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.