicative process that AAJ opposes.

3. Conclusion

- A. AAJ generally supports the Proposed Amendments to Rule 30(b)(6). AAJ believes that the revised Rule is fair and balanced for both the noticing party and organization subject to the deposition, as it imposes new requirements on each.
- B. To maintain this fairness, it is necessary that the Rule not lose its requirement regarding disclosure of the “identity of the witness” who will testify. If a final Rule does not reflect this, the resulting Rule simply creates new burdens for plaintiffs while allowing corporations to further control litigation and the pretrial discovery process.

Sincerely,



Elise Sanguinetti

President

American Association for Justice

TAB 17

TESTIMONY AND COMMENT OF

MICHAEL NEFF
NEFF LAW

NEFF LAW

CATASTROPHIC INJURY &
WRONGFUL DEATH ATTORNEYS

January 24, 2019

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

Re: Proposed Amendments to FRCP 30(b)(6)

To the members of the Committee:

My name is Michael Neff. I graduated from law school in 1993 and have been practicing since then. I started my own law firm in 1996. We now have four lawyers and represent injured people.

In that time, I've litigated hundreds of cases and tried approximately 30 cases. I've tried cases to verdict that ranged from \$0 to \$47 million.

During the time that I have practiced, I've had to adapt from what was taught in law school to how things work in the "real world." In law school, I studied the rules of civil procedure and thought, "If I allege something that is true, the Defendant will admit it" and "If I ask for the documents I need to prove my case, I will get them in thirty days."

In the "real world", I've never found that to be the case. Instead, almost all allegations are denied or the Defendant asserts that they are "without knowledge" to admit. Those responses are frequently false. Corporations usually do have knowledge and can admit the truth. Rather, they prefer to deny things and hope for the best in litigation. Perhaps the Plaintiff's counsel won't work so hard. If the Plaintiff's lawyer does work diligently, perhaps we can stonewall him with a bunch of witnesses coached not to know anything.

In my view, the single most important tool that the Plaintiff's counsel has to pursue the truth in an efficient and economical manner is the 30(b)(6) deposition. I have been using 30(b)(6) depositions for most of my career. In one case, we eventually obtained a \$9 million verdict in a negligent alarm monitoring case. *We took one 30(b)(6) deposition.* The remainder of discovery was expert depositions and damages witnesses.

Regarding the proposed rules, I see no reason to add a meeting regarding the identity of witnesses. Instead, just require the Defendant to identify the witnesses at least two weeks before the deposition. Requiring the identity of the witness is important to give time for the Plaintiff's lawyer to do some preparation.

p. 404-531-9700 | f. 404-531-9727 | MLNLAW.COM

The Pinnacle Building | 3455 Peachtree Road NE, Ste. 509 | Atlanta, Georgia 30326

If I understand correctly, some defense counsel have objected that the Plaintiff will do internet research on the witness as if this were a bad thing. That is remarkably disingenuous as the defense always does social media research on the Plaintiff. In fact, many defense counsel are requesting social media in written requests for documents.

In a December 7, 2018 letter written to the Committee by Bradley W. Petersen of Slattery Peterson PLLC, Mr. Peterson wrote that when selecting a 30(b)(6) representative for his client, among the things he considers are:

- Witness's qualifications;
- Witness's personal knowledge and experience;
- Witness's prior experience testifying;
- Organization's interest in having someone with personal knowledge testifying

If those things are important to the defense, they are also important to the plaintiff. Thus, the plaintiff's counsel should be given appropriate time to explore and become familiar with those things before the deposition so that the lawyer taking the deposition need not waste time asking questions that are readily available.

If you want to save time, require the witness to do a hybrid of the Rule 26 report where he or she identifies background, education, experience, prior testimony, personal knowledge, and sources of information. I'm confident that the defense bar would not like this. However, it isn't necessary if the defense will disclose their witnesses in advance.

I've seen a suggestion that identifying the witness in advance is not important because the plaintiff's lawyer can use her phone at the depo to do research. Clearly, no competent lawyer would show up for trial without studying who the witnesses are. 30(b)(6) depositions are a party deposition and can be used at trial. Sandbagging a response on the morning of the deposition precludes the plaintiff's counsel from thinking about her deponent and making connections between the deponent's knowledge and experience and the case at bar. Less preparation leads to inferior results. This is hardly justice when the deck is already highly stacked against the plaintiff due to the dramatic difference of resources between an individual plaintiff and billion dollar insurance companies and large corporations.

As noted by another witness, the 30(b)(6) deposition is one trade off of choosing the benefits that come with doing business as a corporate entity.

There is no reason to limit topics. It won't save time. Rather it will require more depositions and more inefficiency. Many large cases can require 20 or more depositions. Limiting topics forces the plaintiff to depose more individuals. We will be back to the "I don't know" rigmarole that evidenced the need for Rule 30(b)(6). Only the defense lawyer benefits from this. It is the opposite of the just, speedy, and inexpensive justice.

Respectfully,



Michael L. Neff



Document Details

| | |
|---|--|
| Docket ID: | USC-RULES-CV-2018-0003 |
| Docket Title: | Proposed Amendments to the Federal Rules of Civil Procedure * |
| Document File: | |
| Docket Phase: | Proposed Rule |
| Phase Sequence: | 1 |
| RIN: | Not Assigned |
| Original Document ID: | USC-RULES-CV-2018-0003-DRAFT-0144 |
| Current Document ID: | USC-RULES-CV-2018-0003-0135 |
| Title: | Comment from Michael Neff, NA |
| Number of Attachments: | 0 |
| Document Type: | PUBLIC SUBMISSIONS * |
| Comment on Document ID: | USC-RULES-CV-2018-0003-0001 |
| Comment on Document Title: | Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure |
| Status: | Posted |
| Received Date: | 12/03/2018 * |
| Date Posted: | 12/04/2018 |
| Posting Restriction: | No restrictions |
| Submission Type: | Web |
| Number of Duplicate Submissions: | 1 * |

Document Optional Details

| | |
|--|-------------------------|
| Status Set Date: | 12/04/2018 |
| Current Assignee: | NA |
| Status Set By: | Skillman, Frances (USC) |
| Legacy ID: | |
| Additional Field 1: | |
| Tracking Number: | 1k2-96wo-uplw |
| Total Page Count Including Attachments: | 1 |

Submitter Info

Comment: Changes are not needed to FRCP 30(b)(6). *🌐

First Name: Michael *🌐

Last Name: Neff *🌐

Mailing Address: 3455 Peachtree Road, Suite 509 *

Mailing Address 2: Suite 1770

City: Atlanta *

Country: United States

State or Province: Georgia

ZIP/Postal Code: 30326 *

Email Address: mneff@mlnlaw.com *

Phone Number: 404-531-9700 *


Fax Number:

Organization Name: NA *🌐

Submitter's Representative:

Government Agency Type:

Government Agency:

Cover Page: 

TAB 18

COMMENT OF

MICHAEL R. NELSON AND THOMAS M. BYRNE
EVERSHEDS SUTHERLAND (US) LLP

To: Advisory Committee on Civil Rules

From: Michael R. Nelson and Thomas M. Byrne

Date: January 18, 2019

We write to offer comments to assist the Committee as it considers proposed amendments to Fed. R. Civ. P. 30(b)(6). As explained below, in view of our combined experience of more than 60 years in proceedings under the rule, we have grave concerns regarding the proposed amendment.

First, the proposed amendment unfortunately does not address the primary shortcomings of the current rule but would introduce an entirely new set of difficulties in organizational depositions. Although the current rule requires “reasonable particularity” in describing the matters for examination, no other limitations are stated. No process is provided for asserting or resolving objections to the matters listed for examination. Consequently, the designation of hopelessly overbroad topics is commonplace. So too is the designation of purely legal conclusions or contentions. A lay witness should not have to advocate the organization’s cause under cross-examination by opposing counsel. This is unfair and unproductive, and the absence of guidelines on permissible matters for examination has hobbled the process with inevitable squabbling over whether a witness has adequately prepared or whether the witness’s answers concerning the organization’s legal contentions should bind the organization in subsequent phases of the litigation. Depositions of witnesses should be about facts – and only facts – relevant to claims or defenses. The proposal fails to address the aspects of implementation of the rule that are in the most dire need of attention.

Second, rather than reducing the range of controversies concerning implementation of the rule, the proposal would spawn a new one of its own creation. Specifically, proposal would require advance notice by the organization of its designees for testimony and impose a “meet and confer” requirement concerning the designations themselves. No case law known to the undersigned supports this significant expansion of the rule’s obligations on organizations. Nor is it clear that current practice poses a particular problem in terms of administration of the rule. Would the proposal lead to less squabbling over the procedures? Almost certainly not; there will be now be another layer of potential disputes, with no substantive

guidance provided by the rule. Greater efficiency? Not so; it will only prolong the proceedings under the rule and add to the process-cost of litigation.

Under the current rule, an organization that fails to make adequate designations may face a motion before the court. And, if the witness is inadequately prepared on a legitimate subject, then ordinarily the organization must live with the answers, even if disadvantageous. An empirical case has not been made for involving an opposing party in the deponent's heretofore independent decisions on designees for testimony. The proposal represents an abrupt break with the committee's momentum toward streamlining civil discovery and should be withdrawn for further consideration or revised.

Mike Nelson will appear to present testimony at the public hearing in Washington on February 8, 2019 and will gladly answer any questions.

Thank you for considering our views.

Contact information for commenters:

Michael R. Nelson
mikenelson@eversheds-sutherland.com
T: 212.389.5061

Thomas M. Byrne
tombyrne@eversheds-sutherland.com
T: 404.853.8026

TAB 19

COMMENT OF

MARY T. NOVACHECK
BOWMAN AND BROOKE LLP

January 22, 2019

VIA Electronic Mail: Rule_Comments@ao.uscourts.gov

Judicial Conference Advisory Committee on Civil Rules

Re: REFORMING RULE 30(b)(6)

Dear Advisory Committee:

Bowman and Brooke LLP respectfully submits this Comment to the Advisory Committee on the Federal Rules of Civil Procedure ("the Committee").

Bowman and Brooke is a national law firm with 13 offices across the country, known for defending product manufacturers' mass torts and highest profile litigation nationwide. Our lawyers have tried more than 875 product liability lawsuits throughout 48 states, the U.S. Virgin Islands, Puerto Rico and several Canadian provinces. We have engaged in a countless number of depositions including depositions conducted under Rule 30(b)(6). Through these experiences, we have developed substantial experience with the burdens related to this rule. As a result, we provide the following comments on the Committee's proposed changes to that Rule.

We oppose the proposed amendment in its current form. We believe the proposed change requiring the named organization to meet and confer with requesting counsel as to the identity(ies) of the corporate representative testifying in response to the notice is problematic. A "prompt" meeting is not practical for the realities of litigation.

I. Proposed Amendment to Rule 30(b)(6)

The Civil Rules Advisory Committee ("Advisory Committee") proposes adding the language highlighted in red to Rule 30(b)(6):

(6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf, and it may set out the matters on which each person designated will testify. **Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization 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.** A subpoena must advise a nonparty organization of its duty to make this designation **and to confer with the serving party.** The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

A proposed Committee Note would state:

[a]lthough the named organization ultimately has the right to select its designees, discussion about the identity of persons to be designated to testify may avoid later disputes.

II. Requiring responding parties to confer on the identity of the witnesses is contrary to well-settled law and will create confusion and burden, giving rise to new litigation issues for the courts to resolve

We urge the Committee to remove the “identity of the witness” language from the proposed amendment. We understand from prior advisory committee meetings and the proposed “Committee Note” that the Committee does not intend the amendment to allow noticing parties to participate in the choice of the deponent. The only way to achieve the Committee’s intent is to strike that language from the proposed amendment.

If that language remains, it will create a sea change in the law related to Rule 30(b)(6) depositions. Such a change would be extremely troublesome for organizations already burdened by a system that requires endless hours of preparation, broad and numerous topics, particularly in contentious MDL and mass tort cases. Even if this is not the committee’s intent, the fact that it is included in the amendment gives that impression, which will breed confusion about the committee’s intent, raising new issues courts will need to resolve.

Case law is well-settled that the responding organization alone selects the testifying witness. Demanding that the parties confer on the identity of witnesses will give rise to claims that the new rule voids well-settled prior case law. It is not uncommon for requesting parties to prefer a different witness than the one designated. But this amendment is not needed to give them access to the individuals they wish – requesting parties are not restricted from deposing other corporate employees as fact witnesses.

Bear in mind that the burden on the corporate designee under the current rule is significant. We have observed numerous instances where requesting parties use these depositions simply to increase burden, not to gain new information. Notices commonly contain 50 to 100 “topics” for examination. These depositions are often duplicative of others. Requesting parties often depose designated individual to testify consistently with prior depositions in related cases taken years ago. Complicating this further by mandating preparation as to why the designee is the person at the company best suited for the job may force an organization to produce a witness not well suited to the rigors of testifying on behalf of the organization. This would be unfair in high stakes litigation, and without a doubt, requesting parties would use the amended rule to increase pressure on organizations to extract settlements.

The proposed Committee Note stating that “the choice of the designee is ultimately the choice of the organization” does not adequately protect prior law. The word “ultimately” indicates that the requesting party will now have some level of involvement in selecting the witness, and courts will read the new language to give them a role. The “identity of the witness” language must be removed from the proposed amendment altogether.

III. Requiring a prompt meeting to confer on the designation of witnesses increases the burden on both parties.

Under the amendment, at the meet and confer, the parties would be required to discuss the identity of the witness or witnesses designated to testify “promptly” after receipt of the notice. In reality, requesting parties often serve 30(b)(6) deposition notices months in advance of the eventual deposition.

As time progresses in the litigation, corporations prepare their intended witnesses, but at times they change their initial selection due to a variety of circumstances, sometimes strategic and often not foreseeable at the time the notice is served. The noticing party would ask for an explanation when designations change. Requiring the organization to confer about the identity of the witness shortly after the notice is served threatens the confidentiality of later attorney work product and attorney-client privileged communications when those designations change.

A “prompt” meet and confer is not well suited to the practical realities of these depositions. The current, clear case law enables corporations to make these decisions as needed without conferring with the opponent when the witnesses’ identities change. Requiring a meeting on the witness’ identity to occur “promptly” after service is simply not practical and increases the already heavy burden placed on the organization.

We urge the committee to reconsider its current draft of amendments to Rule 30(b)(6). These depositions involve hotly contested issues in product liability lawsuits. Do not reduce the responding organization’s power to select the person best suited to the role of its corporate representative. The proposed amendment would add to the already heavy burden on the organization and the employee selected to testify. It would not benefit the needs of the case and it would needlessly increase the cost of attorneys’ fees for work undertaken to comply with this new process.

Thank you for considering Bowman and Brooke’s position on this important issue.

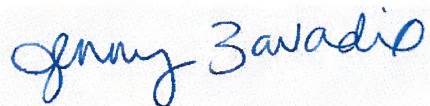
Sincerely,

BOWMAN AND BROOKE LLP

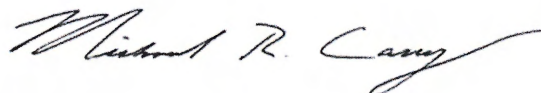
A handwritten signature in black ink, appearing to read "Mary T. Novacheck", written in a cursive style.

Mary T. Novacheck
Partner

Jenny Zavadil



Partner



Michael R. Carey
Partner



Sandra Giannone Ezell
Partner

MN/vf

TAB 20

COMMENT OF

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION



December 21, 2018

To the Advisory Committee on Civil Rules

Submitted electronically: <https://www.regulations.gov/docket?D=USC-RULES-CV-2018-0003>

**COMMENTS ON PROPOSED AMENDMENTS
TO RULE 30(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

The National Employment Lawyers Association (NELA) submits the following comments to the Advisory Committee on Civil Rules in response to the Request for Comment on the proposed amendment to Federal Rule of Civil Procedure 30(b)(6) (“Proposed Amendment”). We appreciate the opportunity to offer our perspectives regarding the Proposed Amendment. We commend the Committee and the Rule 30(b)(6) Subcommittee on the process that led to this Proposed Amendment, as well as the substance of the Proposed Amendment. In particular, the Subcommittee’s “road show” which permitted input from such a wide range of perspectives, including a meeting in connection with the AAJ conference in Boston, resulted in a rule that is well-balanced in addressing concerns of both the defense bar and plaintiff-side counsel.

NELA is well qualified to comment on the issues raised by the Proposed Amendment because it is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA’s members litigate daily in every federal circuit, which provides NELA with a unique perspective on how these issues will actually play out on the ground.

I. Comment on the Proposed Amendment

In our written comments earlier in the rulemaking process, NELA opposed expansive changes to Rule 30(b)(6). We noted that, while not perfect, Rule 30(b)(6) works well in practice, and achieves the efficiencies at which the rule was aimed. We encouraged the Committee to leave the rule unchanged, thereby allowing the courts to handle issues that arise on a case-by-case basis. Now, following the drafting period, we believe that the decision to add a formal meet and confer process strikes the right balance.

With respect to the requirement of a meet and confer on the number and description of topics, we note that experienced counsel already do this when the need arises. We agree that making it an explicit requirement will ultimately reduce disputes and promote efficiency. The Proposed Amendment strikes the right balance. The noticing party will not be bound by a rigid

limit on the number of topics, and will retain ultimate control of the subject-matter covered. And both parties will benefit from getting clarity on topics that can be refined, narrowed, eliminated, or saved for later stage of the litigation. A presumptive cap on the number of topics is not needed. In our experience, the “horror story” examples of 100-topic deposition notices provided by the defense bar are the very rare exception. We usually see Rule 30(b)(6) depositions used reasonably, listing a number of topics directly tied to the issues at play. We have seldom experienced disputes over the number of topics listed. Imposition of a bright-line limit would only encourage counsel to make each topic broader than necessary in order stay under the cap. This would make it more difficult for witnesses to prepare and would lead to disputes.

Requiring advance notice of witnesses also makes sense; it is not a “radical mandate” as suggested by Lawyers for Civil Justice (“LCJ”). Again, our experience is that this already happens in many cases. Making the practice mandatory will eliminate gamesmanship in situations where parties refuse to identify witnesses, hindering counsel’s ability to adequately prepare and making the deposition longer and most costly. Of course, the party being deposed will retain control over the witnesses provided. But, as stated in the Draft Committee Note, advance discussion should help avoid later disputes about whether the witness was appropriately knowledgeable.

Finally, we agree that the Proposed Amendment appropriately clarifies that the new meet and confer process will be ongoing, if necessary. As the Draft Committee Note makes clear, the process does not mandate that the parties reach an agreement on all issues. However, specifying that the process should be ongoing is in keeping with the spirit of Rule 1 and will help prevent the process from becoming perfunctory.

II. Comment on the Draft Committee Note

The Draft Committee Note appropriately explains the rationale behind the proposed rule change, and will provide useful guidance for practitioners moving forward. We appreciate the explicit discussion of Rule 1 and the overarching goal of moving cases forward with collaboration and efficiency. We also agree with the clarification that the meet and confer process is not intended to result in an agreement on every issue.

On the other hand, we believe that the Committee should consider removing the following sentence from the Draft Committee Note: “At the same time, it may be productive to discuss other matters, such as having the serving party identify in advance of the deposition the documents it intends to use during the deposition, thereby facilitating deposition preparation.” During the initial discussions of the proposed rule change, there was a suggestion to mandate a pre-deposition exchange of exhibits. NELA, along with other groups, opposed this because it (1) would merely result in counsel over-disclosing numerous exhibits out of an abundance of caution, and (2) could effectively turn what should be a cross-examination into a mere live version of interrogatories. Including the suggestion of an early exchange of deposition exhibits in the Committee Note risks reading into the new rule a requirement that has already been considered and set aside.

III. Response to Comments from the Lawyers for Civil Justice

We also want to address the comments submitted by Lawyers for Civil Justice, a corporate and defense-side organization, on September 12, 2018. LCJ's comments are largely addressed not to the Proposed Amendment, but to an attempt to revive suggestions that were considered and wisely rejected during the Subcommittee's review, and deliberately excluded from the Committee's Proposed Amendment. The public comment period should be used to evaluate and as needed refine proposed amendments, addressing the topics specifically raised by the proposed amendment. It is not intended to revisit specific suggestions already considered, subject to public comment, and then rejected in formulating a proposed amendment. To do so would be wasteful of the substantial effort that went into the Subcommittee's work, and which already reached the correct result.

A. Objections by the responding party should not block a deposition from moving forward.

LCJ proposes that a formal objection process be added, and, most significantly, that no deposition may take place on topics to which the responding party objects until after motion practice resolves the dispute. This is counter-productive. The meet and confer requirement included in the Proposed Amendment is the better approach.

The 30(b)(6) deposition is often the first deposition taken in the case. Encouraging formal objections would create more motion practice at the start of the discovery process, causing long delays that will prevent any productive discovery from being conducted. Further, requiring piecemeal depositions, in which the deposition proceeds as to topics the responding party has agreed to, with a second deposition after the court rules on an inevitable motion to compel regarding the topics to which the responding party objects, would be terribly inefficient. These types of inefficiencies can be avoided by leaving the rule as it stands, and allowing the organization to move for a protective order if the proposed notice truly is objectionable.

Currently, it is not uncommon for a responding party to raise objections in advance of a Rule 30(b)(6) deposition, but those objections do not block the deposition from going forward. Nearly always, by the time the deposition is completed, there are no disputes remaining for a court to address. In the circumstances where there are disputes, the testimony provided in the deposition gives context which provides a sounder basis for resolving those disputes. The proposed change would inevitably lead to protracted disputes requiring court intervention, and piecemeal depositions or greater delay, as the deposition is postponed until the dispute is resolved.

The current rule is working effectively. As one court explained:

Although there is some authority for the proposition that a 30(b)(6) notice should be stricken in part based upon the specific topics included in the notice, *the proper operation of the Rule does not require, and indeed does not justify, a process of objection and Court intervention prior to the*

schedule deposition. That would provide a corporate deponent a procedural benefit that no other deponent has. ...

Instead, the better procedure to follow for the proper operation of the Rule is for a corporate deponent to object to the designation topics that are believed to be improper and give notice to the requesting party of those objections, so that they can either be resolved in advance or otherwise. The requesting party has the obligation to reconsider its position, narrow the scope of the topic, or otherwise stand on its position and seek to compel additional answers if necessary, following the deposition. ***The reason that is a better procedure is that the deponent's answers to relevant questions at the deposition will have a great deal of impact upon the strength of the arguments in support of or against a motion to compel.*** The answers provided will give the Court a factual record with which to judge whether a particular topic or question asked should be compelled or not. And that forces a responding party to ensure that the witness provides as much relevant or possibly relevant information as possible given the liberal scope of discovery provided by Rule 26 to forestall the necessity for a motion to compel.

New World Network Ltd. v. M/V NORWEGIAN SEA, No. 05-22916 CIV, 2007 WL 1068124, at *4 (S.D. Fla. Apr. 6, 2007) (emphasis added). This procedure, outlined by the court under the existing rule, is what we commonly see in practice in courts throughout the country. It typically results in informal resolution of any concerns about the scope of the 30(b)(6) notice. The Proposed Amendment which mandates that a meet and confer about the scope of the Rule 30(b)(6) topics take place is the better approach, leading the parties to resolve most disputes between themselves, with fewer issues submitted to the courts.

LCJ goes further and suggests that as to some topics, a responding party may not only object, but refuse to produce any witness at all, instead directing the propounding party to documents. As a general rule, a company may not use this method to respond to a Rule 30(b)(6) notice:

In responding to a Rule 30(b)(6) notice or subpoena, a corporation may not take the position that its documents state the company's position and that a corporate deposition is therefore unnecessary. *Great Am.*, 251 F.R.D. at 540.

Similarly, a corporation cannot point to interrogatory answers in lieu of producing a live, in-person corporate representative designee. *Marker*, 125 F.R.D. at 127.

QBE Ins. Corp. v. Jorda Enterprises, Inc., 277 F.R.D. 676, 689 (S.D. Fla. 2012) (footnote omitted). It should not be permitted to do so by claiming the company has “no knowledge” outside of the documents. A company is in a better position to understand and interpret its own documents than an opposing party is, thus the parties are not equally informed by the written

record. Companies often seek information from former employees, and name them as witnesses in employment disputes. If they are permitted to do so, they should be similarly required to seek such information earlier in discovery in order to prepare for a Rule 30(b)(6) deposition so that testimony binding upon the company is available. Testimony from former employees cannot be attributed to the company in the same way. Moreover, the testimony of the witness can ultimately be that the company has no knowledge – but the Company may not then be permitted to come forward at trial with the knowledge it testified that it lacked. The discovery process is designed to ensure both parties have the opportunity to uncover evidence in advance of trial, not to permit a company to play games with what knowledge it has by manipulating the time at which it seeks information from former employees if no other source exists.

B. A uniform 30-day notice requirement is too inflexible.

LCJ proposes that 30 days' notice be mandatory for any deposition pursuant to Rule 30(b)(6). There is no reason for such a one-size-fits-all approach. Especially given that the Proposed Amendment builds in a meet and confer process in which an initial notice may be discussed, and then modified, there should be no reason for a further 30-day period after the parties have conferred and narrowed the topics to be included. Professional counsel will always discuss deposition dates with opposing counsel and seek a mutually agreeable date. To have a rigid 30-day notice rule for just one type of deposition would be one-sided, and would make discovery take longer without any real benefit that is not better obtained through the meet and confer process incorporated in the Proposed Amendment.

C. A numerical limitation on the number of topics is artificial and unproductive.

LCJ's suggestion that there be a limit of ten topics in a Rule 30(b)(6) deposition is unwarranted and counter-productive. Artificial limits are hardly the norm as LCJ suggests: the Federal Rules do not include a limit on the number of document requests or requests for admission. Nor should they on the number of topics to be included in a Rule 30(b)(6) deposition. Moreover, to limit a propounding party to ten topics would merely serve to encourage broader topics, which responding parties would then complain were too vague. There is no corresponding limit on the range of topics on which a named witness may be deposed, and it would be one-sided to impose such a limit only when the responding party is a corporation rather than a natural person. LCJ's proposal is founded on the unlikely contention that it is "common" for Rule 30(b)(6) notices to include 60 or 100 separate topics spanning 50-80 years. As noted above, those are, in fact, highly unusual circumstances which can be readily addressed with a motion for a protective order, as they were in the two cases relied upon by LCJ in support of its proposal.

D. The current rule under which a Rule 30(b)(6) notice counts as one deposition, while a maximum of seven hours is permitted with each witness should be maintained.

The Advisory Committee notes establish that each Rule 30(b)(6) deposition notice counts as one deposition, regardless of the number of witnesses the producing party chooses to designate. Any change in this rule would permit a corporate party to game the system by

designating a large number of separate witnesses, leaving the opposing party no opportunity to depose other witnesses without obtaining an enlargement of the presumptive limitation. Plaintiffs, for whom compensation is often largely or wholly contingent upon the outcome of litigation, have no incentive to take unnecessary depositions, or make depositions last longer than needed. With the utility of Rule 30(b)(6), many of our members do not even use all of their allotted depositions. Moreover, where a defendant designates a large number of separate witnesses in response to a Rule 30(b)(6) notice, then witnesses with fewer or shorter topics may only be deposed for an hour or two. But where witnesses are designated to cover more, or more significant topics, a full day is necessary, appropriate, and the current practice allows for a full seven hour deposition with each witness. These issues are commonly resolved by agreement with opposing counsel, and rarely require court intervention. However, if a change were made, then court intervention to adjust the number of depositions permitted, or the allocation of time among 30(b)(6) designees could be required.

Notably, the party receiving the notice is in control of how many witnesses are produced. For instance, in some cases multiple witnesses are designated to cover different time periods. This is done, presumably, for the convenience of the organization. The noticing party should not be required to use an extra deposition due to the needs (strategic or otherwise) of the other side. Further, limiting the amount of time that a party can spend with each Rule 30(b)(6) witness may prevent certain topics from being explored as thoroughly as needed, requiring additional fact witness depositions that could otherwise be avoided. This area is not currently a source of disputes that cannot be resolved by the parties, and a rule change would be more likely to increase unnecessary conflict.

- E. There should be no bar on questions related to a party's contentions, nor any different rule restricting questions about what witnesses did to prepare for deposition. The existing rules that apply to all witnesses should be used with Rule 30(b)(6) witnesses as well.

LCJ's proposal to bar on asking witnesses what materials they reviewed to prepare for deposition, and barring questions regarding the legal contentions of a party would place corporate designees on a separate footing than other party witnesses, with no justification. NELA urges the Committee to avoid introducing discovery restrictions on individual litigants that do not apply to organizational parties.

Corporate defendants often ask plaintiffs in employment cases what reasonably could be described as "contention questions" during their deposition (e.g., "What support do you have for your claim that you suffered discrimination?"), and plaintiffs do the same in deposing certain corporate representatives (e.g., "Which individuals were involved in the decision to fire the plaintiff?" or "What does defendant contend was the legitimate, non-discriminatory reason for the employment decision at issue?"). From the perspective of the plaintiff, for example, identifying the relevant decision-makers at the earliest point possible in a case is essential in deciding which individuals potentially should be deposed, as well as focusing subsequent discovery requests. As such, these types of questions address the problem of information asymmetry that almost always exists at the outset of an employment case, while promoting efficiency in the discovery process.

Allowing such questions to be asked of individual plaintiffs, but not of the designated representatives of organizational defendants, would unfairly tilt the scales in favor of one party to the litigation, without any principled justification. Further, in light of the limitations on other discovery devices that could be used to narrow factual issues, the value of 30(b)(6) depositions in identifying an organizational litigant's position on the facts in a case is higher than ever. Such a change would only lessen the effectiveness of the rule.

Existing rules and practices deal adequately with the issue of litigants inappropriately asking certain deponents to offer legal conclusions or state legal contentions, i.e., the party objecting to the question may do so, and seek judicial resolution of their objection if necessary.

Current law recognizes that whether a particular issue should be raised during a 30(b)(6) deposition or through a contention interrogatory depends on the particular circumstances of a given case, and NELA respectfully urges the Committee to consider carefully whether rulemaking on this issue would be productive. *See U.S. v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996) ("Whether a Rule 30(b)(6) deposition or a Rule 33(c) contention interrogatory is more appropriate will be a case by case factual determination.") It is not at all clear that what constitutes a "contention question" may be reduced to a generally-applicable definition that could be included in a rule amendment.

Thank you for the opportunity to present NELA's views on this important matter. Please do not hesitate to contact NELA should you have any questions.

Respectfully submitted,

Terry O'Neill
NELA Executive Director
Oakland, CA
toneill@nelahq.org

Joseph D. Garrison
NELA Liaison to the Civil Rules Advisory Committee
Garrison, Levin-Epstein, Fitzgerald & Pirrotti, PC
New Haven, CT
Jgarrison@garrisonlaw.com

Robert L. Schug
Nichols Kaster, PLLP
Minneapolis, MN
Schug@nka.com

Christine Webber
Cohen, Milstein, Sellers & Toll PLLC
Washington, DC
cwebber@cohenmilstein.com

TAB 21

TESTIMONY AND COMMENT OF

BRUCE R. PARKER
VENABLE LLP

January 15, 2019

Bruce R. Parker

T 410.244.7534

F 410.244.7742

BRParker@venable.com

VIA EMAIL AND FIRST-CLASS MAIL

(email: RulesCommittee_Secretary@ao.uscourts.gov)

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

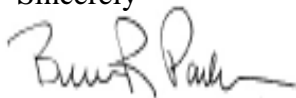
Dear Rules Committee:

As I indicated in an email to the Committee on December 10, 2018, I intend to appear in Washington, DC on February 8, 2019 to testify on the proposed changes to Rule 30(b)(6). On December 27, 2018, I filed a public comment objecting to the Committee's proposed changes titled: "Comments on Proposed Amendment to Federal Rule of Civil Procedure 30(B)(6)." For convenience, I've enclosed a copy of the comment.

My February 8th testimony will elaborate on my written comments and shed further light on why the Committee's proposal to require a meet and confer on the identity of each person the organization intends to designate as its representative is both troublesome and unnecessary. Specifically, I'll discuss my views that such a requirement: (1) invades attorney opinion work product; (2) will inevitably lead to additional discovery disputes and increased costs; and (3) is a solution in search of a problem because under the existing Rules a requesting party can already: (a) seek sanctions if a corporate representative is unable to adequately address the areas identified in the notice; and (b) depose individually the person who the requesting party believes should have been designated as the representative. To support my position, I may cite to the Committee's Notes on the 2010 Amendments to Rule 26 – specifically its rationale for providing work product protection against discovery of draft expert reports and attorney-expert communications.

If you have any questions or concerns, or are in need of additional information, please do not hesitate to contact me. Thank you.

Sincerely



Bruce R. Parker

December 27, 2018

T 410.244.7534
F 410.244.7742
BRParker@Venable.com

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

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

Dear Members of the Civil Rules Advisory Committee:

I welcome the opportunity to provide you with my comments on the proposed amendments to Federal Rule 30(b)(6).

I have been a civil defense lawyer for 40 years. For most of my career, I have defended product liability cases brought against pharmaceutical and medical device manufacturers. I am a member of the American College of Trial Lawyers, and I have tried cases to verdict in state or federal courts in seven states. I have served as the President of the International Association of Defense Counsel and the Maryland Defense Counsel Association. I have also served on the Board of Directors for the Lawyers for Civil Justice and the Defense Research Institute. Both organizations have submitted comments regarding the proposed amendments to Rule 30(b)(6).

I do not have a strongly held opinion regarding the proposal for a mandatory meet and confer on the topics to be included in the deposition notice. As a practical matter, counsel currently confer on the "matters for examination." Consequently, aside from generating more expense to a process (speaking of discovery) already too expensive, current practice will not materially change by mandating a meet and confer on this issue. The same is not true, however, for mandating a meet and confer on the identity of the corporate designee.

There are many deficiencies in Rule 30(b)(6) practice that cry out for amendment. The Lawyers for Civil Justice offered several sensible suggestions in its submissions dated December 21, 2016, July 5, 2017, April 6, 2018 and September 12, 2018. Those proposed rule changes would provide a meaningful improvement to current practice under Rule 30(b)(6). The selection of the designee, however, is one area of practice that does not routinely cause disputes, because it is abundantly clear from case law that the corporate deponent has the sole right to select whom shall

December 27, 2018

Page 2

serve as its representative.¹ The Draft Committee Note recognizes as much, stating: “Although the named organization ultimately has the right to select its designee” This acknowledgment begs the question, why require a meet and confer on the identity of the representative? The only clue the Committee Note offers is that “discussion about the identity of the person to be designated to testify may avoid later disputes.” I do not understand the reasoning behind this statement. If the selection of the designee is a significant problem, and in my experience it is not, then why continue to give the corporate deponent the ultimate right to select its representative? On the other hand, if the selection of the designee is not a significant problem, then requiring a meet and confer on this issue is mandating a solution to a problem that does not exist. Instead, my experience teaches me that mandating a meet and confer on the identity of the designee will virtually guarantee that discovery fights will develop over the selection process.

Aside from being unnecessary, inevitably inviting additional discovery disputes and thereby increasing discovery costs, I primarily object to the proposed amendment because it invades the opinion work product of counsel for the corporate deponent (whom I will refer to as

¹ See, e.g., *Quilez-Velar v. Ox Bodies, Inc.*, Civ. No. 12-1780(GAG/SCC), 2014 WL 12725818, at *1 (D.P.R. Jan. 3, 2014) (“[T]he noticed corporation alone determines the individuals who will testify on those subjects. What the discovering party simply cannot do is require that a specific individual respond to a Rule 30(b)(6) notice.”); *Colwell v. Rite Aid Corp.*, No. 3:07cv502, 2008 WL 11336789, at *1 (M.D. Penn. Jan. 24, 2008) (“Nothing in the rule indicates that the party seeking the deposition can determine the identity of the person to be deposed.”); *Booker v. Massachusetts Dept. of Public Health*, 246 F.R.D 387, 389 (D. Mass. 2007) (“Plaintiff may not impose his belief on Defendants as to whom to designate as a 30(B)(6) witness.”); *Cleveland v. Palmby*, 75 F.R.D. 654, 657 (W.D. Okla. 1977) (“Rule [30(b)(6)] does not provide that a party can specifically name an employee of an organization and then require the organization to designate such employee as a witness to testify on behalf of the organization.”); *Burris v. Versa Prod., Inc.*, No. CIV. 07-3938 JRT/JJK, 2013 WL 608742, at *7 n.6 (D. Minn. Feb. 19, 2013) (“Because Rule 30(b)(6) imposes on the organization the obligation to select the individual witness, the party seeking discovery under that provision of the rule is not permitted to insist that it choose a specific person to testify unless in response to a Rule 30(b)(6) notice.”). See also 8A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2103 (3d ed. 2013) (“[T]he party seeking discovery under [Rule 30(b)(6)] is not permitted to insist that it choose a specific person to testify[.]”); JAMES WM. MOORE, ET AL., MOORE’S FEDERAL PRACTICE § 30.25[3](3d ed. 2013) (“It is ultimately up to the organization to choose the Rule 30(b)(6) deponent, and the party requesting the deposition generally has no right to assert a preference if the designee is sufficiently knowledgeable on the subject matter.”).

December 27, 2018

Page 3

“deponent counsel”).² The scenarios below demonstrate how the proposed amendment will intrude upon deponent counsel’s opinion work product.

Scene 1 of scenario #1: Experienced counsel who is requesting a Rule 30(b)(6) deposition (whom I will refer to as “requesting counsel”), armed with the right to have a meet and confer on the selection of the designee, will demand (at the meet and confer) to be told who among the employees (former and current) were considered to be the designee. The rationale for this demand will be that requesting counsel cannot engage in a meaningful meet and confer without this information. This demand, while seemingly reasonable, ignores the fact that the process by which a designee is chosen is a function of the opinion work product of deponent counsel.

Since Rule 30(b)(6) depositions are routinely sought in products liability litigation, discussions between deponent counsel and the client begin soon after suit is brought to identify individuals who can address issues likely to be raised in such a deposition. Interviews are conducted, and in this deliberative process, the client and deponent counsel develop a list of potential candidates (I will refer to this pool as the “finalists”) with relevant knowledge.

If deponent counsel is required to disclose the “finalists,” at or before the meet and confer, doing so will disclose the results of the analytical process through which the finalists were chosen. Those favoring the amendment will argue that “opinion work product” is solely the deliberative process, and that such information is not sought when counsel is simply asked to identify the finalists. That, however, is disingenuous. It is functionally equivalent to asking requesting counsel to identify the names of all of the experts considered but not retained for any purpose. Such a

² Opinion work product encompasses the “mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation [and] is generally afforded near absolute protection from discovery.” *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 663 (3d Cir. 2003) (citation and internal quotation marks omitted). *See also Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985) (“Opinion work product . . . is accorded an almost absolute protection from discovery because any slight factual content that such items may have is generally outweighed by the adversary system’s interest in maintaining the privacy of an attorney’s thought processes and in ensuring that each side relies on its own wit in preparing their respective cases.”); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977) (“In our view, opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.”); *Republic of Ecuador v. Mackay*, 742 F.3d 860, 869 n.3 (9th Cir. 2014) (“Opinion work product represents the core types of work product . . . , namely an attorney’s mental impressions, conclusions, opinions, or legal theories developed in anticipation of litigation. It is virtually undiscoverable.”) (citations and internal quotation marks omitted); *Smith v. Scottsdale Ins. Co.*, 621 Fed. Appx. 743, 746 (4th Cir. 2015) (“[O]pinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.”) (citation and internal quotation marks omitted).

December 27, 2018

Page 4

discovery inquiry would be rejected as invading the opinion work product of the requesting counsel. Even if the anticipated response just outlined had merit (with which I would disagree), the next step in the meet and confer will, without question, invade the opinion work product protection.

Scene #2 of Scenario #1: If the names of the finalists are given to requesting counsel when the designee is actually selected, requesting counsel will either: (1) not oppose the selection, (2) demand to know why the person chosen was selected over other finalists, or (3) argue that another person (not among the finalists) ought to serve as the designee. Clearly deponent counsel cannot respond fully to arguments made in instances (2) and (3) because doing so would disclose the reasoning behind the selection of the designee. It is not uncommon to find an employee who has considerable knowledge on an issue but who is wholly unsuitable for any number of reasons to be a corporate designee. In this situation, deponent counsel will select someone who has less knowledge on the “matters for question” but who is a considerably better witness and, as such, a better corporate designee. If nothing else, being forced to identify who was among the finalists gives requesting counsel a list of employees to target for individual depositions.

My experience as trial counsel in hotly contested mass tort litigation convinces me that the dispute outlined above will prompt the requesting party to file a motion to compel (before the deposition is taken) to challenge the selection of the designee. At the hearing on the motion, the court will ask deponent counsel why someone was selected as the designee over seemingly more qualified candidates identified by requesting counsel. This question puts deponent counsel in the untenable position of either: (1) responding to the court’s inquiry, and thereby potentially waiving opinion work product; or (2) refusing to answer on the grounds that doing so would violate opinion work product protection recognized in Federal Rule of Civil Procedure 26(b)(3). It is entirely likely that, if deponent counsel declines to answer the court’s question, the court may order the corporation to produce the designee identified by the requesting party. There is no effective appeal process for the corporate deponent faced with such an order.

Scene #1 of Scenario #2: Assume the requesting party has deposed several corporate employees in their individual capacity before noticing a Rule 30(b)(6) deposition. Since the testimony of these employees is not an admission of the corporation, it is commonplace for a requesting party to seek a Rule 30(b)(6) deposition on issues already addressed in these prior depositions. In some of the depositions, the witnesses will have demonstrated poor witness skills. In this situation, deponent counsel will most likely decline to produce the same witnesses as the corporate designee. Deponent counsel will instead find employees (current or former) who possess good witness skills and will have that person prepared to serve as the designee. Unlike scenario number one, where no transcripts of testimony were available, here, transcripts are available that will demonstrate that witnesses with key knowledge were not chosen as the designee on the same issues discussed in their depositions. In this situation, deponent counsel can reasonably anticipate the court pushing even harder for an explanation of why the previously-deposed individuals were

December 27, 2018

Page 5

not chosen as the designee. If the explanation is not forthcoming (for the reasons explained), it is even more likely that an order will be issued granting the motion and directing the corporate deponent who to produce as its designee.

I mentioned at the beginning of my comments that the selection of the designee rarely causes a dispute in litigation. That is because if the selected designee cannot address the areas identified in the notice, the corporation will likely face motions to compel with sanctions, and/or motions to exclude the designee's testimony. Moreover, at trial, the requesting counsel is likely to argue to the jury in one way or another that the selection of an inadequate or poorly prepared designee reflects an attempt by the corporation "to hide the truth." Thus, experienced deponent counsel do not take lightly the responsibility to select a designee who meets the requirements of Rule 30(b)(6).

The above examples are not attempts to develop an imaginative law school examination. They are scenarios that will likely occur with the proposed rule change based upon decades of experience handling Rule 30(b)(6) depositions. If the Committee does not intend to change case law (which holds that the selection of the corporate designee belongs to the corporate deponent), then no purpose is served (other than to generate discovery disputes) by mandating a meet and confer on the identity of the designee. For all these reasons, I urge the Committee to withdraw the proposal to mandate a meet and confer on the identity of the corporate designee.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Parker", with a long, sweeping horizontal line extending to the right.

Bruce R. Parker

TAB 22

COMMENT OF

NATIONAL CONSUMER LAW CENTER, INC.
AND
NATIONAL ASSOCIATION OF
CONSUMER ADVOCATES

COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES

and its

RULE 30(b)(6) SUBCOMMITTEE

On Behalf of

**NATIONAL CONSUMER LAW CENTER, INC. AND NATIONAL ASSOCIATION OF
CONSUMER ADVOCATES**

January 3, 2019

INTRODUCTION

The National Consumer Law Center (“NCLC”) and the National Association of Consumer Advocates (“NACA”) respectfully submit this Comment to the Judicial Conference Advisory Committee on Civil Rules and its Rule 30(b)(6) Subcommittee (“Subcommittee”) pursuant to its invitation for comment on the proposed amendments to Civil Rule 30.

NCLC is a 501(c)(3) nonprofit organization, founded in 1969, whose mission is to use its expertise in consumer law to advance the rights of underrepresented low-income people, including through litigation. NCLC's litigation activities focus on cases in which low-income or elderly consumers may benefit from NCLC's specialized expertise, particularly in the areas of credit, bankruptcy, preservation of home ownership, consumer sales and services, and the provision of services to low-income utility users and potential users.

NACA is a nonprofit association whose members are legal services attorneys, law professors, and private and public sector attorneys committed to the protection and representation of consumers. NACA’s mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and

to serve as a voice for its members, as well as consumers, in the ongoing struggle to curb unfair and abusive business practices.

Based on our extensive litigation experience on behalf of consumers around the country, NCLC and NACA support the proposed amendment, with minor recommendations for further improvement.

I. THE PROPOSED AMENDMENT REPRESENTS A REASONABLE CHANGE THAT WOULD FACILITATE FACT-FINDING, PRESERVE PARTIES' RESOURCES, AND PROMOTE JUDICIAL ECONOMY.

Depositions “rank high in the hierarchy of pre-trial, truth-finding mechanisms.”¹ They are so crucial to the fact-finding process that disrupting them can “frustrate the entire civil justice system’s attempt to find the truth.”² Rule 30(b)(6) was an important addition to the deposition repertoire, one that its inaugurating Advisory Committee described as “an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process.”³ And indeed, the Rule has proved a decidedly effective and essential tool in consumer law cases since its adoption.

Moreover, the Rule has struck a fair and appropriate balance between the interests of plaintiffs and defendants: it seeks to keep plaintiffs from having to depose a series of corporate representatives, all of whom disclaim any knowledge of the issue,⁴ while also giving corporate defendants more control over the process, including the power to designate and prepare their own 30(b)(6) witnesses.⁵

¹ *Founding Church of Scientology, Inc. v. Webster*, 802 F.2d 1448, 1451 (D.C. Cir. 1986).

² *United States v. Kattar*, 191 F.R.D. 33, 38 (D.N.H. 1999) (quoting *Damaj v. Farmer’s Ins. Co., Inc.*, 164 F.R.D. 559, 560 (N.D. Okla. 1995)).

³ Fed. R. Civ. P. 30(b)(6) Advisory Comm. Note (1970).

⁴ *Id.*

⁵ Fed. R. Civ. P. 30(b)(6); *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 687-88 (S.D. Fla. 2012) (“The rule [30(b)(6)] gives the corporation being deposed more control by allowing it to designate and prepare a witness to testify on the corporation’s behalf.”) (citing *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996)).

We agree with the Subcommittee, however, that the Rule is not perfect. The plaintiffs' bar complains that corporate representatives too frequently show up to depositions only to claim ignorance as to the matters on which they are to be deposed. The defense bar, by contrast, complains that far-reaching deposition notices require significant preparation costs that are not justified. The proposed amendment's meet-and-confer requirement represents a balanced approach to reforming the Rule that will help ameliorate the concerns raised by each side. As a result, the National Consumer Law Center and the National Association of Consumer Advocates support this recommended addition to Rule 30(b)(6).

A. The Proposed Meet-and-Confer Requirement Would Foster Greater Productivity in 30(b)(6) Depositions and Achieve Judicial Economy by Facilitating Adequate Preparation of Witnesses.

As the Subcommittee is well aware, one issue that often arises in the context of 30(b)(6) depositions is the inadequate preparation of witnesses.⁶ Indeed, this problem has plagued numerous NCLC and NACA cases over the past several decades since Rule 30(b)(6) was adopted. Based on our experiences in the consumer protection litigation realm, NCLC and NACA believe that the proposed amendment directly would address, and help reduce, the incidence of this recurring obstacle to effective discovery in our cases.

First, if the organization's failure to designate or prepare a knowledgeable representative stems from a misunderstanding between the parties (perhaps arising from the serving party's overlong or ambiguously worded notice⁷), then requiring the parties to confer in advance could help clarify any misunderstandings so they can be rectified promptly. Second, the proposed preliminary meeting would deter intentional violations of the Rule since an astute organization

⁶ Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, at 293 ("Particular concerns have included . . . inadequately prepared witnesses.").

⁷ See *id.* ("Particular concerns have included overlong or ambiguously worded lists of matters for examination . . .").

would recognize that courts would be less willing to suffer this type of gamesmanship knowing that the parties were required to confer about the matters for examination and the identities of those best suited to answer these questions beforehand.

By promoting the adequate preparation of witnesses, the proposed amendment would be beneficial to both parties, as well as beneficial for the fair and efficient administration of justice. For the serving party, an adequately prepared witness helps to ensure the most efficient access to relevant information; for the organization, an adequately prepared witness helps to avoid multiple discovery demands or potential sanctions.⁸ Indeed, Lawyers for Civil Justice cited this latter factor in a 2016 comment in which they advocated for amendments to the Rules that would “promote early cooperation between the parties,”⁹ including earlier discussion about “the substance . . . of the 30(b)(6) deposition.”¹⁰ Finally, for the court system, a meet-and-confer requirement that helps clarify the goals of the deposition and facilitates adequate preparation of the witness can help conserve judicial resources that may otherwise have to be expended deciding whether to compel an organization’s representative witness to answer questions beyond the scope of the deposition notice¹¹ or deciding whether to impose sanctions for inadequate compliance with the rule.

In short, by facilitating designation and preparation of knowledgeable witnesses, the proposed amendment and its meet and confer requirement would serve the interests of the serving party, responding organization and the judicial system as a whole.

⁸ See Lawyers for Civil Justice, *Not up to the Task: Rule 30(b)(6) and the Need for Amendments that Facilitate Cooperation, Case Management and Proportionality*, Comment to the Advisory Committee on Civil Rules, at 7-8 n.27 (Dec. 21, 2016) (citing cases involving sanctions for inadequate preparation).

⁹ *Id.* at 3.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 7 n.26 (citing cases demonstrating that case law is divided on whether an organization’s representative witness can be forced to answer questions beyond the scope of the notice).

B. Second, the Proposed Amendment’s Identification Requirement, in Particular, Would Help Reduce the Incidence of Bandyng.

Requiring the parties to confer not just about what information the serving party seeks but also about who within the organization might possess it would help to further curb the specific bandying abuse which Rule 30(b)(6) originally was intended to deter if not eliminate..¹² While the adoption of Rule 30(b)(6) already has helped reduce this practice, it has failed, in its current form, to fully put a stop to it.¹³

By requiring open and frank discussions about the witness or witnesses the organization plans to designate as its representatives, the proposed amendment undoubtedly will help ensure, as the Subcommittee predicts, that the representatives it ultimately designates will be “the right person to testify.”¹⁴ Reduction of bandying would, in turn, hasten fact-finding and “avoid later disputes.”¹⁵

C. Third, the Proposed Meet-and-Confer Requirement Would Help Promote the Fair and Efficient Administration of Justice by Diffusing Information Asymmetry Earlier in the Litigation Process.

Information asymmetry characterizes many of NCLC’s and NACA’s consumer protection cases, and indeed characterizes a great many of the cases in which 30(b)(6) depositions are found useful. A key underlying purpose of Rule 30(b)(6) is to help diffuse this asymmetry by “giv[ing] a requesting party the means to obtain testimony efficiently from the corporation when the requesting party does not know who the appropriate witnesses are, or when

¹² Fed. R. Civ. P. 30(b)(6) Advisory Comm. Note (1970) (“[The new provision] will curb the ‘bandying’ by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it.”)

¹³ For one prominent example of corporate bandying that occurred since the adoption of Rule 30(b)(6), *see* Miles W. Lord, *The Dalkon Shield Litigation: Revised Annotated Reprimand by Chief Judge Miles W. Lord*, 9 Hamline L. Rev. 7, 11 (1986) (“The project manager for Dalkon Shield explains that a particular question should have gone to the medical department. The medical department representative explains that the question was really [for] the quality control department. The quality control department representative explains that the project manager was the one with the authority to make a decision on that question.”).

¹⁴ Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, at 293.

¹⁵ *Id.* at 294.

one witness may not be able to provide the desired information.”¹⁶ Because the defendant-corporation or government agency often has sole knowledge of the events that gave rise to the lawsuit and of its own practices, Rule 30(b)(6) depositions enable plaintiffs to glean relevant information about such practices, which otherwise may be inaccessible to them, sooner in the litigation process and allow defense counsel to better and more efficiently prepare representatives to testify to these practices when deposed.

The fact that plaintiffs’ original notices and deposition interrogations sometimes may appear to be overly broad or entirely off-topic, and therefore characterized as so-called “fishing expeditions”, usually is directly attributable to this information asymmetry which even can persist late into the discovery process. The proposed 30(b)(6) conferences, however, promise to help diffuse this information asymmetry earlier—before the 30(b)(6) depositions are taken—and thereby will enable plaintiffs to narrow the scope of their notices and to focus their depositions more accurately to cover only the subjects that are most relevant to their claims.

Early communication would help streamline discovery for plaintiffs but also would serve the interests of organizational defendants. Rather than being forced by an overly broad notice to designate multiple representatives and prepare them for many potential lines of questioning—one of the very ills at which the proposed amendment is aimed¹⁷—parties could home in on the most relevant areas for examination and organizations would be able to focus on preparing only for those topics that had been designated. This improvement would save the organization significant preparation costs and also limit the need for subsequent, follow up depositions.

¹⁶ Sidney Schenkier, *Turning the Table, Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6)*, 29 Litig. 20, 20.

¹⁷ Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, at 293 (“Particular concerns have included overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses.”).

Indeed, some of the parties now objecting to this proposed amendment have elsewhere lauded rules promoting just these kinds of preparatory, preliminary discussions. Lawyers for Civil Justice, for example, argued in an earlier comment that “[r]equiring 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.”¹⁸ NCLC and NACA agree, and believe that the proposed amendment could achieve precisely these goals.

D. In Any Event, the Proposed Amendment Would Effect Only a Minor—and Unburdensome—Change to Rule 30(b)(6).

NCLC and NACA support the Subcommittee’s inclination only to propose at this time relatively minor changes to Rule 30(b)(6), a highly valuable Rule that has worked in substantially its original form for nearly fifty years and that all can agree provides “a key element of discovery in many cases.”¹⁹ Objections that the proposed amendment imposes a new and unfair burden on corporations are misguided at best.²⁰

In fact, the proposed amendment’s requirements are largely redundant with corporations’ existing obligations. Rule 26 already requires parties, within fourteen days of a Rule 26(f) conference, to disclose “the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses,” as well as “a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or

¹⁸ Lawyers for Civil Justice, *supra* note 10, at 3.

¹⁹ *Id.* at 2.

²⁰ *See, e.g.*, Letter from John H. Beisner, Skadden, Arps, Slate, Meagher & Flom LLP, to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, June 11, 2018; Letter from Kenneth J. Reilly, Shook, Hardy & Bacon LLP, to Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, et al., June 6, 2018.

control and may use to support its claims or defenses.”²¹ The work of identifying these individuals and documents overlaps substantially with the work of identifying Rule 30(b)(6) designees.

Indeed, in some jurisdictions, the proposed amendment would simply codify existing practice. As some Standing Committee members have observed, “making this rule change would not really change practice much in some districts.”²² At least one district requires a party bringing a motion before the court regarding a 30(b)(6) deposition to first certify that the parties “have met and conferred about the matter.”²³ And at least two districts require parties to confer or at least try to confer about scheduling depositions before noticing them.²⁴

The success of the proposed amendment’s provisions in other jurisdictions is strong assurance that the proposed amendment would prove workable—rather than unduly burdensome—if adopted nationally. In brief, the proposed amendment presents a low-burden method of improving upon Rule 30(b)(6) successes and helping to ensure that parties can better “secure the just, speedy, and inexpensive determination of every action and proceeding.”²⁵

II. RULE 30(b)(6) SHOULD BE IMPROVED VIA TWO FURTHER CHANGES.

As discussed in Section I, NCLC and NACA agree that the Advisory Committee’s proposed amendment is a step in the right direction and support its adoption. We believe, however, that the proposed amendment has not gone quite far enough and would be improved via the following two changes.

²¹ Fed. R. Civ. P. 26(a)(1).

²² Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, at 335.

²³ *Id.*

²⁴ See *Civil Local Rules*, United States District Court for the Northern District of California, at 30-31, <https://cand.uscourts.gov/localrules/civil#DEPOSITIONS>; *Rule 30.1: Conduct at Depositions*, United States District Court for the Northern District of Ohio, http://www.ohnd.uscourts.gov/sites/ohnd/files/CivilRules_Rule301.pdf.

²⁵ Fed. R. Civ. P. 1.

A. The Committee Note Should Clarify that the Amendment Leaves the Burdens Between Parties Unchanged.

Under the current Rule 30(b)(6), the burden lies with the organization to move the court to intervene if it disagrees with the scope of a plaintiff's 30(b)(6) notice. The language of the proposed amendment does not indicate an intent to shift this burden, but it would nonetheless be beneficial to make clear that the burden remains with the organization. This confirmation could be achieved by a small change to the Draft Committee Note. Our suggestion is to amend the Note as follows (addition italicized):

The duty to confer as necessary continues if needed to fulfill the requirement of good faith. But the conference process must be completed a reasonable time before the deposition is scheduled to occur. *If the conference process fails to produce agreement between the parties, the recipient of the notice may move the court for a protective order under Rule 26.*

The addition of the above-proposed language, or language similar to it, would forestall any misinterpretations and insure that the relevant burdens between parties would remain unchanged.

B. The Rule Should Indicate that the Parties Should Confer About Which Particular Matters Each Designated Representative Will Testify About.

The proposed amendment currently imposes a duty to confer about the *identity of each person* the organization will designate to testify and the *matters* for examination. The aims of the amendment would be directly and substantially advanced by obliging the parties to take the next logical step and discuss *which individuals will testify to which matters*. This improvement could be achieved by making the following small revision to the proposed amendment (addition italicized):

Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization 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 *on each matter*.

Such a modification would directly further the Subcommittee’s goal of encouraging “candid exchanges” in order to help “reduce the [organization’s] difficulty of identifying the right person to testify,” and help “avoid later disputes” that can arise when the wrong person is designated to testify about particular matters.²⁶ Moreover, the amendment would make 30(b)(6) depositions more efficient and constructive because it would further ensure that all parties are adequately prepared for the deposition.

Any added burden on the parties would be slight considering that the proposed amendment already requires parties to discuss the identities of the representatives and the matters for examination. Indeed, attorneys who are approaching the proposed amendment’s requirements in good faith are likely to discuss this subject anyway. In short, the addition of three words—“on each matter”—would simply move the parties one half-step further in the direction already bidden by the proposed amendment. It represents a minor, sensible enhancement to the amendment as written.

CONCLUSION

The National Consumer Law Center and the National Association of Consumer Advocates support adoption of the proposed amendment for the reasons explained in Section I. NCLC and NACA believe the amendment could be further improved by making the two revisions proposed in Section II.

²⁶ Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, at 294.

Respectfully submitted on behalf of the National Consumer Law Center and the National Association of Consumer Advocates.

Stuart T. Rossman
Director of Litigation
National Consumer Law Center
7 Winthrop Square, 4th Fl.
Boston, MA 02110
(617) 542-8010
srossman@nclc.org

Ira Rheingold
Executive Director
National Association of Consumer Advocates
1215 17th Street NW, 5th Floor
Washington, DC 20036
(202) 452-1989
Ira@consumeradvocates.org

TAB 23

COMMENT OF

FORD MOTOR COMPANY



FORD MOTOR COMPANY'S COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES REGARDING THE PROPOSED AMENDMENT TO RULE 30(B)(6)

January 7, 2019

Ford Motor Company ("Ford") appreciates the opportunity to submit this Comment on the proposed amendment to Federal Rule of Civil Procedure 30(b)(6) under consideration by the Civil Rules Advisory Committee.

INTRODUCTION

Ford opposes the proposed Rule 30(b)(6) changes because they do not address the long-standing problems with the Rule. Worse, by including a conferral requirement about witness identity, the proposed rule changes would substantially interfere with an organization's existing right to identify its own witnesses, thereby giving rise to a whole new category of discovery abuses and disputes.

In comments previously submitted to the Rule 30(b)(6) Subcommittee, Ford described its extensive involvement with Rule 30(b)(6) depositions, both as a plaintiff and defendant, and provided concrete examples of the problems it frequently must address when it receives Rule 30(b)(6) deposition notices.¹ These include: an extensive number of topics,² vague or unnecessary expansive topic descriptions,³ topics with little or no connection to the matters at issue in the lawsuit,⁴ and topics so old or disconnected to Ford's ongoing business operations that Ford has no information available other than old documents.⁵

The problems Ford identified in its prior comments frequently require Ford to seek court intervention to resolve the disputed issues, or they result in protracted discovery battles between the parties. Both of these outcomes distract the parties (and often the court) from the merits of the claims and simultaneously waste judicial resources and the parties' time. Worse, justice is not furthered in the many situations in which the propounding party uses expansive Rule 30(b)(6) discovery seemingly to seek a tactical advantage to force settlements not on the merits. In Ford's experience, such conduct is common,⁶ but contrary to Rule 1. Yet the lack of

¹ Ford Motor Company's Comments to the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules, July 31, 2017 ("Ford's Subcommittee Comments"), <https://www.regulations.gov/document?D=USC-RULES-CV-2018-0003-0044>.

² *Id.* at 3. Ford discussed a collection of 52 recent Rule 30(b)(6) deposition notices. On average, the notices set forth 31 topics per lawsuit, including subparts.

³ *Id.* at 3-4, 6-7.

⁴ *Id.* at 4, 7-8.

⁵ *Id.* at 9-10.

⁶ See, e.g., *Gomez v. Ford Motor Co.*, No. SA-15-CA-00866-DAE, 2017 WL 5178043, at *4 (W.D. Tex. June 7, 2017)(Granting in part Ford's motion for protective order on Rule 30(b)(6) notice, noting that "plaintiffs' request for information pertaining to all models dating back to 1990 is not relevant, particularly with respect to models with

guidelines and clarity in Rule 30(b)(6) leaves readers to believe openings created by the specific failings of Rule 30 are not to be solved by the generalities of Rule 1. The proposed Rule 30(b)(6) change will exacerbate the problems Ford and other litigants already encounter.

Against this backdrop of problematic Rule 30(b)(6) litigation experience, Ford is deeply disappointed that the proposed amendment to Rule 30(b)(6) does not address procedural gaps in the rule, such as the absence of a specified objection procedure or a means for addressing topics on which the organization has only documentary information.⁷ To be clear, Ford believes that the additional “meet and confer” specification will not solve the disputes arising from inadequate guidance in the rule and will do little to reduce the abusive practices that presently occur.

Even worse, the proposed amendment’s inclusion of witness identity as a topic that the parties must discuss in advance of the deposition will be used to leverage settlements not on the merits and increase disputes. This new discovery obligation threatens to undermine the settled law and practitioners’ understanding that a corporation responding to a Rule 30(b)(6) notice acts with complete independence in selecting the person who will act as the voice of the company. Contrary to the wishful thinking expressed in the draft committee note that conferring about the identity of witnesses prior to a Rule 30(b)(6) deposition “may reduce the difficulty of identifying the right person to testify” and “may avoid later disputes,”⁸ Ford’s experience leads it to conclude that this requirement would instead foster disagreements between the parties and serve as a basis for expanded deposition demands and more motions.

To be more blunt, the propounding party often knows exactly whom they want to answer questions on behalf of the organization—the weak link who cannot withstand the pressure of interrogation. The propounding party will fight for this deponent, citing prior testimony demonstrating subject matter knowledge and direct personal involvement with the matters at issue. For the noticing party, selection of the Rule 30(b)(6) witness is often not a search for information, but instead a search for a powerful sound bite that can impact the opening statement at trial. These are hard, unfortunate truths. Pretending these depositions involve the sincere

different body and door structures.”); *Fish v. Air & Liquid Systems Corp.*, No. GLR-16-496, 2017 WL 697663, at *1, *8 (D. Md. Feb. 21, 2017)(Ford moved for a protective order to limit the 54 areas of inquiry set forth in the Rule 30(b)(6) notice. With regard to certain topics, the Court found “Plaintiffs were required to, but did not, serve discovery with relevance and proportionality in mind as they failed to request information on components and materials that actually have a bearing on the facts in this case.”); *McDermid v. Ford Motor Co.*, No. 14-CV-2430-CM-TJJ, 2016 WL 1399263, at *2 (D. Kan. Apr. 8, 2016)(Denying motion to compel Rule 30(b)(6) deposition where the language describing the deposition topics “is convoluted, unclear, overly broad, and does not explicitly identify specific topics for the deposition.”); *Wolfe v. Ford Motor Co.*, No. 06-1217-MLB, 2008 WL 294547, at *1 - *2 (D. Kan. Feb. 1, 2008)(Denying motion to compel Rule 30(b)(6) deposition to address lawsuits, claims and reports arising from other crashes of the subject vehicle model where the only information in Ford’s possession regarding the incidents was documentary, finding “[t]he discovery requested by plaintiffs in their Rule 30(b)(6) notice is unreasonably cumulative. It can also be obtained by a review of the documents previously produced by Ford, a source less burdensome and/or less expensive.”).

⁷ Ford’s Subcommittee Comments urged action to address these two particular circumstances, among others. See Ford’s Subcommittee Comments at 6-10.

⁸ See Committee Note to Proposed Amendment to Federal Rule of Civil Procedure 30(b)(6), Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure, and the Federal Rules of Evidence - Request for Comment, August 2018, at 37-38.

pursuit of truth belies the numerous specific experiences Ford has addressed in the recent past.⁹ Creating rules, as the Committee proposes to do, that ignore the tactical leverage sought and exploited by the propounding party would solve nothing. Adding a requirement that the noticing party has a say in the person who speaks for the producing party just compounds the problems already inherent in Rule 30(b)(6) depositions. Moreover, it is unnecessary because a noticing party retains the right to seek the deposition of any person with relevant knowledge as a fact witness. The proposed rule would encourage the noticing party to demand a deponent be recast as a Rule 30(b)(6) witness simply for strategic reasons.

1. The Committee Should Reject Any Amendment to Rule 30(b)(6) that Includes Witness Identification as Part of the Meet-and-Confer Requirement

Far from being a helpful measure, Ford expects the proposed mandated discussion of witness identity prior to a Rule 30(b)(6) deposition will stir up disagreements between litigants, cause confusion in the courts, and create new grounds for discovery disputes. A requirement to confer about the identity of the corporate representative reverses settled law about the responsibilities of the parties and the function of Rule 30(b)(6) depositions. Ford urges the Committee to drop this concept from inclusion in any amendment to the rule.

Selecting a Rule 30(b)(6) deponent is not a casual undertaking for a responding organization. A Rule 30(b)(6) deposition constitutes a major evidentiary event: the party who noticed the deposition may use that testimony at trial for any purpose,¹⁰ and the testimony may even see use in other lawsuits addressing the same subject matter, as Ford has experienced.¹¹ The witness selected will be the face and voice of the company on topics central to the litigation. An organization's ability to direct how it will present its case is intertwined with determining who will give Rule 30(b)(6) testimony. For example, alternative possible witnesses may differ in their ability to articulate relevant concepts, to assimilate information from other sources within the organization, or to remain focused in the stressful atmosphere of a deposition. In Ford's experience, the 30(b)(6) topics frequently involve decades-old design decisions and quite often there is no current employee with any meaningful personal knowledge about these issues. When that common circumstance occurs, Ford must select an employee who then has a challenging

⁹ See, e.g., *Ash v. Ford Motor Co.*, No. 2:06CV210-B-A, 2008 WL 1745545, at *3 (N.D. Miss. Apr. 11, 2008)(plaintiff brought a motion to compel to force Ford to produce a particular individual as its Rule 30(b)(6) corporate representative); *Wolfe*, 2008 WL 2944547, at *1 -*2 (plaintiff moved to compel a Rule 30(b)(6) witness to testify regarding "the exact same documents" previously produced, despite no additional corporate knowledge being available). See also Ford's Subcommittee Comments at 6-7, 11-12 (describing Rule 30(b)(6) deposition notices received listing vague and philosophical topics that do not focus on allegations asserted in the lawsuit and contention questions seeking to force corporate representatives during videotaped depositions to articulate the legal basis for defenses).

¹⁰ Rule 32(a)(3)("An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).")(emphasis added).

¹¹ Rule 32(a)(8). See also *Nippon Credit Bank, Ltd. v. Matthews*, 291 F.3d 738, 751 (11th Cir. 2002)("A deposition taken in a different proceeding is admissible if the party against whom it is offered was provided with an opportunity to examine the deponent."); *Pesterfield v. Sunbeam Corp.*, No. 3:00CV104, 2005 WL 1076293, at *2 (E.D. Tenn. May 6, 2005)("many courts which have addressed the use of prior testimony from collateral proceedings have held that, where the party (or the party's successor in interest) against whom the testimony is to be admitted had the motive and opportunity to develop or cross-examine the testimony, the testimony may be used in the current proceeding.").

task—read all the appropriate documents and prior testimony and become the Company representative on topics previously unknown to that employee, and then answer questions under oath for hours and be targeted in a motion for sanctions if the opposing counsel claims that the deposition preparation was not sufficient. A party should not suffer interference from its litigation opponent in determining who will speak for the organization given those complexities and consequences.

In light of the clear strategic importance of witness selection to the adverse party's litigation position, noticing parties need little encouragement to voice demands that an individual of their choosing be designated as the Rule 30(b)(6) witness. Even under the current version of Rule 30(b)(6), Ford has experienced attempts by noticing parties to force the designation of a particular individual. For example, in *Ash v. Ford Motor Co.*, a plaintiff demanded that Ford present a particular person as its Rule 30(b)(6) witness, and even (unsuccessfully) pursued motions to compel and to impose sanctions when Ford refused to produce that person as its witness.¹² The court's rejection of that plaintiff's position reflects the widespread consensus that the responding party, alone and without influence from the noticing party, decides who will represent the organization at a Rule 30(b)(6) deposition.¹³ In another recent matter, the requesting party's counsel outright refused to depose the individual being offered as Ford's 30(b)(6) witness without any meaningful explanation or rationale.

The proposed amendment's witness identity conferral requirement would create a threat to the responding party's ability to decide for itself who will best convey responsive information available to the company. Although no legal basis presently exists for a noticing party to claim that its views should influence the organization's witness selection,¹⁴ the proposed amendment's directive to discuss witness identity is ripe for misconstruction. Building into the rule itself the

¹² See *Ash*, 2008 WL 1745545, at *3 (plaintiffs demanded that Ford designate James Vondale as its Rule 30(b)(6) corporate representative, but the court noted that the "party seeking discovery is not permitted to insist that [the responding organization] choose a specific person to testify" and so "plaintiff was not entitled to insist on [Mr. Vondale's] presence absent having served him with a subpoena.").

¹³ See, e.g., *Quilez-Velaz v. Ox Bodies, Inc.*, Civ. No. 12-1780(GAG/SCC), 2014 WL 12725818, at *1 (D.P.R. Jan. 3, 2014) ("the noticed corporation alone determines the individuals who will testify on those subjects. What the discovering party simply cannot do is require that a specific individual respond to a Rule 30(b)(6) notice."); *Thompson v. Kawasaki Heavy Indus., Ltd.*, 291 F.R.D. 297, 304 (N.D. Iowa 2013) ("the corporation itself selects the deponent who will speak for it"); *Lizana v. State Farm Fire & Cas. Co.*, No. CIV.A.108CV501LTSMT, 2010 WL 445658, at *2 (S.D. Miss. Feb. 1, 2010) ("it is Defendant's choice to designate its corporate representative(s) who consent to testify on its behalf."); *Booker v. Massachusetts Dept. of Public Health*, 246 F.R.D. 387, 389 (D. Mass. 2007) ("Plaintiff may not impose his belief on Defendants as to whom to designate as a 30(B)(6) witness."); *Folwell v. Hernandez*, 210 F.R.D. 169, 172 (M.D.N.C. 2002) ("One of the most important consequences of Rule 30(b)(6) is that under it, only the corporation selects the persons who will testify.").

¹⁴ See, e.g., *Merriweather v. United Parcel Service, Inc.*, No. 3:17-CV-349-CRS-LLK, 2018 WL 3572527, at *4 (W.D. Ky. July 25, 2018) ("By its terms, Rule 30(b)(6) does not permit the plaintiff to designate a deponent to speak for the corporate defendants."); *Progress Bulk Carriers v. American Steamship Owners Mut. Prot. and Indem. Asso.*, 939 F. Supp. 2d 422, 430 (S.D.N.Y. 2013) ("[Rule 30(b)(6)], however, does not permit the party issuing the notice to select who will testify on the organization's behalf—which is exactly what Progress Bulk has attempted to do in this case."); *Colwell v. Rite Aid Corp.*, No. 3:07cv502, 2008 WL 11336789, at *1 (M.D. Penn. Jan. 24, 2008) ("Nothing in the rule indicates that the party seeking the deposition can determine the identity of the person to be deposed."); *Dillman v. Indiana Ins. Co.*, No. 3:04-CV-576-S, 2007 WL 437730, at *1 (W.D. Ky. Feb. 1, 2007) (Rule 30(b)(6) "does not permit the plaintiff to designate a deponent to speak for the corporate defendants [and] the plaintiff's attempt to do so is not appropriate.").

requirement that “the serving party and the organization must confer in good faith about . . . the identity of each person the organization will designate to testify” will suggest to some lawyers that both noticing and responding parties must have meaningful influence and the power to approve witness selection. When the noticing party’s input does not result in its preferred witness appearing as the Rule 30(b)(6) deponent, Ford anticipates that motions asserting a failure to confer in good faith and to require additional depositions along with sanctions will inevitably follow.

Ford sees nothing to be gained from inserting into Rule 30(b)(6) this witness identity conferral requirement that bears great potential for generating misunderstanding and disruption of the established corporate representative deposition process. Rather than considering the identity of a possible witness, the noticing party’s energy would be better spent developing coherent, defined descriptions of the corporate information sought in the deposition.¹⁵ The party who receives the Rule 30(b)(6) notice, not an outsider, stands in the best position to understand the distribution of responsive information within the organization and how to centralize that material for discussion at the deposition. And only the responding party can balance the personal knowledge attributes of different candidates with other strategic litigation considerations to “identif[y] the right person to testify” as the voice of the organization. Fundamentally, determining the identity of the person who will speak on behalf of a corporation is not a proper subject of collaboration with a litigation adversary. This decision is too intrinsic to the organization’s identity and too important to its litigation strategy to expose to interference from an opposing party.

The proposed amendment’s witness identity conferral requirement would also create a new discovery obligation that serves little purpose except to breed conflict. Parties responding to a Rule 30(b)(6) notice have not previously needed to disclose the name of the corporate representative prior to the deposition. In fact, because the witness will testify regarding information known or reasonably available to the organization, and not the individual’s personal knowledge, courts have frequently declared the witness’s identity to be simply irrelevant to the Rule 30(b)(6) procedure.¹⁶ Even though the nature of a Rule 30(b)(6) deposition would not change following adoption of the proposed amendment, disclosure of information previously considered irrelevant to the proceeding will, with a stroke, become essential for compliance with the rule.

This new conferral mandate can be expected to fuel the engines of parties motivated to pursue a litigation strategy based on fomenting discovery disputes rather than developing the merits of their position. Thus, the courts can expect motions arising from claims that the identity of the

¹⁵ See, e.g., Ford’s Subcommittee Comments at 7 (setting forth examples of incredibly vague Rule 30(b)(6) topics from actual notices Ford received).

¹⁶ See *Roca Labs, Inc. v. Consumer Opinion Corp.*, No. 8:14-CV-2096-T-33EAJ, 2015 WL 12844307, at *2 (M.D. Fla. May 29, 2015)(stating “the identity of Defendants’ corporate representatives is not relevant and Defendants are not required to identify their Rule 30(b)(6) witnesses prior to deposition.”); *Klorczyk v. Sears, Roebuck & Co.*, Civ. No. 3:13CV257 (JAM), 2015 WL 1600299, at *5 (D. Conn. Apr. 9, 2015)(“the Court will not require Sears to disclose the name(s) or resume(s) of its 30(b)(6) witness.”); *Cruz v. Durbin*, No. 2:11-CV-342-LDG-VCF, 2014 WL 5364068, at *8 (D. Nev. Oct. 20, 2014)(“the Rule 30(b)(6) deponent’s name is irrelevant. Rule 30(b)(6) deponent[s] testify on behalf of the organization. See FED.R.CIV.P. 30(b)(6). Therefore, the court denies Cruz’s motion to compel with regard to the identify of Wabash’s Rule 30(b)(6) deponent because it seeks irrelevant information.”).

witness was not timely provided in advance of the deposition. Further, the identity conferral provision will invite disputes if the responding party changes its mind and substitutes a different person for a witness earlier identified. The proposed amendment implies that a responding organization must, at some unspecified point prior to the deposition, commit to presenting a particular individual as the corporate representative. The draft committee note indicates that the conference process, and by implication the designation of the Rule 30(b)(6) witnesses, “must be completed a reasonable time before the deposition is scheduled to occur.”¹⁷ But the process of witness preparation necessarily continues until the deposition begins, and that process sometimes produces unpredictable situations. In Ford’s experience, some individuals believed to be capable of fully digesting or describing the available corporate knowledge may, in fact, not have that ability. Some proposed witnesses may become reticent, even unwilling, to serve as the corporate representative once they fully understand what a deposition entails. And especially given that no employee’s primary responsibility is to sit for Rule 30(b)(6) depositions, it is common that other unforeseen situations occur that challenge the selection of the corporate representative. When circumstances requiring a change of witnesses develop under the proposed amendment, however, the responding party will be unable to fulfill the expectations raised by the required pre-deposition conferral on witness identity. Again, Ford anticipates this situation will spark more disagreements about compliance and, ultimately, more discovery motions.

Inclusion of any requirement for pre-deposition conferral about the identity of Rule 30(b)(6) witnesses will undermine the established allocation of responsibilities, foster false expectations and encourage discovery squabbles necessitating court resolution. The Committee should ensure that no such provision goes forward. Ford believes this witness identity conferral requirement will be so costly, so counter-productive and will detract so substantially from the ordered operation of Rule 30(b)(6) that the Committee should refuse to proceed with any amendments if that aspect remains included in the package.

2. Ford Expects No Meaningful Benefit from the Proposed Mandate to Meet and Confer Regarding the Number and Description of Rule 30(b)(6) Topics—This is Already Common Practice.

The meet and confer process is familiar ground to Ford. Ford’s counsel generally engage in such exchanges with the noticing party when the company receives a Rule 30(b)(6) notice containing a range of topics that Ford considers excessive and disproportionate to the needs of a case or that fail to describe the topics with sufficient clarity or specificity to allow for proper witness preparation.¹⁸ Ford voluntarily undertakes these actions, but also recognizes that many U.S. District Courts direct that parties must meet and confer before a Rule 30(b)(6) dispute will become ripe for court attention.¹⁹

¹⁷ See Committee Note to Proposed Amendment to Federal Rule of Civil Procedure 30(b)(6), Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure, and the Federal Rules of Evidence - Request for Comment, August 2018, at 38 (emphasis added).

¹⁸ See, e.g., *Gomez*, 2017 WL 5178043, at *2 (recounting descriptions of meet and confer attempts undertaken by Ford’s counsel to resolve disputed Rule 30(b)(6) topic issues); *Wolfe*, 2008 WL 2944547, at *1 (describing unsuccessful conferral efforts made prior to filing of motion regarding Rule 30(b)(6) topics).

¹⁹ See, e.g., *Eagle Railcar Servs.-Roscoe, Inc. v. NGL Crude Logistics, LLC*, No. 1:16-CV-0153-BL, 2018 WL 2317696, at *13 (N.D. Tex. May 22, 2018); *Goldstein v. Federal Deposit Insurance Corporation Receiver for K Bank*, No. CIV. ELH-11-1604, 2013 WL 8446550, at *1 (D. Md. May 16, 2013); *Menendez v. Wal-Mart Stores*

Because in current practice parties commonly confer regarding Rule 30(b)(6) disagreements, inserting a mandate into the text of the rule likely will not produce a significant change. There may be a small number of practitioners who presently do not engage in the conferral process,²⁰ but who would become willing to do so if conferral became an obligation. Additionally, knowing that the parties must confer about the number and description of deposition topics may encourage some noticing parties to craft their wording of the matters for examination with greater care and perhaps may constrain the temptation to list topics of lesser significance that would bloat the number of areas set out in the deposition notice. Nonetheless, because current practice already embraces conferral regarding discovery disagreement, Ford anticipates there would be no meaningful benefit from this aspect of the proposed amendment.

Simply adding the meet and confer requirement, however, leaves the parties with an incomplete process. Although the parties must confer as directed, there is no guarantee that they will reach agreement.²¹ When the parties cannot resolve their differences, the amended Rule 30(b)(6) identifies no specific procedure for parties to raise objections or seek court intervention. Instead, the amendment leaves litigants in the murky realm of current Rule 30(b)(6) dispute resolution that varies dramatically from court to court.²² Expanding the procedural requirements of Rule 30(b)(6) without making provisions for addressing parties' inevitable disagreements will only amplify the procedural uncertainty and lead to procedural limbo. If the Committee intends to pursue the additional meet and confer requirements regarding the number and description of Rule 30(b)(6) topics, Ford urges the Committee to add a specified procedure for raising objections or seeking court redress.

3. The Committee Should Reconsider Making Substantial Amendments that Would Provide Guidance and Address Functional Deficiencies in Rule 30(b)(6) Practice.

E.L.P., No. 1:10-CV-00053, 2012 WL 2159186, at *2 (N.D. Ind. June 13, 2012). *See also* Local Rule 26.3 (M.D. Pa.) (“Counsel for movant in a discovery motion shall file as part of the motion a statement certifying that counsel has conferred with counsel for the opposing party in a good faith effort to resolve by agreement the issues raised by the motion without the intervention of the court, together with a detailed explanation why such agreement could not be reached.”); Local Rule Civ. P. 26.04(b) (N.D.W.Va.) (“Before filing any discovery motion, including any motion for sanctions or for a protective order, counsel for each party shall make a good faith effort to meet in person or by telephone to narrow the areas of disagreement to the greatest possible extent.”).

²⁰ *See, e.g., Ash*, 2017 WL 5178043, at *2 (recounting outreach efforts undertaken to initiate meet and confer discussion without response from party-opponent).

²¹ As even the committee note acknowledges, “[t]he obligation is to confer in good faith, consistent with Rule 1, and the amendment does not require the parties to reach agreement.” Committee Note to Proposed Amendment to Federal Rule of Civil Procedure 30(b)(6), Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure, and the Federal Rules of Evidence - Request for Comment, August 2018, at 38 (emphasis added).

²² Ford’s Subcommittee Comments discuss at length the unpredictable and inconsistent direction district courts have given regarding the proper actions parties may take to object or engage in motions to address Rule 30(b)(6) disputes. *See* Ford’s Subcommittee Comments at 6 – 9. Additionally, comments recently submitted by Lawyers for Civil Justice present an extensive recitation of the widely varying, even contradictory, rulings addressing the proper process for objecting to problematic Rule 30(b)(6) notices or otherwise seeking court engagement to address abusive Rule 30(b)(6) tactics. *See* Lawyers for Civil Justice Comment to the Advisory Committee on Civil Rules, “Fixing What’s Broken: A Call for Straightforward Answers to the Questions that Regularly Confound Rule 30(b)(6) Practice,” Sept. 12, 2018, at 5-7. <https://www.regulations.gov/document?D=USC-RULES-CV-2018-0003-0129>

Ford's Subcommittee Comment from July 2017 described a number of specific aspects of Rule 30(b)(6) practices that the company must litigate because the rule fails to provide adequate direction to parties.²³ The Committee's proposed amendment, however, addresses none of these identified flaws. Ford believes choosing the weak sauce of expanded party conferral on topics over the dense meat of direct fixes to demonstrated Rule 30(b)(6) problems would constitute a costly wasted opportunity. Rather than settle for marginal tinkering that will produce little practical change, other than the negative effects induced by the requirement of pre-deposition conferral over witness identity, the Committee should revisit concepts that would address operational problems in Rule 30(b)(6) practice.

Most critically, Rule 30(b)(6) needs a clearly defined procedure for raising objections. Parties confronted with a notice setting forth inadequately-described or irrelevant topics, an abusive number of areas of inquiry, or other problematic circumstances presently can only guess at the acceptable action to take. Some courts accept a motion for protective order,²⁴ while other courts applying the very same rule find such a motion entirely inappropriate.²⁵ Particularly in the aftermath of the amendment to Rule 26 and the recognition that the pursuit of discovery has enforceable limits, parties should have an established procedure to raise objections and challenge overzealous Rule 30(b)(6) notices. As shown by the inclusion of objection procedures within other core discovery rules, such as Rule 33, 34, 36 and 45, the need for a defined Rule 30(b)(6) objection procedure is axiomatic and cannot be considered controversial.

Additionally, Rule 30(b)(6) should contain provisions for addressing circumstances in which the responding organization has only documentary information or even no information at all. Ford frequently must litigate this situation, either because the Rule 30(b)(6) topics address matters that occurred in the distant past²⁶ or because the notice addresses issues, such as the circumstances of motor vehicle crashes, in which Ford had no direct involvement.²⁷ Rule 30(b)(6) deposition testimony in these circumstances adds no new information to the case, but imposes an unnecessary burden on the responding party of producing a witness simply to read or paraphrase for the record information contained in documents already produced. Rule 30(b)(6) should provide a procedure for alternate discovery methods when such circumstances arise.

²³ See Ford's Subcommittee Comments at 4 – 12.

²⁴ See, e.g., *Fish*, 2017 WL 697663, at *1 - *2. See also *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1147 (10th Cir. 2007) ("failing a negotiated resolution with [the party propounding Rule 30(b)(6) discovery], [the responding party] could have sought a protective order from the district court."); *Int'l Brotherhood of Teamsters v. Frontier Airlines, Inc.*, No. 11-CV-02007-MSK-KLM, 2013 WL 627149, at *6 (D. Colo. Feb. 19, 2013) ("In the event that the parties' attempts to resolve disagreements about a Rule 30(b)(6) deposition are unsuccessful, filing a pre-deposition motion is the appropriate course of action.").

²⁵ See, e.g., *Salzbach v. Hartford Ins. Co.*, No. 8:12-CV-01645-T-MAP, 2013 WL 12098763, at *2 (M.D. Fla. Apr. 19, 2013) ("a protective order is not the appropriate remedy for deciding relevancy of a topic before a 30(b)(6) deposition."); *New World Network Ltd. v. M/V Norwegian Sea*, No. 05-22916-CIV, 2007 WL 1068124, at *4 (S.D. Fla. Apr. 6, 2007) ("the proper operation of [Rule 30(b)(6)] does not require, and indeed does not justify, a process of objection and Court intervention prior to the schedule[d] deposition.").

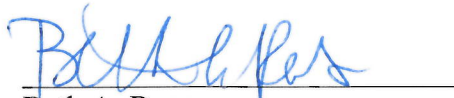
²⁶ See Ford's Subcommittee Comments at 9 – 10 (providing examples of Rule 30(b)(6) deposition topics received by Ford seeking discovery of information pre-dating 1980).

²⁷ See, e.g., *Ortiz de Valdez v. Ford Motor Co.*, No. DR-06-CV-0087-HLH, 2008 WL 11334969, at *1 - *2 (W.D. Tex. Sept. 9, 2008) (denying motion to compel production of a Rule 30(b)(6) witness to discuss information on lists of prior product liability claims); *Wolfe*, 2008 WL 294547, at *2 (denying motion to compel a Rule 30(b)(6) witness to testify regarding documents produced relating to lawsuits and claims).

The Committee should not limit its actions to the proposed amendments received from the Subcommittee. Rule 30(b)(6) practice needs substantial reforms, such as the specific actions described above, and the Committee should revisit such concepts.

CONCLUSION

The proposed Rule 30(b)(6) amendment causes Ford considerable concern. The proposal to require pre-deposition conferral regarding witness identity creates a problematic new discovery obligation that would be inconsistent with the allocation of responsibilities under Rule 30(b)(6) and contrary to the core concept of a corporate representative deposition. No such requirement should be adopted. The additional conferral requirements on the number and description of deposition topics will have no meaningful impact on Rule 30(b)(6) practice. Rather than focus on unhelpful conferral expansion, Ford urges the Committee to re-consider necessary substantial changes such as adoption of a defined objection procedure. Ford appreciates the opportunity to present its views to the Committee.



Beth A. Rose
Ford Motor Company
Assistant General Counsel



Brittany M. Schultz
Ford Motor Company
Counsel

TAB 24

TESTIMONY OF

PATRICK G. SEYFERTH
BUSH SEYFERTH PAIGE PLLC

January 24, 2019

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

RE: *Proposed Amendment to Federal Rule of Civil Procedure 30(b)(6)*

Dear Members of the Committee:

My name is Patrick Seyferth, and I am a founding partner of the litigation law firm of Bush Seyferth & Paige in Troy, Michigan. I am also a member of the Defense Research Institute, a member of the Product Liability Advisory Council, and life member of the Sixth Circuit Judicial Conference. During my 23 years of practice, I've served as lead trial counsel—as well as lead discovery counsel—for a wide array of Fortune 500 Companies in catastrophic civil cases spanning 23 states. Accordingly, my firm and I have participated in hundreds of Rule 30(b)(6) depositions over the years as both defending and deposing counsel. So, like everyone here, my primary focus is on making discovery friendlier to the courts and respectful to the rights—and pocketbooks—of the litigants.

The last few decades have seen many changes to the Federal Rules. Many of those changes were welcomed by practitioners and courts alike. But sometimes, the pushing-and-pulling behind the Rule amendment process produces an inadequate solution—or, perhaps worse, a solution in search of a problem.

Unfortunately, a duty to confer about the identity of the corporate witness is just such a “solution.” Not only does this proposed duty fail to alleviate any real problem with discovery practice, it exacerbates the true pitfalls behind Rule 30(b)(6) and affords only greater opportunities for gamesmanship and collateral litigation.

While the public comments have already highlighted many of the problems with the proposed duty,¹ I believe that the concerns found in those comments reduce to two basic shortcomings.

¹ See, e.g., Letter from John H. Beisner, US Chamber Institute for Legal Reform, to Rebecca A. Womeldorf, Secretary of the Comm. on Rules of Practice and Procedure of the Admin. Office of the United States Courts

First, the proposal unfairly burdens an organization's practical ability to select its most capable witness.²

Selecting the appropriate witness for a 30(b)(6) deposition is no simple task.³ The responding organization and counsel must first determine who can speak knowledgeably on the noticed topics, and then, from that list of candidates, select a witness who can be adequately prepared. The noticed topics may concern facts and decisions that occurred decades ago—topics that no one in the organization can reasonably be expected to speak about solely from personal knowledge.⁴ The organization, then, must choose a witness that can be both educated on the noticed issues and explain those facts under the stress of deposition. The stakes in choosing such a witness are extraordinarily high. The witness will be speaking on behalf of the corporation, and what he or she says may be legally binding.⁵

(August 3, 2017), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2018-0003-0038&attachmentNumber=1&contentType=pdf> ("First ILR Comment"); Letter from John H. Beisner, US Chamber Institute for Legal Reform, to Rebecca A. Womeldorf, Secretary of the Comm. on Rules of Practice and Procedure of the Admin. Office of the United States Courts (June 11, 2018), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2018-0003-0127&attachmentNumber=1&contentType=pdf> ("Second ILR Comment"); Letter from Beth A. Rose & Brittany M. Schultz, Ford Motor Co., to Rebecca A. Womeldorf, Secretary of the Comm. on Rules of Practice and Procedure of the Admin. Office of the United States Courts (July 31, 2017), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2018-0003-0044&attachmentNumber=1&contentType=pdf> ("First Ford Comment"); Letter from Beth A. Rose & Brittany M. Schultz, Ford Motor Co., to Rebecca A. Womeldorf, Secretary of the Comm. on Rules of Practice and Procedure of the Admin. Office of the United States Courts (January 7, 2019), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2018-0003-0151&attachmentNumber=1&contentType=pdf> ("Second Ford Comment"); Letter from Alex Dahl, Lawyer's for Civil Justice, to Rebecca A. Womeldorf, Secretary of the Comm. on Rules of Practice and Procedure of the Admin. Office of the United States Courts (September 12, 2018), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2018-0003-0129&attachmentNumber=1&contentType=pdf> ("LCJ Comment"); Letter from Bruce Parker, Venable LLP, to Rebecca A. Womeldorf, Secretary of the Comm. on Rules of Practice and Procedure of the Admin. Office of the United States Courts (December 27, 2018), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2018-0003-0145&attachmentNumber=1&contentType=pdf>.

² Second ILR Comment at 2-4.

³ Kent Sinclair & Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms*, 50 ALA. L. REV. 651, 689 (1999).

⁴ Craig M. Roen & Catherine O'Connor, *Don't Forget to Remember Everything: The Trouble with Rule 30(b)(6) Depositions*, 45 U. TOL. L. REV. 29, 37 (2013); see also LCJ Comment at 3-4.

⁵ *Resolution Tr. Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993) ("When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent."); *Estate of Thompson v. Kawasaki Heavy Indus., Ltd.*, 291 F.R.D. 297, 304 (N.D. Iowa 2013) ("It is all the more appropriate to bind a corporation to the testimony of its Rule 30(b)(6) designee, where the corporation itself selects the deponent who will speak for it[.]"); *Aldridge v. Lake Cty. Sheriff's Office*, No. 11 C 3041, 2012 WL 3023340, at *3 (N.D. Ill. July 24, 2012) ("[T]he purpose of a Rule 30(b)(6) witness is to present the organization's position on the listed topic and that person, then, provides binding answers on behalf of the organization.").

The requirement that the parties confer about the identity of this witness “before or promptly after” notice puts the responding corporation in a ‘catch-22’.⁶ Presumably, a good faith conferral would require responding counsel to disclose a number of potential 30(b)(6) witnesses.⁷ Because of the substantial effort behind selecting the right witness, responding organizations will, then, have to choose between spending enormous sums to expedite the witness-selection process or throwing caution to the wind and identifying potential witnesses before an adequate process can be had.⁸ In either instance, the responding corporation will be, as a practical matter, deprived—at least to some limited extent—of its well-recognized right to select the appropriate witness.⁹ Moreover, corporate parties will no longer be permitted to make “game-time” decisions; witnesses will have to be selected farther in advance, depriving corporate parties of the flexibility often needed to produce the best testimony.

But this is not the only practical obstacle entailed by the proposed duty to confer. This “witness identity” mandate will likely interfere with the Committee’s other proposed mandate—that parties also meet-and-confer regarding the topics for examination.¹⁰ Much of the witness-selection process is directed by the topics to be examined. Some witnesses will be a better choice than others given whatever facts must be discussed. It makes little sense, as a practical matter, to expect the parties to meaningfully confer about the identity of the witness while in the same discussion trying to negotiate the topics for examination. The likely result is an unproductive and unfriendly conferral, providing only further ground for bitter, needless discovery battles.

And the fear of the needless battle underlies all the practice-minded objections to the proposed duty. Meet-and-confers are typically ordered to resolve pending conflicts, so mandating a meet-and-confer, before any dispute has actually arisen, might inject conflict in an otherwise orderly process.

Second, the proposed duty to confer would upset established law surrounding 30(b)(6) witness-selection and other familiar rules of discovery.¹¹

A deponent organization has the exclusive right to select its witness.¹² The courts have recognized many solid reasons for this rule. First, as a matter of efficiency, the deponent

⁶ Fed. R. Civ. P. 30(b)(6) (Proposed Official Draft 2018); Second ILR Comment at 3.

⁷ Second ILR Comment at 3.

⁸ *Id.*

⁹ *See infra* note 12.

¹⁰ Fed. R. Civ. P. 30(b)(6) (Proposed Official Draft 2018); Second ILR Comment at 2.

¹¹ Second Ford Comment at 4-5.

¹² *Resolution Tr. Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993) (“[Rule 30(b)(6)] places the burden of identifying responsive witnesses for a corporation on the corporation.”); *Booker v. Massachusetts Dept. of Public Health*, 246 F.R.D 387, 389 (D.Mass. 2007) (“Plaintiff may not impose his belief on Defendants as to whom to designate as a 30(B)(6) witness.”); *Dillman v. Indiana Ins. Co.*, No. 3:04-CV-576-S, 2007 WL 437730,

organization is in the best position to decide who within it can best represent the facts that are expected to be known by it.¹³ But apart from considerations of efficiency, it would be inherently unfair for the organization to be bound—that is, to be legally spoken for—by a voice handpicked by its legal adversary.¹⁴ Nevertheless, the proposed amendment invites the deposing party to seize a role in a process in which it was never intended to play a role.

And, how would courts define the scope of this new duty, as they would inevitably be compelled to do? How does, for example, this new affirmative duty affect other disclosure obligations of the responding organization, such as Rule 26(a) disclosures?¹⁵ And what rights can deposing parties enforce under the new language? Some may argue that the proposed language is not substantive enough to raise these questions. But if that’s true, then the amendment seems rather pointless. Either the language is so substantive that it unsettles standing law, or is it so trivial that 30(b)(6) proceeds as usual. If the latter is intended, then why amend the rule at all?

In short, the meet-and-confer requirement adds nothing “just,” “speedy,” or “inexpensive” to discovery practice.¹⁶ This deficiency should concern the courts—who will have to spend more resources refereeing discovery skirmishes—as much as it does the litigants who will be footing the bill.

But there are, indeed, real problems with Rule 30(b)(6) as it stands now. I join my colleagues in urging this Committee to abandon the duty to confer and address the real issues burdening Rule 30(b)(6).

Perhaps the most pressing issue is the lack of any rule-specified procedure for objecting to the noticed topics.¹⁷ Counsel faced with a deposition notice is often saddled with a lengthy scroll

at *1 (W.D. Ky. Feb. 1, 2007) (holding that Rule 30(b)(6) “does not permit the plaintiff to designate a deponent to speak for the corporate defendants [and] the plaintiff’s attempt to do so is not appropriate”); *see also* 8A CHARLES ALAN WRIGHT, ET AL., *FEDERAL PRACTICE & PROCEDURE* § 2103 (3d ed. 2013) (“[T]he party seeking discovery under [Rule 30(b)(6)] is not permitted to insist that it choose a specific person to testify[.]”); 7 JAMES WM. MOORE, ET AL., *MOORE’S FEDERAL PRACTICE* § 30.25[3] (3d ed. 2013) (“It is ultimately up to the organization to choose the Rule 30(b)(6) deponent.”).

¹³ *See Resolution*, 985 F.2d at 197 (“Rule 30(b)(6) streamlines the discovery process.”); *Grahl v. Circle K Stores, Inc.*, No. 2:14-CV-305-RFB-VCF, 2017 WL 3812912, at *4 (D. Nev. Aug. 31, 2017) (“The purpose of this requirement is to enable the responding organization to identify the person who is best situated to answer questions about the matter, or to make sure that the person selected to testify is able to respond regarding that matter.”) (internal quotation marks omitted).

¹⁴ *See supra* note 12.

¹⁵ Fed R. Civ. P. 26(a)(1)(A) (requiring parties to disclose, *inter alia*, “the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses”).

¹⁶ *See* Fed R. Civ. P. 1.

¹⁷ LCJ Comment at 5-7; First ILR Comment at 4-7; Second Ford Comment at 8.

of vaguely worded topics without any clear recourse in the Rules.¹⁸ The Rules' silence, here, has left practitioners with chaotic case law. In some jurisdictions, the only remedy for responding organizations is to move for a Rule 26(c) protective order.¹⁹ In others, courts have announced that such motions are unwelcome.²⁰ Responding counsel should not have to grapple with diverging sets of case law in order to lodge a simple objection. Courts should not be forced to deal with such a fundamental issue on an *ad hoc* basis, either. Recent reforms to Rules 33, 45, and so on, have shown that simple objection procedures can provide fair and efficient results.²¹ The same is true for Rule 35.

The principal goal behind amending the Rules should be to bring our federal courts closer to the "speedy," "just," and efficient system envisioned in Rule 1.²² I fear, however, like many of my colleagues, that this Committee's proposal will do just the opposite. For all these reasons, I urge this Committee to excise the duty to confer from its proposal and act on the issues that matter.

Sincerely,



Patrick G. Seyferth
Bush Seyferth & Paige PLLC

¹⁸ See First Ford Comment at 3 (noting that the number of topics noticed in the average Ford product liability case exceeds the number of interrogatories allowed under Rule 33).

¹⁹ See, e.g., *Gomez v. Ford Motor Co.*, No. SA-15-CA-00866-DAE, 2017 WL 5178043, at *4 (W.D. Tex. June 7, 2017) (granting in part Ford's protective order and criticizing the broad scope of the noticed topics); *Fish v. Air & Liquid Sys. Corp.*, No. CV GLR-16-496, 2017 WL 697663, at *1-2 (D. Md. Feb. 21, 2017) (same).

²⁰ See, e.g., *Salzbach v. Hartford Ins. Co. of the Midwest*, No. 8:12-CV-01645-T-MAP, 2013 WL 12098763, at *2 (M.D. Fla. Apr. 19, 2013) ("[A] protective order is not the appropriate remedy for deciding relevancy of a topic before a 30(b)(6) deposition."); *Direct Gen. Ins. Co. v. Indian Harbor Ins. Co.*, No. 14-20050-CIV, 2015 WL 12745536, at *2 (S.D. Fla. Jan. 29, 2015) ("[A]n advance ruling on relevance or any other objection is not appropriate under Rule 26.").

²¹ Second Ford Comment at 8.

²² Fed. R. Civ. P. 1. ("[The Rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

TAB 25

COMMENT OF

MICHAEL L. SLACK
SLACK DAVIS SANGER, LLP

January 22, 2019

Michael L. Slack
Austin Office
mslack@slackdavis.com

VIA EMAIL

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

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

Dear Members of the Civil Rules Advisory Committee:

My firm and I represent plaintiffs against large airlines and multi-national and foreign manufacturers with complex organizational structures. We litigate in both federal and state courts in the United States. In the post-*Daimler* environment, we frequently must engage in discovery on procedural challenges to personal jurisdiction and motions to dismiss under *forum non conveniens* before we get to discovery on the merits. Discovery can be a long and dreary path to ultimately secure the 20-30 most salient documents and to identify the 2-3 most important corporate historians for a given event, usually a catastrophic aircraft crash.

To combat discovery obfuscation in written discovery and to minimize the expenditure of considerable wasted resources securing meaningful discovery we rely heavily on Rule 30(b)(6) and its state court counterparts.

There are two essential features that Rule 30(b)(6) brings to discovery: opposing party accountability in discovery and efficiency in securing the necessary information with the least waste of time. Besides the above-mentioned procedural hurdles that we frequently face in aviation litigation, we frequently are seeking to discover similar occurrences, knowledge or awareness of the defendant of a product defect or unsafe practices, control over vendors and suppliers and what the defendant did to investigate and correct the defect or unsafe practice. With foreign and multi-national companies, the evidence we seek is often claimed by defendants to be in the possession of company divisions situated in foreign countries.

Rule 30(b)(6) is the one discovery tool that singularly forces accountability and promotes efficiency over the alternative discovery options.

1. We believe that a corporation facing a Rule 30(b)(6) deposition is less likely to be evasive in written discovery because the properly prepared corporate witness can be used to illuminate the incompleteness and evasiveness of responses to document requests and interrogatories. In our experience, a Rule 30(b)(6) deposition transcript is usually a spot “cure” for evasiveness and will often eliminate the need for a motion to compel.
2. Ordinary oral depositions are undermined by “I don’t know” answers which are unacceptable and carry severe consequences to the corporation under Rule 30(b)(6). An “I don’t know” response by a designated Rule 30(b)(6) corporate witness to a well-asked liability question can be fatal to

the defendant. Rule 30(b)(6) is by far the best available discovery tool for securing meaningful discovery with the least investment of resources.

3. Specifically, with respect to identifying the most knowledgeable subject-matter witnesses within the organization, Rule 30(b)(6) is immeasurably better at identifying the most relevant individuals to be deposed on specific topics. It is also most useful in establishing how the corporation disseminates information internally, maintains its records and what personnel have access to technical as well as management documents.
4. Rule 30(b)(6) allows the plaintiff to elicit corporate knowledge and information not easily ascertained by alternate forms of discovery. When “I don’t know” has negative consequences to the corporation for an evasive answer, the quality of the discovery product improves significantly.

These are a few of the features of Rule 30(b)(6) that make it the most useful and impactful discovery tool a plaintiff has in efficiently and effectively securing the essential discovery needed for both procedural and substantive issues.

I look forward to testifying before the Committee.

Sincerely,

SLACK DAVIS SANGER, LLP

Michael L. Slack

MLS/reI

TAB 26

TESTIMONY AND COMMENT OF

DONALD H. SLAVIK
SLAVIK LAW FIRM, LLC

From: dslavik@slavik.us
To: [RulesCommittee Secretary](#)
Subject: Rule 30(b)6 hearing February 8, 2019
Date: Friday, January 25, 2019 8:02:00 PM
Attachments: [image001.png](#)
[image002.png](#)

Dear Secretary:

Per the request for a short statement of the anticipated focus of my testimony, please accept the following:

I plan to testify in accordance with the comments to the Propose Rule changes I filed earlier. In addition, I hope to address any questions of the committee members, especially with regards to the practicality of the proposed meet and confer requirements, the identification in advance to the witness(es) who are offered to give testimony, why limits on the number of topics would be an impediment to an efficient method of conducting discovery, and why limiting the types of questions being asked would also be inefficient. Having taken seven 30(b)6 depositions in the last two weeks, I should be able to answer any questions as to the practicalities of how they are conducted and why the proposed changes to the rule will help.

Thanks for the opportunity to testify in two weeks.

Donald H. Slavik, Esq.



Slavik Law Firm, LLC

dslavik@slavik.us (c) 414-899-1197 (o) 970-457-1011 (d) 949-269-4284
2955 Village Drive, Suite 16, Steamboat Springs, CO 80487-2147
Licensed in CO, TX, WA and WI Prof. Engr. (Ret.) in WI



Before printing, please think about the environment.

CONFIDENTIALITY NOTICE: The information contained in this electronic mail transmission is intended for the use of the named individual or entity to which it is directed and may contain information that is privileged or otherwise confidential. It is not intended for transmission to, or receipt by, anyone other than the named addressee (or a person authorized to deliver it to the named addressee). It should not be copied or forwarded to any unauthorized persons. If you have received this electronic mail transmission in error, please delete it from your system without copying or forwarding it, and notify the sender of the error by reply email or by calling (970) 457-1011

so that our address record can be corrected

DISCLAIMER: This email does not create an attorney-client relationship with Slavik Law Firm, LLC, nor does any responsive email to legal inquiries made to the Firm. While attorney-client privilege arises, there is no representational relationship until there is a retainer contract signed by the client and co-signed by Attorney Donald H. Slavik.

LIMITED LIABILITY COMPANY: Slavik Law Firm, LLC is a Colorado Limited Liability Company, pursuant to Colorado Statutes 7-80-101 et seq. Slavik Law Firm, LLC maintains professional liability insurance to cover its acts and those of its members and employees.

December 17, 2018

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

Re: Proposed Amendments to FRCP 30(b)(6)

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

Thank you for the opportunity to submit these comments on the proposed amendments to Federal Rule of Civil Procedure 30(b)(6) [Proposed Amendments]. I have been practicing for more than 37 years as a litigator, almost exclusively representing victims of defective products. I've handled cases in forty states, hold active bar licenses in four states, and been admitted to numerous Federal Courts. Most of the matters I've handled involve defective transportation products, including automobiles, light and heavy-duty trucks, motorcycles, all-terrain vehicles and aircraft. In the scope of my representation, I've taken numerous depositions pursuant to FRCP 30(b)(6). I've also participated with the Duke Judicial Center in the drafting of their publication entitled "Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality." My background and experiences in this area have framed my views of how Rule 30(b)(6) should be used to accomplish the goal set out in Rule 1 of the "just, speedy and inexpensive determination of every action and proceeding."

In the course of many matters I have and am handling, I need to take testimony of one or more representatives of an organization, usually a corporation. As one who is exclusively paid contingently on the successful resolution of matters, I must be highly efficient with my time as well as minimize the costs of the litigation, as that comes out my clients' financial recoveries. The same cannot be said for my opponents who have it in their interest to increase the time and expense I put into litigating. When I draft a 30(b)(6) notice of deposition and list the areas of inquiry, I focus on only what I need to prove the case. The less time I spend having to take testimony, the better it is for my clients.

The Proposed Amendments before this Committee, for the most part, help in making the 30(b)(6) process more efficient. First, requiring identification in advance by the producing party of the witnesses being offered to testify permits me to determine whether they are likely to have at least some first-hand knowledge of the subject matter. It allows me to try to find out in advance if the proposed witnesses have testified in the past in a similar matter, and if so, attempt to collect such transcripts. By reading and reviewing prior testimony, I can better prepare to conduct the deposition in my case in the most expeditious

manner possible, not for the purpose of bringing up unrelated matters, but to enable me to know the breadth of the knowledge of the offered witness and focus in on specific matters quickly.

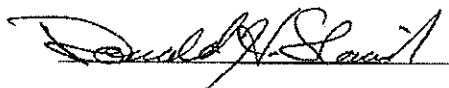
Second, a requirement that the parties meet and confer regarding the subjects of the notice is generally already my standard practice. I would rather know up front what subjects I've listed that the producing party objects to or if the party cannot provide a witness who has knowledge that is relevant. The only problem I've encountered in this area is an unresponsive party and their counsel. The Proposed Amendments would help make unresponsive parties responsive. And if there is a disagreement about subjects of the deposition, I'd rather bring it to the attention of the presiding judge before taking testimony so that we can prevent having to bring it up afterwards, which would require getting an order, traveling again to a distant location and taking a second deposition. I've had the experience of a witness declining to respond to a subject contained in a notice, with no forewarning by opposing counsel, resulting in having to take another 30(b)(6) deposition. In those courts where the judge takes an active role in case management, such as by holding periodic status conferences, in my experience cases are handled more expeditiously and less expensively. Communication between the parties via their counsel contributes to an efficient process. The Proposed Amendments should ensure that the parties are jointly responsible for communicating with each other in advance of the deposition.

While some commenters, notably those on the other side of the bar like Lawyers for Civil Justice, want to make the "number" of topics of inquiry a subject of the Rule as well as part of the meet and confer requirement, I see that as removing a focus from the most important part of the discussion – the subjects of the testimony being taken. Limiting by a rule the number of areas is fraught with problems. Every case is different. In some matters, only a small number of areas will be covered, perhaps fewer than five. In others, such as in those dealing with complex software defects, there may be many dozens of areas that have to be covered. I've had first-hand experience in this with automobile mass tort and class action litigation. Limiting or negotiating how many areas that can be asked about in deposition will lead to more, not fewer, discovery motions brought before the Court.

Thank you again for the chance to present these comments. I hope that I may further elaborate upon them by testimony for the committee early next year.

Very truly yours,

SLAVIK LAW FIRM, LLC

A handwritten signature in black ink, appearing to read "Donald H. Slavik", written over a horizontal line.

Donald H. Slavik

DHS/amp

TAB 27

COMMENT OF

ANDREW J. TRASK

**Comment of Andrew J. Trask on
Proposed Amendments to Federal Rule of Civil Procedure 30(b)(6)**

Thank you for the opportunity to comment on the proposed amendment to Rule 30(b)(6). I currently practice law as Of Counsel at Shook, Hardy & Bacon, where I focus my practice on complex litigation and litigation-oriented public policy. I offer this comment in my personal capacity; the views I express here are my own, and do not necessarily represent Shook's views on the proposed Rule change.¹ I base my comments below on my twenty years of experience defending corporations in complex litigation (which has included preparation and defense of numerous depositions under Rule 30(b)(6), but also based on research for a book on litigation strategy and tactics to be published next year by Cambridge University Press.

I am aware this Committee has received numerous comments on its proposed amendments to Rule 30(b)(6), and various potential reforms it declined to adopt in proposing that amendment. Instead of reiterating positions that have already been made by other commentators, I wish to focus on two areas where the proposed amendments are likely to prompt further gamesmanship and conflict in the conduct of Rule 30(b)(6) depositions.

Questions Beyond the Scope of the Notice

Under the current version of Rule 30(b)(6), parties taking the depositions will often ask questions beyond the scope of the original deposition notice. A few of these questions may be natural follow-ups to information disclosed during the deposition, but many are not. Instead, many of these questions are designed to elicit a corporate statement on a matter of legal interpretation, or commit the corporation to a hypothetical course of action, or engage some other form of "expert" opinion.² I have attended numerous depositions where plaintiffs' counsel have employed this tactic.

There is no current remedy for this tactic. Courts have consistently held that counsel may not instruct a witness not to answer questions outside the scope of the notice.³ These courts have reasoned that treating out-of-scope questions as binding only on the witness and not the corporation is sufficient.⁴ Moreover, at the time of deposition, most lawyers encountering this tactic do not want to risk a court's ire by delaying the deposition to challenge the practice.

Allowing the noticing party to have input into who testifies on behalf of an organization will encourage counsel to ask more questions outside the scope of the 30(b)(6)

¹ I understand that Shook, Hardy & Bacon has submitted its own comment on the proposed changes.

² See, e.g., *Boyer v. Reed Smith, LLP*, 2013 WL 5724046 (W.D. Wash. Oct. 21, 2013) (compliance with internal policy not a proper topic for Rule 30(b)(6) deposition); *Hund v. Smith & Nephew, Inc.*, 2011 WL 13217730, *2 (D.S.C. Jul. 28, 2011) (refusing to allow additional deposition time when questioning went "beyond the topics listed in the deposition notice and falls squarely within the type of expert opinion testimony that the court found to be inappropriate").

³ See, e.g., *Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 730 (D. Mass. 1985); *EEOC v. Freeman*, 288 F.R.D. 92, 99 (D. Md. 2012).

⁴ See, e.g., *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995).

notice. Based on current practices, counsel will leap at the opportunity to put specific witnesses “on the spot” to obtain potential sound bites in support of their case, even if they would not expend a full 30(b)(1) deposition on the effort. While the current practice has not resulted in many disputes before courts, expanded attempts to probe beyond the scope will encourage those defending 30(b)(6) depositions to seek protective orders ahead of time, or to issue instructions that will inevitably lead to subsequent motions to compel. Either way, the propose amendment will lead to further conflict.

Sidestepping Deposition Limits

Rule 30 limits each party to ten depositions. Parties already use broad, multi-topic 30(b)(6) notices to ensure that multiple witnesses testify in a “single” Rule 30(b)(6) deposition. As a result, the Rule 30(b)(6) notice already operates as a means of exceeding the deposition limit set forth in the Federal Rules.

Moreover, deposing counsel often ask 30(b)(6) witnesses questions about their specific positions and responsibilities, and those questions often move beyond simple background and into factual matters not specified in the deposition notice. Some of these questions are legitimate; it makes sense to probe into what a corporate representative knows from their own experience versus what they know only secondhand. But many of these questions can push far enough that the witness becomes, for a substantial part of the deposition, a *de facto* 30(b)(1) witness.

The proposed amendment again allows an expansion of this tactic. By serving an extensive notice with multiple topics, that would require multiple witnesses to fulfill, lobbying for specific witnesses to testify, and then asking those witnesses questions about their own knowledge, counsel can effectively ignore the ten-witness limit imposed by Rule 30.⁵ As described above, defending counsel may not instruct a witness not to answer; instead the answer only binds the witness. But that limitation will not deter counsel who have lobbied for a particular 30(b)(6) witness because they wish to depose them in their personal capacity.

The tactics I describe are not speculative. I have seen them firsthand under the current version of Rule 30(b)(6), and (as the footnotes describe) they are common enough that one can find examples in reported opinions. It is clear that the proposed amendment to the Rule, coupled with courts’ current rulings, will not only allow these tactics to continue, but enable them to work even more effectively. This is one of many reasons why the proposed amendment to Rule 30(b)(6) will not reduce conflict or promote efficiency or fairness.

⁵ See, e.g., *Peshlakai v. Ruiz*, 2014 WL 459650, *6-8 (D.N.M. Jan. 9, 2014) (counsel tried to use 30(b)(6) notice to get “second bite” at previously deposed fact witnesses).

TAB 28

COMMENT OF

SEYFARTH SHAW LLP

Writer's direct phone
(916) 498-7025

Writer's e-mail
jyap@seyfarth.com

Seyfarth Shaw LLP
400 Capitol Mall
Suite 2350
Sacramento, California 95814-4428
(916) 448-0159
fax (916) 558-4839
www.seyfarth.com

January 24, 2019

VIA EMAIL: Rules Comments@ao.uscourts.gov

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

Re: Seyfarth Shaw LLP's Public Comment On Needed Reform To Rule 30(b)(6)

Seyfarth Shaw LLP¹ ("Seyfarth Shaw") respectfully submits this Comment to the Civil Rules Advisory Committee (the "Committee") in response to the Request for Comment on the proposed amendment to Federal Rule of Civil Procedure Rule 30(b)(6) ("Proposed Amendment").

Seyfarth Shaw is a law firm with more than 850 attorneys and 14 full-service offices in the United States and internationally. We have experienced, firsthand, the significant burdens imposed by current practice under Rule 30(b)(6), which often fails to promote the just, speedy, and inexpensive resolution of pending litigation contemplated by the Federal Rules. As such, Seyfarth Shaw supported the Committee's serious consideration of changes to Rule 30(b)(6) that would move this discovery procedure closer in line with the concepts of cooperation and proportionality advanced in the 2015 discovery amendments. However, we believe that the Proposed Amendment does not go far enough in addressing a number of the practical difficulties regularly encountered in litigation surrounding Rule 30(b)(6) depositions.

¹ This submission—from members of Seyfarth Shaw's Labor & Employment and Litigation departments—is a joint effort of practitioners from our group, including Alex Meier, Gina Merrill, and Esther Slater McDonald.

Accordingly, this Comment proposes two areas in need of reform and guidance from the Committee. First, Rule 30(b)(6) should be amended to include presumptive limits on the number of topics covered in a deposition, on the scope of those topics, and on the number of deposition hours. Second, Rule 30(b)(6) should be amended to provide a 30-day notice period and an objection process similar to that provided in Rule 45. We believe these amendments would significantly improve Rule 30(b)(6) practice by providing much needed guidance and transparency to an area that too often creates significant costs and burdens due to procedural ambiguity.

Moreover, we believe the current language of the Proposed Amendment could exacerbate confusion and gamesmanship in the Rule 30(b)(6) process. Specifically, mandating a nebulous conference with only a handful of express topics for consideration may actually increase litigation regarding the scope of and obligations imposed by the new meet and confer language. As such, the Committee should **not** proceed with the Proposed Amendment in its current form.

I. Rule 30(b)(6) Should Be Amended To Include Presumptive Limits

Limits regarding the number and scope of topics are particularly important, 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,² and requesting parties often seek to punish responding organizations and their counsel for being insufficiently prepared.³ Disputes over the

² *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 Enters., 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. Ins. Group 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 Mut. Auto Ins. Co. v. New Horizont, Inc.*, 250 F.R.D. 203, 216 (E.D. Pa. 2008) ("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).

³ 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 Mut. Auto. Ins.*

sufficiency of witnesses preparation will be reduced by limiting the number and scope of topics that a Rule 30(b)(6) designee must prepare for and address. In addition, presumptive limits will facilitate cooperation, early case management and proportionality, and encourage both parties to identify and disclose the information actually required to prosecute or defend the litigation.

A. Rule 30(b)(6) Should Be Amended To Include A Presumptive Limit On The Number Of Topics That Can Be Covered In The Deposition.

Rule 30(b)(6) currently contains no limitation on the number of topics that may be covered during the deposition of a corporate representative. Counsel in their discretion are free to propound as many topics as they see fit, which regularly results in deposition notices throwing in everything (including the kitchen sink) as a potential deposition topic. Notices with more than 50 topics are common.⁴ With no restriction on the number of topics—and since the burden of responding falls entirely on the noticed party—a requesting party has, if anything, a disincentive to leave any topic of potential interest outside the notice.

Such wide-ranging 30(b)(6) depositions impose significant burdens without regard to proportionality. And the burdens imposed by wide-ranging notices are indeed significant: responding parties are required to investigate all factual aspects of each topic, designate one or more witnesses to speak to all aspects of each topic, and educate witnesses about relevant documents and facts that they do not already know.⁵ The process of investigation alone can involve reviewing and

Co., 250 F.R.D. at 217 (compelling 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. Am. 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.")

⁴ See, e.g., *Mondares v. Kaiser Found. Hosp.*, No. 10-CV-2676-BTM WVG, 2011 WL 5374613, at *1 (S.D. Cal. Nov. 7, 2011) (220 topics); *Nester v. Textron, Inc.*, No. A-13-CV-920 LY, 2014 WL 12631817, at *1 (W.D. Tex. Dec. 5, 2014) (110 topics); *Kingery v. Quicken Loans, Inc.*, No. 2:12-cv-01353, 2014 WL 1017180, at *1 (S.D. W. Va. Mar. 14, 2014) (93 topics); *Furminator, Inc. v. Munchkin, Inc.*, No. 4:08CV00367 ERW, 2009 WL 1176285, at *1 (E.D. Mo. May 1, 2009) (at least 85 topics); *Lenard v. Sherwin-Williams Co.*, No. 2:13-CV-2548 KJM AC, 2015 WL 854752, at *3 (E.D. Cal. Feb. 26, 2015) (more than 80); *Hoffman v. L & M Arts*, No. 3:10-CV-0953-D, 2013 WL 655014, at *1 (N.D. Tex. Feb. 21, 2013) (80 topics).

⁵ *Starline Windows Inc. v. Quanex Bldg. Prod. Corp.*, No. 15-CV-1282-L (WVG), 2016 WL 4485564, at *2 (S.D. Cal. July 21, 2016) ("The rule requires the corporation to identify the relevant documents from its records and use those documents to educate a prepared witness who can state the corporation's knowledge on

analyzing reams of documents and data, and interviewing numerous company representatives to discern who has relevant information. Because the company's designee must be able to testify comprehensively—or risk sanctions to the company—the task of compiling and learning the full scope of responsive information can take weeks.⁶

The same concerns that led the advisory committee to impose a numerical limit on interrogatories apply equally here. Before Rule 33 imposed a 25-question limitation, including subparts, litigants could and did send breathtakingly expansive requests that often reached into triple digits.⁷ To streamline discovery and minimize needless burden, the advisory committee imposed a numerical limitation.

The same logic applies with even greater force here because, unlike interrogatories, document requests and other forms of written discovery, which are prepared by attorneys and may be answered over time, a 30(b)(6) deposition requires educating a layperson so that, over the course of several hours, the designee can provide answers that are potentially binding on the corporation. The “one-time” nature of a deposition, coupled with the inherent decrease in precision that comes with an oral answer to an oral question, rather than a written answer to a written question, further supports that a numerical limitation on 30(b)(6) topics is appropriate.

The presumptive limit should be no higher than 10, unless the parties or the court determine that additional areas of inquiry are necessary.

the topic.”); *Great Am. Ins. Co. of New York v. Vegas Const. Co.*, 251 F.R.D. 534, 539 (D. Nev. 2008) (“[A] corporation has ‘a duty to make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them to fully and unequivocally answer questions about the designated subject matter.’”) (citation omitted); *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C.1996) (a corporation is required to prepare “its Rule 30(b)(6) designee to the extent the matters are reasonably available, whether from documents, past employees, or other sources”); *United States v. Mass. Indus. Fin. Agency*, 162 F.R.D. 410, 412 (D. Mass. 1995) (rejecting corporations' arguments that it was not required under Rule 30(b)(6) to educate its witness about actions taken by former employees of the corporation).

⁶ See *FDIC v. Amos*, No. 3:12CV548/MCR/EMT, 2014 WL 12516260, at *7 (N.D. Fla. May 30, 2014) (acknowledging topics required representative to sort through thousands of documents to prepare to testify on noticed topics); *State Farm Mut. Auto Ins. Co.*, 250 F.R.D. at 207-08 (permitting 30(b)(6) deposition although case involved thousands of documents and “no witness or series of witnesses can know each one of the documents”);

⁷ See, e.g., *Breeland v. Yale & Towne Mfg. Co.*, 26 F.R.D. 119, 120 (E.D.N.Y. 1960) (more than 200, including subdivisions); *Frost v. Williams*, 46 F.R.D. 484, 485 (D. Md. 1969) (200 interrogatories); *McLaughlin v. Fellows Gear Shaper Co.*, 102 F.R.D. 956, 959 (E.D. Pa. 1984) (112 interrogatories, “with additional hundreds of subparts”); *In re Shopping Carts Antitrust Litig.*, 95 F.R.D. 299, 301 (S.D.N.Y. 1978) (56 interrogatories equaling 191 questions, including subparts).

B. Rule 30(b)(6) Should Clarify That Topics Must Be Reasonable In Scope And Proportional To The Needs Of The Case.

In addition to presumptive limits on the number of topics, Rule 30(b)(6) should make clear that topics must be reasonable in scope and proportional to the needs of the case. “Reasonable particularity” currently serves as the only substantive gatekeeper for Rule 30(b)(6) notices, but courts have interpreted the requirements of “reasonable particularity” quite differently. Some courts have interpreted the standard to require that topics be reasonable in scope, and those courts have quashed notices where the corporation “could not reasonably designate and properly prepare a corporate representative to testify on its behalf with respect to this broad line of inquiry.”⁸ Other courts, however, have interpreted the “reasonable particularity” requirement to “merely require[] that the requesting party describe topics with enough specificity to enable the responding party to designate and prepare one or more deponents.”⁹ This interpretation gives license to aggressive counsel to propound topics of unlimited breadth and scope, as long as the topics are articulated with specificity.

C. Rule 30(b)(6) Depositions Should Be Subject To A Presumptive Seven-Hour Limit.

The Rule 30(b)(6) advisory committee notes provide: “For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition.”¹⁰ Based on this note, several courts have allowed multiple 30(b)(6) depositions, each for the presumptive limit of seven hours provided by Rule 30(d), on the basis that the clock “resets” each time a different corporate designee is deposed on different topics.¹¹

The current rule and advisory committee notes thereby penalize a corporation for designating multiple 30(b)(6) witnesses and incentivizes corporate litigants to cram relevant knowledge into a single witness, even if it might be more efficient to designate different representatives to address different topics based on their experience and expertise with the corporation.

⁸ See, e.g., *Murphy v. Kmart Corp.*, 255 F.R.D. 497, 506 (D.S.D. 2009) (refusing to enforce 30(b)(6) notice covering “a tremendous amount of information”).

⁹ See, 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); see also *Janko Enters., Inc. v. Long John Silver’s, Inc.*, No. 3:12-CV-345-S, 2014 WL 11152378, at *3 (W.D. Ky. Apr. 3, 2014).

¹⁰ Fed. R. Civ. P. 30 (2000 advisory committee notes).

¹¹ *Am. Home Assur. Co. v. Greater Omaha Packing Co.*, No. 8:11CV270, 2013 WL 4875997, at *1 (D. Neb. Sept. 11, 2013); *Patterson v. N. Cent. Tel. Co-op. Corp.*, No. 2:11-0115, 2013 WL 5236645, at *4 (M.D. Tenn. Sept. 17, 2013); see also *In Re Rembrandt Tech.*, No. 09-CV-00691-WDM-KLM, 2009 WL 1258761, at *14 (D. Colo. May 4, 2009) (holding “[a] blanket rule permitting a seven-hour deposition of each designated deponent is unfair” because it rewards overly broad, cumulative deposition notices).

Rule 30(b)(6) depositions should be subject to the presumptive seven-hour limit that applies to other depositions, even if multiple witnesses are designated in response to the notice. If a more extensive 30(b)(6) deposition is required in a particular case, the deposing party may seek leave of court to enlarge the deposition, just as parties may currently seek additional time for fact witness depositions if warranted by the circumstances.

II. Rule 30(b)(6) Should Be Amended To Include A Notice Requirement & Objection Process

Rule 30(b)(6), in its current form and in contrast to rules governing document requests and subpoenas, does not provide a clear framework for when depositions must be noticed or how a party may object to the notice.¹² Rather, district courts have created or endorsed different avenues for a party to protect itself from problematic Rule 30(b)(6) notices. For example, some courts have concluded that the only mechanism to challenge an overbroad or otherwise inappropriate Rule 30(b)(6) notice is through a motion for protective order because there is no objection procedure.¹³ Under this avenue, the recipient must raise its disputes regarding the notice with the court before the deposition occurs,¹⁴ and cannot, without facing the prospect of sanctions, refuse to provide the requested testimony at the deposition.¹⁵

¹² Cf. *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 242 F.R.D. 164, 165-66 (D. Mass. 2007) (“[T]here is no provision in the rules which provides for a party whose deposition is noticed to serve objections so as to be able to avoid providing the requested discovery until an order compelling discovery is issued... Put simply and clearly, absent agreement, a party who for one reason or another does not wish to comply with a notice of deposition must seek a protective order.”); *Bregman v. Dist. of Columbia*, 182 F.R.D. 352, 355 (D.D.C. 1998); see also *Beach Mart, Inc. v. L&L Wings, Inc.*, 302 F.R.D. 396, 405 (E.D.N.C. 2014) (“The proper procedure to object to a Rule 30(b)(6) deposition notice is not to serve objections on the opposing party, but to move for a protective order.”); *United Consumers Club, Inc. v. Prime Time Marketing Mgmt. Inc.*, 271 F.R.D. 487, 497-98 (N.D. Ind. 2010) (same).

¹³ See, e.g., *New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, 242 F.R.D. 164, 165-66 (D. Mass. 2007) (“Unlike the procedure with respect to interrogatories, requests for production of documents and requests for admissions, there is no provision in the rules which provides for a party whose deposition is noticed to serve objections so as to be able to avoid providing the requested discovery until an order compelling discovery is issued.”).

¹⁴ *Robinson*, 2013 WL 1776100, at *3 (“once a Rule 30(b)(6) deposition notice is served, the corporation bears the burden of demonstrating to the court that the notice is objectionable or insufficient. Otherwise, the corporation must produce an appropriate representative prepared to address the subject matter described in the notice.”)(emphasis original); *Int’l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc.*, No. 11-CV-02007-MSK-KLM, 2013 WL 627149, at *6 (D. Colo. Feb. 19, 2013) (“filing a pre-deposition motion is the appropriate course of action.”); see also *Espy v. Mformation Techs., Inc.*, 2010 WL 1488555, at *3 (D. Kan. Apr. 13, 2010) (same); *Knowledge A-Z, Inc. v. Jim Walter Res., Inc.*, 2008 WL 2600167, at *2 (S.D. Ind. June 25, 2008) (same).

¹⁵ *New England Carpenters*, 242 F.R.D. at 166 (“What is not proper procedure is to refuse to comply with the notice, put the burden on the party noticing the deposition to file a motion to compel, and then seek to justify non-compliance in opposition to the motion to compel.”); *William Beaumont Hosp. v. Medtronic, Inc.*,



Other courts have concluded that parties must not involve the court prior to the deposition.¹⁶ These courts find motions for protective order to be generally improper for addressing disputes with a Rule 30(b)(6) deposition notice,¹⁷ with some courts going so far as to declare motions for protective orders entirely inapplicable to relevance and overbreadth objections.¹⁸ Instead, under this avenue, courts advise that the responding party should assert objections to the notice, proceed with the deposition, and either provide the requested information despite the objections or refuse to do so and raise the issue in response to a motion to compel.¹⁹

Moreover, courts also disagree about whether “undue burden or expense” is equivalent to “overly broad/unduly burdensome,” creating an asymmetry between potential objections and

No. 09-CV-11941, 2010 WL 2534207, at *4-5, 9 (E.D. Mich. June 18, 2010) (granting sanctions when defendant objected to topic, did not prepare witness on topic, but moved for a protective order only shortly after depositions on agreed topics).

¹⁶ See, e.g., *F.D.I.C. v. Brudnicki*, No. 5:12-CV-00398-RS-GRJ, 2013 WL 5814494, at *2 (N.D. Fla. Oct. 29, 2013) (“The proper operation of [Rule 30(b)(6)] does not require a process of objection and court intervention prior to the deposition regarding disputed topic designations.”); *New World Network Ltd. v. W/V Norwegian Sea*, No. 05-22916-CIV, 2007 WL 1068124, at *4 (S.D. Fla. Apr. 6, 2007) (“the proper operation of the Rule does not require, and indeed does not justify, a process of objection and Court intervention prior to the schedule[d] deposition.”).

¹⁷ See *McMillan v. Dep’t of Corrs.*, No. 5:13-CV-292-WS-GRJ, 2015 WL 5169214, at *3 (N.D. Fla. Sept. 3, 2015) (“Defendants’ motion for protective order is not well-taken because it reflects a fundamental misunderstanding regarding the purpose of a Rule 30(b)(6) deposition and the Court’s role in resolving disputes arising in connection with such depositions.”); *Salzbach v. Hartford Ins. Co.*, No. 8:12-CV-01645-T-MAP, 2013 WL 12098763, at *2 (M.D. Fla. Apr. 19, 2013) (“a protective order is not the appropriate remedy for deciding relevancy of a topic before a 30(b)(6) deposition.”).

¹⁸ See *Lykins v. CertainTeed Corp.*, No. 11-2133-JTM, 2012 WL 3542016, at *4 (D. Kan. Aug. 16, 2012) (“because irrelevancy is not one of the enumerated grounds for a protective order under Rule 26(c), this Court has held that the validity of an objection to a Rule 30(b)(6) deposition notice on grounds of overbreadth or irrelevancy should be considered in the context of a motion to compel.”)(quotation omitted); *Direct Gen. Ins. Co. v. Indian Harbor Ins. Co.*, No. 14-20050-CIV-COOKE/TORRES, 2015 WL 12745536, at *1 (S.D. Fla. Jan. 29, 2015) (“In situations where a particular noticed topic is alleged to be outside the scope of Rule 26 discovery, . . . , the remedy is also clear and does not involve this Court preemptively reviewing arguments on relevance or overbreadth that may arise in a Rule 30(b)(6) notice[.]”)(emphasis original).

¹⁹ See *New World Network*, 2007 WL 1068124, at *4 (“the better procedure to follow for the proper operation of [Rule 30(b)(6)] is for a corporate deponent to object to the designation topics that are believed to be improper and give notice to the requesting party of those objections, so that they can be either resolved in advance or otherwise. The requesting party has the obligation to reconsider its position, narrow the scope of the topic, or otherwise stand on its position and seek to compel additional answers if necessary, following the deposition.”)(emphasis original).

moving for a protective order.²⁰ Accordingly, the lack of clarity creates confusion not only about the proper procedure for challenging a Rule 30(b)(6) deposition notice, but also about the standard to apply in adjudicating such disputes.

Similarly, Rule 30(b)(6) does not set forth how much notice a party must give an organization prior to the deposition. This omission can create unnecessary disputes among the party regarding reasonable notice and sufficient time to adequately prepare an appropriate witness. Such preparation is of paramount importance due to the complexities involved with a 30(b)(6) deposition. However, in the absence of a clear rule, courts have taken varying approaches to what length of time is considered “reasonable.”²¹

Rule 30(b)(6) should be amended to provide a uniform procedure for noticing a Rule 30(b)(6) deposition and for raising and resolving objections to such a notice. 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.²² 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 of whether the deposition notice provided sufficient time for the receiving party to respond and prepare.

The revised rule should adopt an objection and motion to compel procedure like that of Rule 45. Such a rule would provide a structure with which the courts and litigants are already familiar and which would provide the key components needed to challenging a defective Rule 30(b)(6) notice. For example, Rule 45(d)(2) establishes an early deadline for objecting, and it identifies steps available to both sides in the event the parties cannot reach resolution. Applying a similar mechanism to Rule 30(b)(6)—together with a 30-day notice requirement—would improve efficiency by, at very least, eliminating any legitimate disputes and motion practice over when or how challenges to a Rule 30(b)(6) deposition can be made. This process would also allow the parties to move forward with the Rule 30(b)(6) deposition on topics to which no objection is raised while the disputed issues are resolved. Accordingly, the parties could advance litigation where agreement is reached while also ensuring that parties do not need to engage in “contingent preparation” of Rule 30(b)(6) witnesses about topics that may or may not be included in the

²⁰ See, e.g., *Neponset Landing Corp. v. Nw. Mut. Life Ins. Co.*, 279 F.R.D. 59, 62 (D. Mass. 2011) (“While under some circumstances a protective order may have been the appropriate procedure, this court will not fault [a company] for preserving its objections to certain topics, producing a witness who addressed the large majority of designated topics without objection, and waiting until after the deposition to see if any remaining issues could be resolved without court intervention.”).

²¹ 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”).

²² 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).

deposition. Moreover, it is likely that the objection process may lead to negotiation of a mutually acceptable notice and list of topics through the meet and confer process; the objection process would help facilitate communication and cooperation between the parties, consistent with the 2015 discovery amendments.

III. The Language Of The Proposed Amendment May Lead To Increased Confusion And Litigation

The Proposed Amendment's language regarding the express conference requirements will likely lead to further disputes and litigation regarding the requirements of Rule 30(b)(6). Specifically, the Proposed Amendment's mandate to confer about "the identity of each person who will testify" will likely lead to litigation regarding the noticing party's standing to participate in the decision about who will testify and to resist the organization's decision if the noticing party would prefer a different witness. Such issues are already well settled.²³ Any ambiguity injected into these issues through the language of the Proposed Amendment is not only unnecessary, but harmful. The language will likely serve to exacerbate the contentious nature of many Rule 30(b)(6) depositions.

IV. Conclusion

Seyfarth Shaw appreciates the Committee's recognition of the issues that parties encounter in current practice relating to Rule 30(b)(6). Nevertheless, the Committee should **not** proceed with the Proposed Amendment as currently drafted, as it will potentially increase litigation over the new meet and confer requirements and does nothing to address the need for clarity or limitations. As set forth above, we urge the Committee to continue its work in this area and to enact substantive amendments to Rule 30(b)(6) that provide presumptive limitations on the number of topics, the scope of topics, and the number of hours provided in a Rule 30(b)(6) deposition as well as a clear

²³ Rule 30(b)(6) requires "the named organization" to designate one or more persons "to testify on its behalf." FED. R. CIV. P. 30(b)(6); *Resolution Tr. Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993) ("[Rule 30(b)(6)] places the burden of identifying responsive witnesses for a corporation on the corporation"). Because the Rule 30(b)(6) deponent speaks for the organization, the organization has complete discretion and responsibility for determining the identity of its representatives. See, e.g., *Quilez-Velar v. Ox Bodies, Inc.*, Civ. No. 12-1780(GAG/SCC), 2014 WL 12725818, at *1 (D.P.R. Jan. 3, 2014) ("the noticed corporation alone determines the individuals who will testify on those subjects. What the discovering party simply cannot do is require that a specific individual respond to a Rule 30(b)(6) notice."); *Colwell v. Rite Aid Corp.*, No. 3:07cv502, 2008 WL 11336789, at *1 (M.D. Penn. Jan. 24, 2008) ("Nothing in the rule indicates that the party seeking the deposition can determine the identity of the person to be deposed."); *Booker v. Massachusetts Dept. of Public Health*, 246 F.R.D 387, 389 (D.Mass. 2007) ("Plaintiff may not impose his belief on Defendants as to whom to designate as a 30(B)(6) witness."). Indeed, courts have held that, because the witness is not speaking to his or her personal knowledge, the organization need not disclose the name of the witness in advance of a Rule 30(b)(6) deposition because the identity of the witness is "irrelevant." See, e.g., *Cruz v. Durbin*, No. 2:11-CV-342-LDG-VCF, 2014 WL 5364068, at *8 (D.Nev. Oct. 20, 2014) ("the Rule 30(b)(6) deponent's name is irrelevant. Rule 30(b)(6) deponent[s] testify on behalf of the organization. See FED.R.CIV.P. 30(b)(6). Therefore, the court denies Cruz's motion to compel with regard to the identify of Wabash's Rule 30(b)(6) deponent because it seeks irrelevant information.").

notice and objection process. We believe such amendments would provide greater clarity, transparency, and proportionality in the process and would significantly reduce the costs and burdens associated with current Rule 30(b)(6) practice.

Sincerely,

SEYFARTH SHAW LLP


Julie G. Yap

JGY:ljm

TAB 29

TESTIMONY OF

HASSAN A. ZAVAREEI
TYCKO & ZAVAREEI LLP

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

January 24, 2019

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

Dear Committee Secretary and Members:

I appreciate the opportunity to present testimony regarding the Proposed Amendments to Rule 30(b)(6), and commend the Advisory Committee for its efforts at drafting amendments that are fair, balanced, and address many of the concerns raised during the informal comment period.

My comments are informed by 23 years of experience as a civil litigator, including seven years at Gibson, Dunn & Crutcher LLP and 16 years as a partner at Tycko & Zavareei LLP, a private public interest law firm that represents a wide range of clients, including individuals fighting for their civil rights, consumers seeking redress for unfair business practices, whistleblowers exposing fraud and corruption, and non-profit entities and businesses facing difficult litigation.

Throughout my years in litigation, I have taken and defended many 30(b)(6) depositions, and have become familiar with the challenges they often present. 30(b)(6) depositions are an essential tool for eliciting crucial information regarding entities' structure, leadership, policies, and practices. The information obtained from a 30(b)(6) deposition can lay the groundwork for all future discovery, and in the class action context, can be determinative with respect to whether a class is ultimately certified. Thus, it is vital that any amendments to Rule 30(b)(6) be carefully crafted to achieve a fair balance between the interests of noticing and responding parties. Based on my experience, I believe that requiring advance notice of the identity of witnesses will make the discovery process more efficient, transparent, and fair. Further, I believe that requiring the parties to confer regarding the number of matters for examination will distract from the ultimate goal of 30(b)(6) depositions by creating unnecessary conflict and delay.

I. Requiring Advance Notice of the Identity of Witnesses Will Advance the Discovery Rules' Goal of Promoting the Fair, Speedy, and Just Resolution of Cases.

Requiring parties to confer regarding the identity of witnesses will maximize the usefulness of depositions by allowing noticing parties to focus their questions appropriately. For instance, a



noticing party that is informed in advance of a witness's identity may be able to simply confirm the witness's background, experience, and position before quickly moving on to more substantive topics. Relatedly, a noticing party that has at least some basic information regarding the witness's role at the company may be more inclined and/or able to limit its inquiry to the topics and documents that are most essential.

Notably, entities may, and often do, designate multiple 30(b)(6) witnesses. When this occurs, noticing parties are especially hindered by not knowing the identity of each witness, as they cannot direct their questions towards the witness who may be most qualified to answer. This leads to longer and less effective depositions, as well as frustration on the part of both parties. Further, from a purely practical perspective, when a witness is designated as both a 30(b)(6) corporate witness and a 30(b)(1) individual witness, the parties cannot coordinate in advance regarding scheduling and travel unless the identity of witness is disclosed.

Requiring advance notice of the identity of witnesses will also help prevent common abuses of the discovery process. For instance, corporations often designate witnesses that lack knowledge on the relevant subject matter in order to cause delay and put financial pressure on relatively under-resourced plaintiffs. Corporations also frequently designate unqualified witnesses in order to gain insight into plaintiffs' deposition strategy so that future, more qualified witnesses may benefit from this knowledge. Finally, corporations regularly fail to disclose the identity of their witnesses until just before a deposition is scheduled to occur, thus depriving the noticing party of the ability to adequately prepare. All of these tactics increase the cost and delay associated with depositions and unfairly burden the noticing party.

To ensure that Rule 30(b)(6) continues to promote the important goals of fairness and efficiency, the Rule must contain a requirement that the identity of witnesses be disclosed in advance.

Some of the comments submitted in response to the Proposed Amendments argue that the witness disclosure requirement will allow noticing parties to block witnesses they perceive to be particularly effective spokespeople for their organizations. This concern is without merit. The text of the Proposed Rule explicitly states that a 30(b)(6) witness is a person that "the organization designates" to testify. The Draft Committee Note further clarifies that "the named organization ultimately has the right to select its designees." Indeed, a party's choice of 30(b)(6) witness is solely within its own discretion and control, and the noticing party may not dictate in any way who the witness should be. If removing the word "ultimately" will help allay concerns and/or reduce confusion regarding who the choice of witness belongs to, the Committee should consider doing so.



II. Requiring Parties to Confer Regarding the Number of Matters for Examination Will Distract from the Substance of Depositions and Create Unnecessary Conflict

Requiring parties to discuss in advance the number of topics for examination will allow corporations to obstruct noticing parties' reasonable requests by creating an opening for the noticed party to argue that the noticing party is asking for too much. In reality, the number of relevant deposition topics will vary widely from case to case. For instance, the complexity or procedural posture of a particular case may necessitate a more searching inquiry. Additionally, it is often necessary for noticing parties to ask unanticipated follow-up questions during the course of a deposition, especially when faced with an uncooperative witness. Requiring a discussion of the number of topics for examination beforehand will provide corporations with an opportunity to object to such questions on the basis that they will increase the number of topics beyond that which was previously agreed upon. Relatedly, requiring parties to discuss numbers in advance will invite unnecessary gamesmanship. A list of ten topics can be easily manipulated into five broader topics, or fifteen more specific topics, for instance.

Given that noticing parties already "must describe with reasonable particularity the matters for examination," the requirement to confer regarding numbers is redundant, elevates form over substance, and encourages parties to focus on arbitrary and meaningless metrics.

* * *

Thank you for your time and attention, and please do not hesitate to contact me should you need any additional information.

Respectfully Submitted,

Hassan A. Zavareei

TAB 30

COMMENT OF

TERRENCE M. R. ZIC
WHITEFORD, TAYLOR & PRESTON LLP

WHITEFORD, TAYLOR & PRESTON L.L.P.

TERRENCE M. R. ZIC
PARTNER
DIRECT LINE (301) 804-3612
DIRECT FAX (301) 215-6359
TZic@wtplaw.com

7501 WISCONSIN AVENUE, SUITE 700W
BETHESDA, MARYLAND 20814
MAIN TELEPHONE (301) 804-3610
FACSIMILE (301) 215-6359

BALTIMORE, MD
BETHANY BEACH, DE*
BETHESDA, MD
COLUMBIA, MD
DEARBORN, MI
FALLS CHURCH, VA
LEXINGTON, KY
PITTSBURGH, PA
ROANOKE, VA
TOWSON, MD
WASHINGTON, DC
WILMINGTON, DE*

WWW.WTPLAW.COM
(800) 987-8705

December 28, 2018

VIA ELECTRONIC MAIL

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

Re: Invitation for Comment on Preliminary Draft of Proposed Amendment
to Rule 30(b)(6)

Dear Committee Members:

I write to respectfully urge you to reconsider the proposed amendment to Federal Rule of Civil Procedure 30(b)(6) put forth by the Civil Rules Advisory Committee ("Advisory Committee"). Although well-intentioned, the portion of the proposed amendment requiring parties to confer in good faith "[b]efore or promptly after the notice or subpoena is served, and continuing as necessary" about the "identity of each person the organization will designate to testify"¹ will inadvertently increase the volume of discovery disputes, thus taxing valuable judicial resources.

This outcome will likely arise for two reasons: (1) requiring the parties to confer on the identity of corporate representatives could be construed as giving the party seeking a 30(b)(6) deposition license to request witnesses other than those chosen by the organization; and (2) the proposed amendment will impose costly and unnecessary logistical burdens on organizations that are not in a position to identify the most suitable 30(b)(6) witness immediately after a notice or subpoena is served.

The current language of the proposed amendment invites the party seeking a 30(b)(6) deposition to construe it as giving them license to demand witnesses other than those selected by the organization from which a deposition is sought. Although the Advisory Committee has

¹ Draft Amend. to Fed. R. Civ. P. 30(b)(6).

reaffirmed that the “choice of the designees is ultimately the choice of the organization,”² the current language of the proposed amendment still appears to invite some input by the party seeking discovery, threatening to upend settled law.³

Multiple rationales underpin the well-established precedent that the organization from which a deposition is sought selects the witness(es) who will testify. For one, because corporate knowledge “lies within the organization,” it is the organization that is uniquely positioned to “identify and designate a witness who is knowledgeable on the noticed topic[.]”⁴ Second, and relatedly, giving the organization the “benefit of choosing and preparing its deponent” avoids needless delay and inefficiencies and furthers the overall purpose of Rule 30(b)(6), which is to streamline discovery.⁵ Third, and perhaps most critically, given the potentially binding nature of corporate representative testimony, it would be inherently unfair for the party seeking discovery to have *any* role in selecting a 30(b)(6) witness. To do so would run counter to the fact that it is the *responding party alone* who is accountable if a witness cannot satisfactorily testify about responsive information known or reasonably available to the organization.⁶ For all of these reasons, the identity of a 30(b)(6) witness should remain solely the choice of the organization being deposed. Unfortunately, the current ambiguous language of the proposed amendment threatens to upend this important precept.

There is also a common-sense practical issue with the current language of the proposed amendment. Because parties appear to be simultaneously required to meet and confer on both the scope of the noticed topics *and* the identity of the witness(es) before disputes regarding the scope of a notice can be resolved, organizations will frequently be forced to essentially guess as to the most appropriate witness. Selecting a 30(b)(6) witness (or witnesses) is not a simple matter. Again, the *organization alone* is accountable if a witness cannot satisfactorily testify

² Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, at 292.

³ See, e.g., *Folwell v. Hernandez*, 210 F.R.D. 169, 172 (M.D.N.C. 2002) (“One of the most important consequences of Rule 30(b)(6) is that under it, only the corporation selects the persons who will testify”); *Grahl v. Circle K Stores, Inc.*, No. 2:14-cv-305-RFB-VCF, 2017 WL 3812912, at *4 (D. Nev. Aug. 31, 2012) (corporation has “the benefit of choosing and preparing its deponent”); *Apple Inc. v. Samsung Electronics, Co.*, No. C 11-1846 LHK (PSG), 2012 WL 1511901, at *2 (N.D. Cal. Jan. 27, 2012) (“the purpose served by Fed.R.Civ.P. 30(b)(6)” is “to require an organization to identify and designate a witness who is knowledgeable on the noticed topic”); *Thompson v. Kawasaki Heavy Indus., Ltd.*, 291 F.R.D. 297, 304 (N.D. Iowa 2013) (“the corporation itself selects the deponent who will speak for it”); *Thermolife Int’l, LLC v. Vital Pharm., Inc.*, No. 14-61864-CIV-ZLOCH, 2015 WL 11197783, at *1 (S.D. Fla. Oct. 5, 2015) (“[T]he party seeking discovery under [30(b)(6)] is not permitted to insist that it choose a specific person to testify . . . the corporation has the obligation to select the individual witness”) (internal quotations and citations omitted).

⁴ *Apple*, 2012 WL 1511901, at *2.

⁵ *Grahl*, 2017 WL 3812912, at *4.

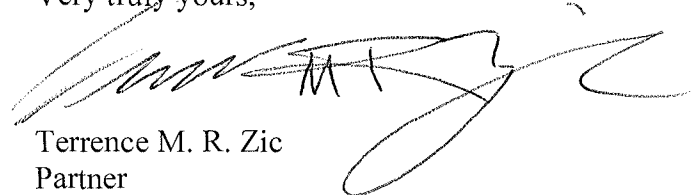
⁶ See *Thompson*, 291 F.R.D. at 304 (testimony “bind[s]” the corporation because “the corporation itself selects the deponent who will speak for it and has the opportunity to prepare the deponent to testify to matters beyond his or her personal experience”).

about responsive information known or reasonably available to the organization.⁷ Therefore appropriately selecting and dutifully preparing 30(b)(6) witness(es) requires significant time, effort, and resources. In the type of complex serial litigation I handle, this process can take months.

Under the language of the proposed amendment, an organization would have to confer with the serving party about the identity of a witness “[b]efore or promptly after” the 30(b)(6) notice or subpoena is served.⁸ Some courts may construe this as imposing an affirmative obligation on the organization to disclose the name of the selected witness early in the meet-and-confer process before the scope of the notice can be resolved, or even before the organization has had a fair opportunity to review the relevant documents and materials pertaining to the topics set forth in the notice or subpoena. In either scenario, the organization is not given a reasonable opportunity to select the most suitable 30(b)(6) witness consistent with its obligations. And, contrary to the Advisory Committee’s stated hope,⁹ the addition of the phrase “and continuing as necessary” may not alleviate an increase in disputes regarding the proper timing of witness selection and disclosure. If the party seeking the deposition believes that the language of the proposed amendment bestows the right to receive the identity of a witness very early in the meet-and-confer process, the continuing requirement to meet and confer will not resolve the issue.

In sum, the current language of the proposed amendment will inadvertently lead to an increase in needless discovery disputes surrounding the identification and selection of 30(b)(6) witnesses, exacerbating what is already a frequently acrimonious and difficult process. This potential harm, counter to the stated goals of the Federal Rules of Civil Procedure – fairness and efficiency¹⁰ – can be mitigated by the removal of the requirement that parties must confer about the identity of 30(b)(6) witnesses.

Very truly yours,



Terrence M. R. Zic
Partner

TMZ:sle

⁷ See *Id.*; see also Fed. R. Civ. P. 30(b)(6) (“The persons so designated shall testify as to matters known or reasonably available to the organization”); *Alexander v. F.B.I.*, 186 F.R.D. 137, 141 (D.D.C. 1998) (“the designating party has a duty to prepare the witness to testify on matters not only known by the deponent, but those that should be reasonably known by the designating party”).

⁸ Draft Amend. to Fed. R. Civ. P. 30(b)(6).

⁹ See Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, at 292.

¹⁰ See Fed. R. Civ. P. 1.

TAB 31

COMMENT OF

THOMAS C. REGAN
LECLAIRRYAN



January 25, 2019

David G. Campbell, Chair
Committee on Rules of Practice and
Procedure of the Judicial Conference of the
United States
Submitted electronically to
<https://www.regulations.gov/docket?D=US>
C-RULES-CV-2018-0003

Re: Proposed changes to F.R.C.P. 30(b)(6)
Procedure for Conducting Depositions of Corporate Representatives

Dear Mr. Campbell:

I am a Member of LeClairRyan, an AmLaw 200 firm employing approximately 300 attorneys in 25 offices in 14 states. I serve the Firm as a practicing attorney familiar with both state and federal practice in 3 states (New Jersey, Pennsylvania, and Tennessee), as the partner in charge of the New Jersey and Philadelphia, Pennsylvania offices, and as the Practice Area Team Leader for the Products Liability and Transportation team that comprises approximately 40% of the litigation group. I am slated to become the Litigation Department Leader before the end of the quarter.

We have followed with interest the Committee's two year process for amending the Rule in an effort to improve workflow and reduce delay associated with the production of corporate representatives for deposition. There are few experienced practitioners in the federal courts who would disagree with the need for amendment. The current rule is divisive and is far less explicit than other civil rules. The sheer frequency with which this rule is used begs for amendment and clarity.

The federal courts have done yeoman's work in attempting to fill the gaps in the current rule. Local rules of practice and a strong Magistrate Judge can prevent many disagreements from getting out of control. However, amending the rule to prevent the disagreements in the first place is an excellent use of the Committee's time. We thank the Committee for its hard work in attempting to create a better framework. Still, we believe some of the changes proposed are ill-fated, while some changes that were not

E-mail: Thomas.Regan@leclairryan.com
Direct Phone: (973) 491-3360
Direct Fax: (973) 491-3569

1037 Raymond Boulevard, Sixteenth Floor
Newark, New Jersey 07102
Thomas C. Regan, Attorney In Charge
Phone: (973) 491-3600 \ Fax: (973) 491-3555

included would be more conducive to the stated purpose of the Committee. Below, we outline where we believe the Committee's good faith efforts will actually cause more disagreement than they resolve and where we believe the Committee's amendment proposal could better further its goals.

I. Introduction.

As a preface to our suggestions below, we would like to provide the benefit of our own experience in the federal courts as it relates to Rule 30(b)(6). Like most rules, 30(b)(6) works well in a significant percentage of civil cases filed in the federal courts. Although the system is adversarial, our colleagues in the bar take their oaths of professionalism and duties of courtesy to heart. Further, most cases filed before the federal courts are of such value that gamesmanship and nitpicking do not carry a return on investment, and so the process of choosing a corporate representative for deposition often proceeds without significant interference. However, a not insignificant portion of the cases filed in the federal courts do face obstacles in the smooth development of discovery through a corporate witness.

The federal courts are open to practice to attorneys licensed in the jurisdiction, and thus the bar in those courts run the gamut from very inexperienced to veterans of years of practice before the courts. We are concerned that the changes to the rule proposed will invite gamesmanship and actually cause more disagreements than they prevent. We believe this to be so regardless of what category of experience plaintiff's counsel falls into, because the rule both expands the ability of a veteran practitioner to attempt to influence the choice of witness and suggests to the inexperienced practitioner that he or she may do so. Further, the lack of finality to the rule, coupled with the lack of notice requirements and connections to the other related rules, raises the concern of multiple, additional touchpoints required to involve the court in mediating a dispute between counsel over what can be a very simple process.

II. Change to Meet and Confer Requirement Invites Gamesmanship.

a. Requiring Parties to Meet and Confer Regarding Identity of Witnesses.

The Committee clearly considered the issues related to the meet and confer requirements inserted into the rule. Respectfully, while those considerations are evident from the language of the rule, including a meet and confer requirement regarding the identity of the witnesses while simultaneously reminding counsel in the Rule and the Committee Note that the choice of witness ultimately lies with defense counsel producing the witness is internally inconsistent and is likely to immediately cause

issues. The Committee tried to implement the change without upsetting well-settled law in every Circuit, but imposing this requirement is a radical mandate of change that can only lead to disagreement and gamesmanship.

What purpose is served by forcing defense counsel to discuss with counsel for the plaintiff (or noticing party) the identity of the witness to be produced, if in the end it is defense counsel's¹ choice regardless of that discussion? Counsel is required under the amendment to meet and confer in good faith. Given the statements in the current and proposed rule and the Committee Note that the choice of witness remains exclusively with defense counsel, it calls into question what conduct would qualify as bad faith, so long as the witness identified is the witness produced, even over the most vociferous of objections from the noticing party.

Introducing the identification of the 30(b)(6) witness into the meet and confer requirement also creates an illusory leverage point during the meet and confer process. For example, if there is a legitimate negotiation to be undertaken on a specific category of inquiry, we foresee some counsel would attempt to leverage that issue in order to elicit a concession on the identity of the corporate witness. The fact that the witness produced need not be agreed upon does not prevent it from being leveraged by the other side. We believe the inconsistency in the language, and the fact that inserting the identification in this process is such a radical change, combine to invite this kind of behavior.

The Draft Committee Note suggests that "discussion about the identity of persons to be designated to testify may avoid later disputes," but it seemingly ignores the present disputes it is creating. Admittedly, if there is agreement reached in the meet and confer process regarding the identity of witnesses, it will "avoid later disputes" regarding that person's identity. However, it will not prevent a later dispute if adverse counsel believes the person produced was inadequately prepared to respond to the list of matters for examination or was not the person most qualified to so respond, thus providing an inferior level of information than what was requested. It will also generate more disputes at the beginning of the process, which are perhaps not present in the current iteration of the rule.

What is absent from the reporting, in our view, is why the topic of the identity of the witnesses should be present in the meet and confer requirement at all. Indeed, the

¹ For the purposes of this letter, the term "defense counsel" is intended to mean counsel for the party producing the witness pursuant to FRCP 30(b)(6). We recognize that in commercial litigation and other contexts, a notice under the rule might be served on plaintiff or a non-party, but we landed on "defense counsel" for ease of use.

only relevant gain from adding this requirement that we can see is for the preparation of the noticing party to take the deposition of the specific witness. Research into the background of the witness could potentially reveal bias or other information that would not otherwise be available to the questioner if the identity of the witness were not discussed in advance. The rule in this regard falls short of its intention in two ways. First, a 30(b)(6) witness is produced in order to answer questions for the company. That witness' personal information should be less relevant than a fact or expert witness would be. Indeed, at its core, the 30(b)(6) witness *is* the company, and so the particular witness chosen should largely be irrelevant, so long as the witness can dutifully answer the questions posed in the categories agreed upon in the meet and confer process. Second, assuming the policy behind the change to the rule is legitimate, the same information can be conveyed in a notice in response. Changing the rule to require a certain time period's notice to the other parties of the identity of the witness who will be produced would resolve the issue of forcing the noticing party to prepare in the dark and prevent the implicit suggestion that the noticing party has some control over who is produced.

b. Failure to Limit the Meet and Confer Requirement.

Once again, having reviewed the May 11, 2018 Report of the Advisory Committee, it is clear that the Committee engaged in a thoughtful process in noting that it may require more than one conference call or meeting to resolve the issues related to the topics to be discussed and the identity of witnesses. We agree that having more than one conference may (perhaps counterintuitively) lead to a more efficient process. Often, when a FRCP 30(b)(6) notice is received, there are either many topics to be covered that will require more than one witness or, as is often the case with less experienced practitioners, one or more topics that are so hopelessly broad, it is impossible for defense counsel to reasonably respond with an appropriately prepared witness or witnesses. Likewise, an initial discussion may prove fruitful in identifying more specific categories of information, some of which may not be within the knowledge of any corporate witness. The iterations of such notices through a meet and confer process would certainly be a more efficient use of time than trying to respond in a single meeting to all the issues that might arise. It is anathema to the process to assume that defense counsel will have all of the information needed to properly assess whether the company has the requisite knowledge to respond in the context of a deposition. We therefore fully agree that more than one meet and confer conference should be anticipate by the rule.

Simply, we believe that the "continuing if necessary" language chosen has the possibility of breeding endless conversation without any clear delineation of when the

good faith requirement to meet and confer ceases. Largely, this issue relates more to the above requirement of conferring on the identity of the witnesses than it does the categories of inquiry. We anticipate, for example, that continued objections to the chosen individual(s) would lengthen this process, and that the “continuing if necessary” language can be leveraged by either inexperienced or exploitative counsel to interfere with the process. We recommend, therefore, that the language reflect that the meet and confer requirement should continue until either agreement or an impasse is reached *as to the categories of inquiry*, and that, if no changes are made to the section regarding identity of witnesses, that the language reflect that the requirement terminates when the witnesses are chosen by defense counsel. Such a change as to the identity of witnesses would further reinforce the notion that defense counsel is exclusively responsible for choosing the witness or witnesses, and that such decision is not the subject of debate and discourse, either at the outset or “continuing if necessary.”

III. Missing Changes Would Foster Fewer Disagreements.

a. Clear Notice Requirements Are Needed.

The amended Rule 30(b)(6) continues to maintain the absence of any notice requirement within the rule. More often than not, this issue can be worked out through counsel, particularly if short notice is provided for reasons that are readily apparent to all involved, such as a court order allowing only a brief extension of time. However, the lack of a presumptive notice requirement is often the cause of significant consternation right at the outset of the process.

We have personally experienced 30(b)(6) notices that contained dozens of lines of inquiry and gave only ten days’ notice of the scheduling of the deposition. Simply determining the universe of who the relevant witnesses could be can take longer than ten days. The new rule now adds the meet and confer requirement that will “continue if necessary” on categories and identification, but it still provides no notice requirement. Without a clear requirement, there is no balance for the work involved. The noticing party need only fire off the 30(b)(6) notice and respond to a meet and confer inquiry, and it can cause havoc for the adversaries who have no recourse other than filing a motion for a protective order. If the rule, as amended, included a presumptive notice requirement of 30 days, which would match up with other such requirements in the FRCP, e.g. FRCP 33, 34 and 36, it would ease that imbalance, be cognizant that a 30(b)(6) notice adds a level of complexity because the witness needs to be located, and continue the laudable theme throughout the rules that the discovery process is intended to be fair to all litigants.

b. Clear Links to Other Rules Are Needed.

Perhaps the ramification of Rule 30(b)(6) that is the least consistent in application and leads to the most confusion is the lack of reference to the presumptive limits on the number and duration of depositions contained in Rule 30(d). Rule 30(d) sets forth that a deposition is limited to seven hours in duration, absent leave of court. The Committee Note provides that each person designated by the company should be considered a separate deposition for purposes of the durational limit. The proposed amended rule does not change the absence of specific reference in 30(b)(6) to 30(d), despite the Note's change to the rule.

The approach outlined in the Committee Note penalizes the corporation for designating specialized witnesses. Rather than easing the burden of discovery, this approach instead incentivizes the company to present a single, omnibus witness who may not be in the best position to provide meaningful testimony.

We urge the Committee to make clear that the durational limits in Rule 30(d) apply to depositions noticed under Rule 30(b)(6). Parties benefit from more targeted depositions of people from the company with more specialized knowledge. If the sheer number of categories results in the number of witnesses becoming unwieldy, Rule 30(d) already provides the solution in that the durational limit is presumptive, "unless otherwise stipulated or ordered by the court."

Finally, on this topic, we urge the Committee to proscribe questioning that relates to the materials reviewed in anticipation of the deposition or the legal contentions of the company. This type of questioning, in the context of a 30(b)(6) deposition, is far more akin to the questioning of an expert than it is a percipient witness. While a corporate representative may be the person most knowledgeable regarding a particular topic (like an expert), it is likely that the witness relied on documents that were collected and presented by counsel. The Third Circuit determined in *Sprock v. Peil*, 759 F.2d 312, 318 (3d Cir. 1985) that "proper 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 influence and needless interference." Questions leading down this path are undoubtedly intended to reveal this strategy, either directly or in the negative space of documents that were omitted. Similar to the preclusion on discovery of consulting experts and draft expert reports in Rule 26, Rule 30(b)(6) should protect work product from such inquiries in the context of the deposition of a corporate representative.

c. Procedure for Lack of Knowledge.

Finally, Rule 30(b)(6) lacks a clear process for objecting to the notice, particularly in instances where the corporation lacks the knowledge required to adequately respond to some or all of the categories in the notice. The only avenue in the rules in this situation is motion practice, but courts are split on whether that should occur as a motion for a protective order before the deposition (e.g. West Virginia and Colorado) or as an objection to a subsequent motion to compel (e.g. Florida.) This circumstance creates a trap for the unwary, particularly in cases where the noticing party has taken advantage of the Rule's lack of notice requirements.

Under the current scheme, in the absence of a protective order, what will often happen is someone within the company will be designated as the corporate witness. He or she will be presented in response to the 30(b)(6) notice after reviewing whatever corporate records are still available and attempting to digest the information. In essence, Rule 30(b)(6) will operate to force the company to create a witness or face sanctions for not responding to the notice. Indeed, this scenario also leads to arguments that the witness is not the correct person or does not have the requisite knowledge to be an appropriate witness.

Rule 30(b)(6) can cut through this issue by permitting a company receiving a notice to respond to it, when it has no witness who can reasonably and meaningfully testify as to the facts sought, by forwarding the documents upon which the witness would likely rely and certify that the documents represent the universe of knowledge that is currently in the company's possession, custody and control. No purpose is served by essentially having a company employee recite information that is only in the documents being relied upon.

Conclusion.

The federal courts provide consistency across jurisdiction that more and more leads to attorneys crossing state lines to protect their clients in federal court. The consistency of the rules is imperative to ensuring that the fairness afforded by the federal courts is available to foreign defendants.

It is not difficult to imagine the following scenario where counsel for a corporation who is resident and normally practices in Florida, where no objections to a 30(b)(6) notice is permitted before the deposition, handling a matter in federal court in West Virginia or Colorado, where case law requires a motion for a protective order to be filed before the deposition, being served with a Rule 30(b)(6) notice with 60 categories of inquiry for a deposition that is set to occur in seven days. With the proposed changes to Rule 30(b)(6), within that week:

- Deliver the notice to the client and confer with the client concerning the originally proposed topics to be covered and what witness or witnesses might be appropriate,
- Marshal the documents to be used to prepare the witness for deposition, based on the categories that are in flux, because counsel also must,
- Meet and confer on the topics included in the notice, including any topics for which the company has no witness with knowledge,
- Return to the client, assuming some agreement has been reached on the topics, to determine who the proper corporate representatives should be,
- Meet and confer again with counsel on the identity of the corporate representatives, *and continuing if necessary*, particularly on the topics for which the corporation has no person with knowledge or the representatives chosen, even though the noticing party has no say in the representatives chosen,
- File a motion for a protective order before the deposition in order to limit the categories for which there is no witness and/or are irrelevant or otherwise improper,
- Likely file a motion to stay the deposition notice until such time as the motion for a protective order is decided,
- Argue the motion for a protective order, including references to the fact that no witness with knowledge of certain topics exists, with no guarantee that it will carry the day,
- Prepare the witness(es) for the deposition without any protection of the work product required to do so,

- Appear for and defend the depositions, up to 7 hours for each designated representative, even if that representative is doing nothing more than reading from the documents.

The rules are not solely designed to protect noticing parties, any more than they are designed to only be implemented by the AmLaw 100 or 200. The above list of action items does not include, for example, arranging for transportation to and from the site of the deposition, re-arranging schedules of other appearances in other cases or lawyers to cover those appearances, or any of the other myriad things that would be required in order to drop everything and apply the resources required to get everything on that list done in a week. And it assumes a level of available headcount that is not necessarily accurate.

The above is an admittedly contrived scenario, but it is neither impossible nor particularly unlikely to occur. We are all in agreement that Rule 30(b)(6) is in need of amendment. Unfortunately, despite the hard work of the Committee, there is more work that needs to be done to effectuate a fair revision of the Rule that responds to the various concerns that the current version raises.

We thank the Committee for the opportunity to respond to the proposed amendments to the rule and for its hard work in reviewing the rule and proposing a solution.

Sincerely,

Thomas C. Regan
Attorney at Law

TAB 32

COMMENT OF

DYKEMA GOSSETT PLLC



Dykema Gossett PLLC
1301 K Street NW
Suite 1100 West
Washington, DC 20005

WWW.DYKEMA.COM

Tel: (202) 906-8600

Fax: (202) 906-8669

Terri S. Reiskin

Direct Dial: (202) 906-8609

Direct Fax: (855) 216-7884

Email: TReiskin@dykema.com

January 28, 2019

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

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

Dear Members of the Civil Rules Advisory Committee:

The following comments are respectfully submitted on behalf of Dykema Gossett PLLC, a national law firm with offices and over 100 litigators in California, Illinois, Michigan, Minnesota, Texas, and the District of Columbia.

I have been litigating cases in federal courts around the country for more than thirty years. I concentrate on product liability litigation, including individual cases and class actions. I have served as national, regional and local counsel, including in MDLs, and have tried more than a dozen cases to verdict. I have responded to Fed. R. Civ. P. 30(b)(6) notices on behalf of numerous corporate clients, and have been involved in negotiating topics, drafting objections, motions practice, and preparation and presentation of Fed. R. Civ. P. 30(b)(6) witnesses on many occasions.

The Firm's comments are not provided on behalf of any particular client, but, rather, reflect my own observations and those of many of my litigation partners, who frequently represent organizational parties in a variety of types of litigation, including class action, commercial, and tort cases. The Firm opposes the proposed amendment to Fed. R. Civ. P. 30(b)(6) in its entirety and submits that if the Committee is to undertake the potentially disruptive step of amending the organizational deponent rule, it should do so in a manner that is scrupulously fair to plaintiffs and defendants, and addresses the very real problems the Rule raises, rather than creating new ones. The proposed amendment is a solution in search of a problem, and does nothing to address the real issues with the Rule.

On February 8, 2019, I will be testifying before the Advisory Committee on Civil Rules on the proposed amendments. My testimony will be based on the comments set forth below.

A. Fed. R. Civ. P. 30(b)(6) was intended to bind an organization to answers under oath via a human “spokesperson,” not to elicit testimony based on firsthand knowledge.

Fed. R. Civ. P. 30(b)(6) was added in 1970 as part of a general overhaul of deposition procedures in the context of liberalizing civil discovery. Modeled closely on a Canadian rule, it was described as “an added facility for discovery, one which may be advantageous to both sides as well as an improvement to the deposition process.”¹ The intent was to improve the process of deposing an organization by:

- Relieving a requesting party of the burden of identifying the correct witness in an organization² and reducing the possibility of unintentionally taking the deposition of a person who lacked managerial capacity, i.e., the capacity to bind the organization;³
- Eliminating the ability of an organization to field multiple managerial personnel who might each in turn disclaim knowledge of facts clearly known by someone within the organization (“bandying”);⁴
- Protecting organizations from excessive depositions of managerial personnel driven by a lack of knowledge of who precisely should be deposed;⁵ and
- Overriding decisions of some federal courts to the effect that a company should not be burdened with identifying someone to speak for it.

On balance, Fed. R. Civ. P. 30(b)(6) is intended to “streamline” discovery.⁶

The rule has been untouched for almost 50 years, though almost everything else about civil litigation has changed greatly in that time span. As formulated at the beginning – and now – the rule sets forth a mechanism by which the party seeking information states subject matters “with

¹ Advisory Committee Note to 1970 Amendment to Fed. R. Civ. P. 30., cited by 7 Moore’s Federal Practice - Civil § 3.03 (Matthew Bender, 2018).

² *Id.*; see also David J. Blair, *A Guide to the New Federal Discovery Practice*, 21 Drake L. Rev. 58, 67-68 (1971).

³ *Id.*

⁴ *Id.*; see also *Federal Deposit Insur. Co. v. Butcher*, 116 F.R.D. 196, 199 (E.D. Tenn. 1986).

⁵ William B. Jones, *Proposed Amendments to Rules 30, 33, 34 & 37, Federal Rules of Civil Procedures*, 1968 A.B.A. Sec. Ins. Negl. & Comp. L. Proc. 595, 597 (1968).

⁶ *Resolution Trust Corp. v. S. Union Co., Inc.*, 985 F.2d 196, 197 (5th Cir. 1993).

reasonable particularity," and the responding party "must designate one or more officers, directors, or managing agents, or designate other people who consent to testify on its behalf."⁷ This last clause is particularly significant because it allows any person (assuming he or she will cooperate) to act as the spokesperson for the organization. This same language recognizes that just as an organization (depending on its type) may be an artificial person under the law, a 30(b)(6) witness may be a "synthetic" witness: one who may have to be educated – even from zero – on the subject matters in the notice of deposition.

Fed. R. Civ. P. 30(b)(6) gives the requesting party the opportunity to understand an *organization's*

- knowledge of, and positions on, the subjects in the notice;⁸
- interpretations of facts, its subjective beliefs, and its opinions;⁹ and
- interpretations of documents and events on behalf of the corporation.¹⁰

Under Fed. R. Civ. P. 30(b)(6), the responding party must provide someone who can answer the questions.¹¹ Because this person speaks for the organization, the organization must have the right to control the identification process.

B. An organization's right to name its own witnesses lies at the heart of the rule, rightfully so, and has not led to significant problems.

Over the past 50 years, litigants and courts have struggled to arrive at a functional set of principles that fill in the gaps in the current Fed. R. Civ. P. 30(b)(6), or at least to determine the limits of its flexibility. The lack of a presumptive limit on the number of topics in a notice, whether multiple notices can issue to a single organization despite the rule's language that only one such deposition may be noticed as of right, what constitutes a reasonable level of particularity, and, more recently, what is proportional to the needs of the case, all are issues litigators face on a regular basis.

⁷ Fed. R. Civ. P. 30(b)(6).

⁸ *Great Am. Insur. Co. of New York v. Vegas Const. Co., Inc.*, 251 F.R.D. 534, 538 (D. Nev. 2008); *United States v. Mass. Indus. Finance Agency*, 162 F.R.D. 410, 412 (D. Mass. 1995); *Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 21 (E.D. Pa. 1986).

⁹ *Lapenna*, 110 F.R.D. at 20.

¹⁰ *Ierardi v. Lorillard, Inc.*, No. 90-7049, 1991 U.S. Dist. LEXIS 11320, at *5 (E.D. Pa. Aug. 13, 1991).

¹¹ *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012).

It is the open-ended nature of the rule that has caused conflict. As we pointed out in our original comments to the Committee,¹² 30(b)(6) depositions present an unbalanced framework that is unusually favorable to requesting parties and frequently puts the onus on responding parties to establish limits on overbroad topics and to prepare to testify on whatever cannot be limited by negotiation or court action. These real-world problems would best be addressed through modifications to Fed. R. Civ. P. 16 and 26(f), by presumptive limits on the number of topics permitted, and by a more explicit objection/resolution mechanism in Fed. R. Civ. P. 30(b)(6) that – like relevance under Fed. R. Civ. P. 26(b) – puts the onus on the requesting party to justify the relevance and particularity of its topics (which would bring things in line with principles of written discovery).¹³

The difficulties presented by existing Fed. R. Civ. P. 30(b)(6) are reflected in thousands of published and unpublished opinions. These evidence parties' disagreements on how many topics are too many, how the time limits in Fed. R. Civ. P. 30(d) may or may not apply in situations where multiple people are presented in response to the same notice, whether a deposition is impermissibly wandering outside the topic list,¹⁴ whether a person presented as a corporate designee can be deposed again in a "non-designee" capacity, and what should happen when a designee is unprepared to testify on a topic in the notice, such as putting up another witness or propounding interrogatories.¹⁵

By contrast, the case law does not reflect much dispute about the actual *identity* of the corporate representative witness or judicial discussion about why the identity of a designee would be an issue. The rule does not make this a legitimate bone of contention, and as long as the topics – as written or modified by the parties or the court – are addressed, the rule functions as intended.

C. A meet-and-confer process on witness identity would not solve any real-world problem, but it does threaten to create new ones.

¹² See Comments of Clay Guise, Dykema Gossett PLLC, dated August 2, 2017, <https://www.uscourts.gov/rules-policies/archives/suggestions/clay-guise-17-cv-hhhhh> (retrieved January 10, 2019)

¹³ Other helpful measures would include (i) clarifying the relationship between 30(b)(6) and 30(a) and (d); (ii) constraining the use of contention questions; and (iii) providing an explicit means under Fed. R. Civ. P. 26(e) by which to supplement designee testimony.

¹⁴ Contrast *Paparelli v. Prudential Ins. Co.*, 108 F.R.D. 727, 729-730 (D. Mass. 1985) (notice defines scope) with *Cabot Corp. v. Yamulla Enters.*, 194 F.R.D. 499, 500 (M.D. Pa. 2000) and *Detoy v. City & County of San Francisco*, 196 F.R.D. 362, 367 (N.D. Cal. 2000) (counsel may object to topic outside notice at deposition, but deponent must answer questions to extent of Fed. R. Civ. P. 26(b)(1)).

¹⁵ See, e.g., *Alexander v. FBI*, 186 F.R.D. 137, 141-142 (D.D.C. 1998).

The first aspect of the proposed amendment, as discussed below, presents three problems. First, the language of the rule is fundamentally at odds with the logic of the Committee Note, creating the potential for confusion or conflict right out of the box. Second, giving a requesting party any say regarding the quality or desirability of *a particular person* as an organizational designee fundamentally would change the nature of Fed. R. Civ. P. 30(b)(6). Finally, giving adversaries windows into tentative picks for designee witnesses would require the responding parties to reveal information that traditionally has been protected by attorney-client privilege and the work-product doctrine.

1. As the Committee Itself Recognizes, There is No Identifiable Problem that Meeting and Conferring on Witness Identity Would Actually Solve.

As noted in Section B, above, Fed. R. Civ. P. 30(b)(6) presents its share of real-world difficulties: the amount of notice, the breadth of the topics, and deposition drift once the testimony is underway. Instead of focusing on these issues, the proposed amendment creates new problems for taking and defending organizational depositions. The Committee acknowledges that "the named organization ultimately has the right to select its designees," and yet makes reference to a meet-and-confer being potentially beneficial in "avoid[ing] later disputes." This treatment begs three questions.

What is the purpose of an amendment that is undercut by its own Committee Note? At a high level, a meet-and-confer is pointless if witness identity, as a matter of law, is a unilateral decision. The simple answer here is that there is no point to adding a mandatory "collaborative" process if at the end of the day, the responding party still has absolute authority to identify the individual who will speak for and bind the organization in a deposition under Fed. R. Civ. P. 30(b)(6). When the amendment's language is undercut by the Committee's own note, there will surely be disputes over what the language really means. The Committee itself struggles to articulate the reason for the amendment and how it should be understood in the context of retaining the sole right of the receiving party to determine who will speak for it. Litigators who choose to make trouble through discovery will have a field day, and discovery motions practice will inevitably ensue.

Where a common problem is witness knowledge, why would prior discussion of witness identity prevent an actionable "future problem"? The "later disputes" that would arise in the designee context revolve around preparedness on certain topics, and they tend to come up while a deposition is underway. Though the intent may be to improve the chances of having a witness with the proper foundation to testify, there is no guarantee that prior discussion of the *who* would be calculated to foresee, and therefore prevent, disputes about the *what* – especially when the "who" discussion could in itself create significant inefficiencies. It is the organization's responsibility in any event to field the correct witness(es). Moreover, gaps in subject matter

knowledge are often resolved by producing additional personnel to fill in the gap under the structure of the rule: requestors will get *someone* who can answer their questions.

Is it actually possible to head off future disputes? Parties can think that they understand the topics in a notice, and the noticed party can think it has the right person. But many corporate designee difficulties arise at the deposition itself. There is nothing in the proposed amendment to address this situation, nor is there any reason to think that a meet and confer that includes discussion of the identity of witnesses will help avoid it. Indeed, the opposite is likely, as representations made in the context of the meet and confer will inevitably be compared with the witness's actual performance at deposition, leading to further disputes and the opportunity for mischief.

2. Requiring discussion of witness identity would change the relationship of Fed. R. Civ. P. 30(b)(6) to fact depositions and give requesting parties an unwarranted advantage.

Parties propounding corporate deposition notices have powerful incentives to interfere in the selection of the designees. Between an inability of the responding party to object on relevance at a deposition, and the ability of parties under Fed. R. Civ. P. 32(a)(3) to use a corporate designee testimony “for any purpose,” adding an ability to influence designee selection would incentivize requesting parties to steer toward “soft targets.” The current structure of Fed. R. Civ. P. 30(b)(6) provides some protection against this by allowing the responding party to select the “face of the company” – and so to try to limit the risks associated with preparation and conduct of these depositions. Further, the requesting party could use the meet and confer process to demand the identities of other potentially knowledgeable witnesses it can then notice individually for deposition. This “free discovery” would almost certainly be yet another unintended consequence of the proposed amendment.

That requesting parties are not given a “free throw” on their own witness selection is not an injustice, let alone one identified by federal courts. Rather, allowing requesting parties to intrude on the process of witness selection represents a major change and reverses almost 50 years of practice in which the rule has not been concerned about *who* answers a question put to the organization but rather that *some* human witness be available to answer it and thereby bind the entity. The proposed amendment is not a correction or a fine-tuning to obviate commonplace disagreements about corporate representative depositions (described above); it upsets the bargain struck when Fed. R. Civ. P. 30(b)(6) was enacted in 1970.

3. Giving an adversary a voice in witness selection increases burdens, wastes time, and impinges on privilege and work product.

Organizations often receive deposition notices with large numbers of disparate topics. These topics often cover complex subjects and long periods of time. Even if these are limited by negotiation or protective orders, it can still be a challenge to locate, prepare, and schedule witnesses on numerous topics. Injecting prior discussion – “as early as possible” – puts additional constraints on a process that is already challenging.

Parties responding to 30(b)(6) notices must find people who either know or can learn the subject matter. This process – which can take significant amounts of time and effort – demands flexibility because the identification of who will testify and the topics they will address frequently changes. The likelihood of changes increases with the number and complexity of topics in the notice. In many cases, it is impossible to know if a witness is able to handle a particular topic until the preparation process is well under way. Or, during this process, a new person may be identified who is better-suited to handle a particular topic than the person originally identified. As a result, even if it were proper for a requesting party to intrude on the process to ask about identities, there would be little practical point in doing so early on. But these are minor considerations compared to the biggest issue, which is that such a rule would override the “near[ly] absolute protection” that the “mental impressions, conclusions, opinion, or legal theory of an attorney or other representative of a party concerning the litigation” have vis-à-vis adversaries.¹⁶ This lies at the heart of the work product doctrine. Discussion of “tentative picks” implicates Fed. R. Civ. P. 26(b)(3), which immunizes written versions of the same information from discovery. And if “tentative picks” are not what the Committee had in mind in drafting the proposed amendment, what purpose is to be served by the requirement? In almost every case, the main topic of any meet and confer is the clarification or narrowing of the topics. What exactly is the noticing party seeking to learn? Is there a more limited way to frame the topic that will get to the crux of the issues and permit a rational selection of witnesses? The initial meeting almost surely will not get to the issue of identity of witnesses, which can only be ascertained once the threshold questions are answered. The proposed amendment thus effectively requires multiple meet and confer sessions – adding burden without any obvious benefit – until both parties are satisfied that the vague standard of “good faith” has been met. This creates more fertile ground for disputes.

D. The Amendment’s meet and confer is duplicative of existing federal dispute resolution mechanisms, provides no useful resolution process or remedy, and only adds the potential for considerable confusion.

¹⁶ *In re Cendant Securities Litigation*, 343 F.3d 658, 663 (3d Cir. 2003); *see also Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1219 (4th Cir. 1976) (opinion work product protection also attaches to non-lawyers).

Looking at the Amendment from another angle, its inclusion of meet-and-confer language in general (whether it is witness identification or topics) is superfluous and has the potential to inject considerable confusion into the discovery process. This is due to the fact that the *mechanism* for resolving any dispute related to the language of Fed. R. Civ. P. 30(b)(6) *is already in place*. Depending on the jurisdiction, problems with a corporate representative notice are usually handled through one of two mechanisms.

First, some federal courts have concluded that given the lack of explicit objection language in the rule – and the inability to object to relevance issues in a designee’s deposition – a responding party must file a motion for protective order under Fed. R. Civ. P. 26(c)(3).¹⁷ That rule explicitly requires a meet and confer (“the motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties to resolve the matter without court action”).

Second, other federal courts recognize objections and motions to compel as an additional mechanism for resolving disputes about depositions of corporate designees.¹⁸ Fed. R. Civ. P. 37(a)(1) contains an almost identical meet-and-confer requirement (“The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to obtain it without court action”), and the use of objections and a motion to compel is thus essentially a mirror image of filing a motion for protective order – the major difference being which party makes the first move.

Regardless of which mirror-image solution is chosen, numerous Federal District Courts and their judges have refined and further defined what a “meet and confer” means, what the parties should bring to the court, and how disputes will be resolved. While the process is far from uniform and clear – a problem not addressed by the proposed amendment, solutions have emerged through local rules¹⁹ and judicial practice guides.²⁰ These “barriers to entry” in consuming judicial

¹⁷ *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 242 F.R.D. 164, 166 (D. Mass. 2007).

¹⁸ *Princeton Digital Image Corp. v. Ubisoft Entertainment SA et al.*, No. 13-335-LPS-CJB, 2018 U.S. Dist. LEXIS 66802 (D. Del. April 20, 2018); *see also San Diego Unified Port Dis. v. Monsanto Co.*, No. 15-cv-0578-WQH-AGS, U.S. Dist. LEXIS 130197 (S.D. Cal. August 2, 2018).

¹⁹ For example, E.D. Mich. LR 7.1 elaborates on the certifications required to file a contested motion, LR 26.4 provides the requirements for protective orders, and LR 37.1 imposed additional meet and confer requirements on motions to compel.

²⁰ In the same district, Judge Mark A. Goldsmith’s Practice Guidelines, for example, require personal contact or communication in writing, or a certification of non-responsiveness.

resources cause many discovery disputes to be significantly narrowed before a court intervenes. Aside from that, there are mechanisms for referrals of discovery disputes to magistrate judges under Fed. R. Civ. P. 72 and to special masters under recently-enacted Fed. R. Civ. P. 53.

In other words, the framework (if not the uniform applicability) of dispute resolution is already in place. It has been our experience that if parties are inclined to cooperate to resolve discovery issues, as many parties are, they will do so. And they would do so even absent the structure of the federal rules – because every motion carries its own risk/benefit analysis. Cooperation is endorsed by both the defense and plaintiffs’ bars, courts, and discovery think tanks.²¹ If parties cannot or will not cooperate on an issue, or cannot narrow their legitimate disputes further, the only resolution will be judicial.

This is not the case with the proposed Amendment, which references “meet[ing] and confer[ring]” twice – but not once explaining what the end result of failing to meet and confer will be, or how that result would be reached. The proposed Amendment thus goes too far and not far enough. It is fatally flawed and should be withdrawn.

Conclusion

For all of these reasons, we urge the Committee to decline the proposed Amendment.

Sincerely,

DYKEMA GOSSETT PLLC

Terri S. Reiskin

Terri S. Reiskin

See <https://www.mied.uscourts.gov/index.cfm?pageFunction=chambers&judgeid=33#> (retrieved January 7, 2019).

²¹ See generally, the Sedona Conference Cooperation Proclamation (July 2008) (endorsed by numerous federal judges and magistrate judges).

TAB 33

COMMENT OF

DUANE MORRIS, LLP

NEW YORK
LONDON
SINGAPORE
PHILADELPHIA
CHICAGO
WASHINGTON, DC
SAN FRANCISCO
SILICON VALLEY
SAN DIEGO
LOS ANGELES
TAIWAN
BOSTON
HOUSTON
AUSTIN
HANOI
HO CHI MINH CITY

DuaneMorris®

FIRM and AFFILIATE OFFICES

SHARON L. CAFFREY
DIRECT DIAL: +1 215 979 1180
PERSONAL FAX: +1 215 689 1932
E-MAIL: SLCaffrey@duanemorris.com

www.duanemorris.com

SHANGHAI
ATLANTA
BALTIMORE
WILMINGTON
MIAMI
BOCA RATON
PITTSBURGH
NEWARK
LAS VEGAS
CHERRY HILL
LAKE TAHOE
MYANMAR
OMAN
*A GCC REPRESENTATIVE OFFICE
OF DUANE MORRIS*
ALLIANCES IN MEXICO
AND SRI LANKA

**COMMENT
to the
COMMITTEE ON CIVIL RULES REGARDING RULE 30(B)(6)**

January 30, 2019

I respectfully submit this Comment to the Advisory Committee on Civil Rules (“Committee”) in response to the Request for Comment on the proposed amendment to Federal Rule of Civil Procedure 30(b)(6) (“Proposed Amendment”). I write on behalf of my firm, Duane Morris, LLP. This letter draws on the collective experience of our many litigators at Duane Morris, who represent organizational clients as both plaintiffs and defendants.

I. Introduction

The Proposed Amendment is the culmination of the Committee’s most recent attempt to address problems with Rule 30(b)(6). As the Committee observed over two years ago, the application of Rule 30(b)(6) causes problems “constantly, all over the country.”¹ Although it was concerned that “[i]t will be difficult to find rule text that will encourage reasonable practice,” the Committee resolved that it “should at least try.”²

Unfortunately, the Proposed Amendment not only falls short of the Committee’s goal, but it will make the existing situation even worse. The only way to mitigate the uncertainty and needless disputes concerning the existing Rule is to amend it to include *specific* guidance to practitioners – including on how respondents can make objections; how much notice is required before a deposition; and how Rule 30(b)(6) depositions count toward the presumptive limits that apply to depositions generally. The Committee considered and, unfortunately, rejected proposals that would provide such guidance.

¹ Report to the Standing Committee, Advisory Committee on Civil Rules (May 12, 2016) at 41.

² *Id.*

Instead, the Proposed Amendment imposes a vague yet mandatory requirement that counsel “confer in good faith” about both “the number and description of the matters for examination” as well as “the identity of each person the organization will designate to testify.” The Proposed Amendment is both ineffective and harmful. Without the specific guidance that the Committee has declined to incorporate into the Proposed Amendment, a requirement that counsel “confer in good faith” will merely serve as a trigger for more disputes. It will also encourage those litigants who champion “discovery on discovery” to pressure the opposing party to settle and add to the cost of litigation. The problem with the existing rule is not that counsel do not know how to meet and confer; it is that counsel need more specific guidance about the standards that apply to their disputes.

More importantly, the Proposed Amendment’s requirement that the parties meet and confer about the identity of the deponent will have significant unintended consequences. To the extent that the Proposed Amendment is intended to change the existing rule that the respondent has discretion to choose its Rule 30(b)(6) deponent, the Proposed Amendment is grossly unfair to respondents. To the extent that the Proposed Amendment is not intended to change the existing rule, imposing a requirement that the parties meet and confer about something that remains within the discretion of the respondent is nothing more than a source of additional confusion and litigation.

I suggest the Committee reconsider its decision to not include specific guidance in the Proposed Amendment – particularly with respect to the procedure for objections; a specific notice requirement; and the limits that apply to Rule 30(b)(6) depositions. To the extent the Committee declines to do so, I respectfully urge the Committee to reject the Proposed Amendment. It is better to leave Rule 30(b)(6) as it is than to adopt an amendment that, at best, will result in more uncertainty and needless litigation, and that is likely to cause significant unfairness to respondents.

II. The proposed amendment will be ineffective at reducing uncertainty and needless litigation.

As this Committee has recognized, Rule 30(b)(6) has “become a flash point for litigation” that has generated 8,300 decisions and counting.³ Unfortunately, the Proposed Amendment’s requirement that counsel “confer in good faith” does nothing to alleviate the uncertainty in how Rule 30(b)(6) is applied. It will therefore do nothing to stem the tide of litigation over Rule 30(b)(6), and, if anything, will only give counsel another procedural requirement to litigate.

³ Agenda for the Advisory Committee of Civil Rules (April 25–26, 2017), Lauren Gailey Memorandum (“Gailey Memo”), at 249.

In my experience, the problem with Rule 30(b)(6) is not that counsel are refusing to confer about proposed deposition topics or logistics in advance of a Rule 30(b)(6) deposition.⁴ The problem is that the Rule does not give enough guidance to practitioners, such that disagreements between counsel must be resolved by courts, which are often inconsistent in their decisions. With no guidance in Rule 30(b)(6) regarding the procedures or expectations of the meet and confer, parties may not confer in good faith to resolve issues related to the scope of the notice, or may agree to limits on the notice but ask questions beyond the agreed to scope of the notice at the deposition. These issues are particularly disconcerting in litigation where one side is a corporation and the opposing party is an individual or group of individuals.

Including a specific procedure for objections:

For instance, one of the most basic problems with Rule 30(b)(6) is that it includes no clear process for pre-deposition objections to topics contained in the deposition notice.⁵ Some courts require litigants to seek a protective order before the deposition.⁶ Other courts take the opposite approach, and go so far as to hold that parties *must not* involve the court before the deposition.⁷ In those jurisdictions, the responding party must assert objections to the notice and proceed with the deposition without seeking relief from the court. At the deposition, the party then must either provide the requested information despite the objections or refuse to do so and face a motion to compel after the deposition. Depending on the result of that motion, the deposition could be re-opened later with the concomitant costs. The party bringing the motion to compel also faces needless risks, as an unsuccessful motion could lead to an award of attorney's fees. This is a wholly inefficient process for resolving disputes.

⁴ See Agenda for the Advisory Committee on Civil Rules (November 7, 2017) at 174 (recognizing the “existing reality” that “the parties often work out the details on which some of the rule proposals considered by the Subcommittee have focused.”)

⁵ See, e.g., *New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, 242 F.R.D. 164, 165–66 (D. Mass. 2007) (“Unlike the procedure with respect to interrogatories, requests for production of documents and requests for admissions, there is no provision in the rules which provides for a party whose deposition is noticed to serve objections so as to be able to avoid providing the requested discovery until an order compelling discovery is issued.”).

⁶ See, e.g., *id.* at 166 (“[A] party who for one reason or another does not wish to comply with a notice of deposition must seek a protective order.”); *Int’l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc.*, No. 11-2007, 2013 WL 627149, at *6 (D. Colo. Feb. 19, 2013) (“In the event that the parties’ attempts to resolve disagreements about a Rule 30(b)(6) deposition are unsuccessful, filing a pre-deposition motion is the appropriate course of action.”); and *Reese v. Miami-Dade Cty.*, No. 01-3766, 2009 WL 10668208, at *1 (S.D. Fla. June 16, 2009) (“[I]f counsel believes a deposition notice seeking a corporate representative is improper, it is his burden to seek a protective order.”).

⁷ See, e.g., *F.D.I.C. v. Brudnicki*, No. 12-00398, 2013 WL 5814494, at *2 (N.D. Fla. Oct. 29, 2013) (finding that “proper operation of the rule does not require a process of objection and Court intervention prior to the deposition” and that proper course is for propounding party to “seek to compel additional answers if necessary, *following the deposition* regarding disputed topic designations”); *Salzbach v. Hartford Ins. Co.*, No. 8-01645, 2013 WL 12098763, at *2 (M.D. Fla. April 19, 2013) (“[A] protective order is not the appropriate remedy for deciding relevancy of a topic before a 30(b)(6) deposition.”).

A recent multiple-plaintiff personal injury case, in which I represented a corporate defendant, illustrates these inefficiencies. Plaintiffs' counsel served an overly broad notice of deposition upon the corporation, designating topics that went far beyond the scope of the litigation. Among other things, the notice included improper topics designed solely to probe the corporation's relationship with several non-parties, most likely in an attempt to locate the deepest pocket. At a meet-and-confer before the deposition, Plaintiffs' counsel agreed to limit the scope of questioning at the deposition. However, at the deposition, Plaintiffs' counsel nonetheless asked numerous objectionable questions. This forced a decision at the deposition to either allow the improper questioning, instruct our client's corporate designee to not answer the improper questions (which could lead to a motion to compel), or to terminate the deposition and file a motion for protective order (which could result in additional travel and preparation costs if unsuccessful). Having a procedure to resolve objections in advance of the deposition would remedy this type of problem.

Establishing a process for pre-deposition objections would be more efficient and effective at encouraging counsel to resolve their disputes over deposition topics than a vague requirement that they "confer." Indeed, expressly providing responding counsel the opportunity to serve pre-complaint objections would make a separate requirement to "confer" unnecessary. As the Committee previously recognized, "[o]ne advantage of adopting an express objection procedure would be to require the parties to meet and confer before a motion to compel is made."⁸ Conversely, requiring that parties "confer" without providing a mechanism for objections only adds to existing uncertainty. If the parties disagree at their mandatory conference, the Proposed Amendment gives no guidance to the parties about how to resolve that dispute. The rule should also provide guidance as to how parties can respond if the noticing party goes beyond the scope of the agreed-to topics for the deposition.

Including a specific notice requirement:

In addition, although Rule 30(b)(1)'s requirement for "reasonable written notice" works well in other contexts, it commonly provokes disagreement regarding 30(b)(6) depositions. This is because the burden of responding to a 30(b)(6) deposition is great. The lack of guidance has caused parties to repeatedly turn to the courts, forcing courts to determine whether four-day notice is reasonable,⁹ or six days,¹⁰ or eleven days.¹¹ A specific notice requirement would also address the Committee's concerns about unprepared designees. Adequately preparing a designee

⁸ Report of the Advisory Committee on Civil Rules (Dec. 9, 2016) at 11.

⁹ *Gulf Prod. Co. v. Hoover Oilfield Supply, Inc.*, No. 08-5016, 2011 WL 891027, at *2 (E.D. La. Mar. 11, 2011).

¹⁰ *Hill Holiday Connors Cosmopolos, Inc. v. Greenfield*, No. 8-03980, 2010 WL 547179, at *3 (D.S.C. Feb. 9, 2010).

¹¹ *Harvey Trucking, Inc. v. Wells Fargo Ins. Servs. of W. Virginia, Inc.*, No. 9-00007, 2010 WL 11565436, at *4 (S.D. W. Va. Aug. 25, 2010).

takes time, and it is no surprise that—without a sufficient notice requirement—designees are sometimes underprepared.

A 30-day notice provision would fix these problems and is consistent with requirements in other discovery-related rules.¹² If documents must be produced, a 30-day notice requirement provides an organization the same time to locate, review and produce the documents as it would in response to a request came under Rule 34. As it stands now, parties often try to game the system by serving requests for production with a Rule 30(b)(6) deposition notice, providing fewer than 30 days before the deposition to produce documents.

Specifying how Rule 30(b)(6) depositions count towards the presumptive number and duration of depositions:

Finally, the lack of clarity about how Rule 30(b)(6) interacts with the limitations in Rule 30(a)(2)(A)(i) and Rule 30(d) concerning the presumptive number and duration of depositions has led to needless disagreement and confusion. This procedural problem is a direct result of the current text of the Rule and Committee Note. Some courts allow one seven-hour day of questioning for each 30(b)(6) designee.¹³ Others reject a blanket approach along those lines.¹⁴ The Committee should clarify that: (1) by default, a Rule 30(b)(6) deposition should last for one day of seven hours per corporate representative, and (2) each Rule 30(b)(6) deposition counts as a single deposition under Rule 30(d), regardless of the number of designees. With a clear rule in place, the parties and courts can determine when additional time or depositions are necessary.

III. The Proposed Amendment is unfair to respondents.

Not only is the Proposed Amendment unlikely to achieve the Committee's goals, its requirement that the parties confer about the identity of a Rule 30(b)(6) deponent is likely to cause additional confusion and unfairness to respondents. This burden is heightened when one party is a corporation and the other is not so there is no proportionality of interest in containing the scope of the notice.

Under the current version of the Rule, it is clear that an organization responding to a deposition notice has sole authority for selecting the witnesses testifying on its behalf.¹⁵ This is a

¹² See Fed. R. Civ. P. 33, 34, and 36.

¹³ See, e.g., *Am. Home Assur. Co. v. Greater Omaha Packing Co.*, No. 11-270, 2013 WL 4875997, at *1 (D. Neb. Sept. 11, 2013) (allowing “seven hours per 30(b)(6) representative”).

¹⁴ See, e.g., *In re Rembrandt Techs.*, No. 9-00691, 2009 WL 1258761, at *14 (D. Colo. May 4, 2009) (rejecting a “blanket rule permitting a seven-hour deposition of each designated deponent” as “unfair” ... because it rewards broader deposition notices and penalizes corporate defendants who regularly maintain business information in silos” and as “unduly burdensome ... because of the manifest increased cost and disruption of preparing more than one person to respond to a deposition notice”).

¹⁵ See, e.g., 8A Wright & Miller, *Federal Practice & Procedure* § 2013 (3d ed. 2018); *Progress Bulk Carriers v. Am. S.S. Owners Mut. Protection and Indemnification Ass’n, Inc.*, 939 F. Supp. 2d 422, 430 (S.D.N.Y. 2013);

vital rule that protects the truth-finding process and is consistent with the purpose of 30(b)(6) depositions.

In my experience, the selection of a corporate designee is essential to an effective defense. In one recent product liability case, Plaintiff sought to pierce the corporate veil to hold a US domestic corporation liable for alleged acts of a foreign subsidiary of the same parent corporation. The corporate deponent selected was a corporate officer and in-house counsel who could speak to the corporate records and maintenance of the corporate forms. Allowing Plaintiff's counsel to request a particular deponent, such as a mid-level plant manager, would have made it all but impossible to prepare the witness adequately. Understanding the intricacies of the corporate structure and form of a multi-national corporation is outside the understanding of most lay witnesses. Certainly preparing the witness to testify would have been far more challenging and the testimony far less clear and concise. Plaintiff's counsel was not prejudiced because they were able to depose other company employees who knew relevant facts about the product and the Plaintiff's use of the product as fact witnesses.

Rule 30(b)(6) depositions originated as a remedy for “bandying, ... in which deponent after deponent could disclaim knowledge of facts clearly known to *someone* in the organization.”¹⁶ The current version of the rule achieves this purpose: It requires *the organization* to designate a witness or witnesses capable of testifying about the noticed topics. Organizations already have a duty to prepare their designees to testify based upon all reasonably available information.¹⁷ In addition, to the extent that a party believes that it requires the testimony of a particular individual associated with an organization, it may notice that individual's deposition under Rule 30(b)(1). Therefore, the Proposed Amendment's requirement that the parties “confer in good faith about ... the identity of each person the organization will designate to testify” appears to be a solution in search of a problem.

The Proposed Amendment will not lead to better preparation of Rule 30(b)(6) deponents. Organizations are in the best position to identify the designee who can most accurately convey the organization's knowledge. In my experience, corporate designees are unprepared not because the organization has chosen a poor representative. Instead, this problem arises due to overly broad and vague deposition topics that make it difficult for even the most knowledgeable designees to understand and recall all responsive information. In addition, adequate preparation is particularly challenging in litigation that involves historical facts, particularly when no current employees remain to explain documents and fill in gaps as the designee prepares for the

McPherson v. Wells Fargo Bank, 292 F.R.D. 695, 698 (S.D. Fla. 2013); *Resolution Tr. Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993).

¹⁶ Gailey Memo, at 249. See also 1970 Advisory Committee Note, 48 U.S.C., appx.

¹⁷ See, e.g., *Starline Windows Inc. v. Quanex Bldg. Prod. Corp.*, No. 15-1282, 2016 WL 4485564, at *4 (S.D. Cal. July 21, 2016); *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006); *Calzaturificio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 36 (D. Mass. 2001); *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997).

deposition. For instance, in asbestos litigation, where the latency for developing an asbestos-related illness can be forty or more years, the employees who were involved in the development of the products are often retired or deceased. Preparing a witness to testify about decisions that were made by the company forty years ago is difficult. Without a document that explains why a company did or did not think their product needed a warning in the 1970s, it may be impossible for a corporate designee to answer. Also, to respond to an overbroad deposition notice for a deponent with knowledge of historic information a company may need to produce more than one witness to address all topics.

The Committee acknowledges that under the Proposed Amendment, “the choice of the designees is ultimately the choice of the organization.”¹⁸ This begs the question: What is the organization’s good-faith duty under the Proposed Amendment? Contrary to the Committee’s optimistic sentiment that “conferring ... in advance might avoid later controversy,”¹⁹ the amended rule will lead to needless litigation over something that is indisputably within the respondent’s discretion.

In fact, the Proposed Amendment is an invitation for aggressive lawyers to try to block corporate designees they predict will be articulate and strong witnesses, in hopes of causing a less effective witness to act as designee. I have already experienced lawyers attempting just that tactic under the existing rule. It will become even more abused under the Proposed Amendment’s vague requirement to “confer.”

¹⁸ See Preliminary Draft of Proposed Amendments and Request for Comment (August 2018) at 33 (discounting concern that “some might interpret [the conference requirement] as requiring that the organization obtain the noticing party’s approval of the organization’s selection of its witness” and noting that “[t]he proposed amendment ... carries forward the present rule text stating that the named organization must designate the persons to testify on its behalf.”)

¹⁹ Agenda for Advisory Committee on Civil Rules (April 10, 2018) at 114.

IV. Conclusion

I appreciate the significant challenges in addressing the practical difficulties with Rule 30(b)(6) through a change in the Rule's text. In my experience, the only way to do so is to amend the Rule to add specific guidance to practitioners. The Proposed Amendment offers no such guidance, but instead appears to be an attempt to make change for its own sake. Not only is that likely to prove ineffective, it will cause significant unfairness to responding parties. Therefore, I respectfully urge the Committee to reject the Proposed Amendment.

Very truly yours,

/s/ Sharon L. Caffrey

Sharon L. Caffrey

SLC