



**COMMENT**  
**to the**  
**RULE 30(b)(6) SUBCOMMITTEE**  
**of the**  
**ADVISORY COMMITTEE ON CIVIL RULES**

**“ADVANTAGEOUS TO BOTH SIDES”: REFORMING THE RULE 30(b)(6) PROCESS  
TO IMPROVE FAIRNESS AND EFFICIENCY FOR ALL PARTIES**

July 5, 2017

Lawyers for Civil Justice (“LCJ”)<sup>1</sup> respectfully submits this Comment to the Rule 30(b)(6) Subcommittee (“Subcommittee”) of the Advisory Committee on Civil Rules (“Committee”) pursuant to its Invitation for Comment on Possible Issues Regarding Rule 30(b)(6) (“Invitation for Comment”).

**I. INTRODUCTION**

When Rule 30(b)(6) was added to the Federal Rules of Civil Procedure (FRCP) in 1970, the Committee noted that the rule would be “advantageous to both sides as well as an improvement to the deposition process.”<sup>2</sup> This statement was not only accurate—Rule 30(b)(6) did indeed advantage both sides by improving the process at the time—but also contained a deeper truth: A rule governing a two-sided process succeeds only if it works for both parties.

The Subcommittee’s goal, as identified in the Invitation for Comment, is to determine whether changes to Rule 30(b)(6) should be seriously considered and to identify the topics that would

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<sup>1</sup> 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.

<sup>2</sup> FED. R. CIV. P. 30(b)(6) advisory committee’s note to 1970 amendment (“It 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....[and] should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge”(citation omitted)).

improve practice under the rule while preserving its utility.<sup>3</sup> Several bar groups report experiencing significant problems with practice under Rule 30(b)(6), but other groups see no need for reform. Both cannot be true. If one-half of a two-sided process is failing, that process is failing. The Subcommittee has every reason to be confident in its ability to produce thoughtful and practical proposals in an open and transparent process, while heeding its own version of the Hippocratic Oath to do no harm.

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.

Unfortunately, practice under Rule 30(b)(6) has not kept up with the rule's promise to be advantageous to both sides. It allows the requesting party to impose significant burdens that do not result in any benefit to the case. Because 30(b)(6) depositions are not discussed in Rule 26(f) conferences or addressed in Rule 16, it has become a catch-all for the kinds of disproportional demands, sudden deadlines and "gotcha" games that the Committee has removed from other discovery rules. Because there is no procedure for objections, 30(b)(6) notices force a Hobson's choice between attempting to comply despite overbroad topics, vaguely written descriptions and duplicative requests, or filing a motion for protective order, which could result in an even worse outcome including sanctions. And because there is doubt about the binding effect and no express ability to supplement testimony, 30(b)(6) depositions cause unhealthy tension between counsel.

## **II. AMENDING RULES 16 AND 26 TO INCLUDE RULE 30(b)(6) DEPOSITIONS WOULD PROVIDE A CATALYST FOR EARLY COMMUNICATION AND COOPERATION, PRECLUDING LATER DISPUTES.**

Planning for Rule 30(b)(6) depositions involves decisions about the subject matter, the scope of questioning, the number of topics, the number of witnesses, the duration, the location, and any potential objections to these (and other) issues. This complexity not only explains why Rule 30(b)(6) engenders so much acrimony, but also shows why 30(b)(6) should be treated for what it is: an important component of the discovery plan.

A rule change that adds 30(b)(6) to Rules 16 and 26 could serve as "a catalyst for early attention and judicial oversight" that "could forestall later disputes" (to borrow a few well-chosen words from the Invitation for Comment).<sup>4</sup> It also would be consistent with the 2015 FRCP amendments, which were "a major stride toward a better federal court system."<sup>5</sup> Indeed, Chief

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<sup>3</sup> RULE 30(b)(6) SUBCOMMITTEE, ADVISORY COMMITTEE ON CIVIL RULES, INVITATION FOR COMMENT ON POSSIBLE ISSUES REGARDING CIVIL RULE 30(b)(6) 1 (May 1, 2017), [hereinafter INVITATION FOR COMMENT] [http://www.uscourts.gov/sites/default/files/invitation\\_for\\_comment\\_from\\_the\\_rule\\_30b6\\_subcommittee\\_may\\_1\\_2017\\_0.pdf](http://www.uscourts.gov/sites/default/files/invitation_for_comment_from_the_rule_30b6_subcommittee_may_1_2017_0.pdf).

<sup>4</sup> *Id.* at 2.

<sup>5</sup> CHIEF JUSTICE JOHN G. ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (2015).

Justice John Roberts urged judges to undertake a renewed stewardship role by engaging in the litigation process early and tailoring it to the needs of the case.<sup>6</sup>

The fact that 30(b)(6) notices are employed earlier in some cases than in others does not establish a compelling reason to omit 30(b)(6) issues from the discovery planning process. “Too much early discussion” is hardly a risk to our litigation culture or to any particular case. On the contrary, there is plenty of experience to show that establishing and maintaining communication throughout a case, beginning with the early Rule 16 and 26(f) conferences, only helps reduce the number of disputes, not increase them. If, in particular cases, issues arise mid-way through the discovery period that could be facilitated by an interim case management conference, then the parties and the court should have one. But even in such cases, there is no downside to broaching the subject of Rule 30(b)(6) in the early discussions.

Rule 30(b)(6) is an important and frequently used discovery tool, and it belongs in case management conferences and scheduling orders. Language along these lines would achieve the purpose if added to Rule 16(b)(3)(B), Rule 16(c)(2) and Rule 26(f):

Include any agreements the parties reach for conducting Rule 30(b)(6) depositions, including as to the number and identification of anticipated topics, the anticipated number of witnesses for those topics, anticipated objections to the topics, and the timing for objections for such topics, the scope of the deposition(s), the date, duration and location for the deposition, and supplementation.

### **III. RULE 30(b)(6) SHOULD ESTABLISH A CLEAR PROCEDURE FOR OBJECTING TO THE NOTICE.**

Rule 30(b)(6) would work better for both sides if it defined a procedure for raising and resolving objections. Rule 30(b)(6) depositions by their nature generate controversy. Preparing a witness to testify regarding the full extent of information reasonably available to an organization often inflicts an enormous burden of business disruption and expense on the responding party.<sup>7</sup> That burden may be justified where the information is important to the case, but not when the noticed topics have no relevance to the claims or defenses<sup>8</sup> or when the burden is disproportionate to the needs of the case.<sup>9</sup> Also, a failure of the Rule 30(b)(6) notice to describe the subject matters of

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<sup>6</sup> *Id.*

<sup>7</sup> *See, e.g., Great Amer. Ins. Co. of N.Y. v. Vegas Constr. Co.*, 251 F.R.D. 534, 541 (D. Nev. 2008) (finding the responding party obligated “to educate an appropriate Rule 30(b)(6) designee to provide knowledgeable answers reasonably available to the corporation, which include information ascertainable from project files and documents in the repository, information from past employees, witness testimony and exhibits, or any other sources available to the corporation, including factual information learned through or from its counsel.”).

<sup>8</sup> *See Crocs, Inc. v. Effervescent, Inc.*, No. 06-CV-00605-PAB-KMT, 2017 WL 1325344, at \*2 (D. Colo. Jan. 3, 2017) (“The topics of a Rule 30(b)(6) examination, however, must first and foremost be relevant” and noting that “discovery directed at irrelevant matters imposes a *per se* undue burden”) (citations omitted).

<sup>9</sup> *See ChriMar Sys. v. Cisco Sys.*, 312 F.R.D. 560, 564 (N.D. Cal. 2016) (refusing to allow Rule 30(b)(6) deposition on overly broad topic and observing that concern for proportionality was “especially true in light of the recently revised federal Rule of Civil Procedure 26(b)(1)”).

the deposition with “reasonable particularity” renders compliance an impossible task.<sup>10</sup> Parties—and courts—need a regular and consistent procedure for managing such Rule 30(b)(6) issues.<sup>11</sup>

Different district courts have endorsed inconsistent procedures for handling problematic Rule 30(b)(6) notices. Along one pathway, some courts acknowledge that there is no mechanism for objecting to Rule 30(b)(6) notices,<sup>12</sup> so the only remedy is a motion for protective order under Rule 26(c).<sup>13</sup> The recipient must raise its disputes with the court before the deposition occurs,<sup>14</sup> and cannot, without facing the prospect of sanctions, refuse to provide the requested testimony at the deposition and later raise its objections in response to a propounding party’s motion to compel.<sup>15</sup> Other courts take the diametrically opposed view that the parties must not involve the court prior to the deposition.<sup>16</sup> These courts find motions for protective order to be generally improper for addressing disputes with a Rule 30(b)(6) deposition notice,<sup>17</sup> with some courts going so far as to declare motions for protective orders entirely inapplicable to relevance and

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<sup>10</sup> See *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) (“An overbroad Rule 30(b)(6) notice subjects the noticed party to an impossible task. . . . Where, as here, the defendant cannot identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible.”).

<sup>11</sup> The recent amendments to Federal Rule of Civil Procedure 26(b)(1) clarifying the limits of allowable discovery underscore concerns about Rule 30(b)(6) depositions. See, e.g., *Fish v. Air & Liquid Sys. Corp.*, No. GLR-16-496, 2017 WL 697663, at \*15 (D. Md. Feb. 21, 2017) (refusing to allow inquiry on Rule 30(b)(6) topic where the requestor could not articulate why responsive information would be “relevant or proportional to the needs of this case.”); *Arenas v. Unified Sch. Dist. No. 223, Johnson Cty., Kansas*, No. 15-cv-9359-JWL-TJJ, at \*4 (D. Kan. Oct. 17, 2016) (recognizing in the context of a dispute over Rule 30(b)(6) topics that “the recent amendment to Rule 26 requires courts to be vigilant to concerns of proportionality”).

<sup>12</sup> 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.”).

<sup>13</sup> *Id.* at 166. See also *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.”).

<sup>14</sup> *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.”).

<sup>15</sup> *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.”).

<sup>16</sup> 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.”).

<sup>17</sup> 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.”).

overbreadth objections.<sup>18</sup> 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.<sup>19</sup>

Rule 30(b)(6) should end the uncertainty of current practice by providing a uniform procedure for raising and resolving objections—indeed, this is exactly the function of procedural rules. An objection and motion to compel procedure modeled on Rule 45<sup>20</sup> holds the most promise. Rule 45(d)(2) establishes an early deadline for objecting and clear consequences if a responding party fails timely to act,<sup>21</sup> and it identifies steps available to both sides in the event the parties cannot reach resolution.<sup>22</sup> Applying a similar mechanism to Rule 30(b)(6), together with a 30-day notice requirement,<sup>23</sup> would improve the efficiency and functionality for both sides by, at very least, eliminating any legitimate disputes over when or how objections may be raised or motions pursued. 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.

#### **IV. RULE 30(b)(6) SHOULD DEFINE PRESUMPTIVE LIMITS IN ORDER TO IMPROVE COMMUNICATION, COOPERATION AND CASE MANAGEMENT.**

As noted in the Invitation for Comment,<sup>24</sup> Rule 30(b)(6) contains no presumptive limits to guide courts and counsel in planning for, or executing, depositions of organizations. This is anomalous because presumptive limits apply to several other important (and typically less complicated) discovery tools, and those presumptive limits have proven useful to parties and courts by fostering communication, cooperation and effective case management. The same concerns that led the Committee to impose a numerical limit on interrogatories apply equally here.<sup>25</sup> Before

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<sup>18</sup> 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[.]”).

<sup>19</sup> 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.”).

<sup>20</sup> 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* 9 (Dec. 21, 2016) [hereinafter LJC, *Not Up to the Task*], [http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj\\_comment\\_on\\_rule\\_30\\_b\\_6\\_12-21-2016.pdf](http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_30_b_6_12-21-2016.pdf).

<sup>21</sup> See *Amer. Fed. of Musicians v. Skodam Films, LLC*, 313 F.R.D. 39, 43 (N.D. Tex. 2015) (indicating that the failure to serve objections or a motion to quash within the time period allowed by Rule 45(d)(2)(B) will typically constitute a waiver of any objections to the discovery sought).

<sup>22</sup> *Id.* at 42 (noting that party propounding discovery under Rule 45 may pursue a motion to compel after receiving objections, while responding party has the option to file a motion to quash or to modify the subpoena).

<sup>23</sup> LJC, *Not Up To the Task*, *supra* note 20, at 4-5.

<sup>24</sup> INVITATION FOR COMMENT, *supra* note 3.

<sup>25</sup> The same concerns of costliness, harassment, and curbing excessive discovery, which the advisory committee identified for the old Rule 33, are present here. See FED. R. CIV. P. 33(a) advisory committee's note (1993) (“[B]ecause 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). . . . The aim is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device.”).

Rule 33 imposed a 25-question limitation, litigants sent extravagantly expansive requests that often reached into triple digits.<sup>26</sup> Rule 30(b)(6)'s "reasonable particularity" principle does not provide parties meaningful guidance or a basis for discussion. Too often, 30(b)(6) notices are overloaded with dozens of topics, a practice that advantages neither party, but rather leads to back-and-forth finger pointing about too many poorly defined topics on the one hand, and inadequate preparation of witnesses on the other. It is absurd to expect high-definition focus from a wide-angle lens. Yet notices with more than 50 topics are commonplace.<sup>27</sup>

*Numerical limit on topics.* Overly wide-ranging 30(b)(6) notices hinder rather than help the parties and the discovery process, and they violate the principle that discovery must be "relevant to any party's claim or defense and proportional to the needs of the case."<sup>28</sup> Because responding parties are required to investigate all factual aspects of each topic, designate one or more witnesses to speak to the full scope of each topic, and educate the witnesses about relevant documents and facts that they do not already know, a notice that includes numerous topics of little or no relevance imposes substantial burdens without serving any useful purpose to the requesting party. A presumptive limit on the number of topics would be advantageous to both sides by focusing everyone's attention on the merits of real issues while still allowing additional inquiry where appropriate. The presumptive limit should be no higher than 10.

*Limits on scope of topics.* The common sense that underlies presumptive limits on the number of topics also supports a Rule 30(b)(6) amendment requiring that topics be reasonable in scope and proportional to the needs of the case. While some courts have interpreted the rule to require that topics be reasonable in scope,<sup>29</sup> others 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."<sup>30</sup> In other words, the current standard is that topics can be as broad and far-ranging as desired, as long as the language is not vague.

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<sup>26</sup> 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).

<sup>27</sup> 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 topics); *Hoffman v. L & M Arts*, No. 3:10-CV-0953-D, 2013 WL 655014, at \*1 (N.D. Tex. Feb. 21, 2013) (80 topics).

<sup>28</sup> See FED. R. CIV. P. 26(b).

<sup>29</sup> 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," and explaining that 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").

<sup>30</sup> See, e.g., *Nippo Corp. Int'l Bridge Corp. v. AMEC Earth & Env'tl., 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).

Defining Rule 30(b)(6)'s presumptive boundaries would be a significant advancement 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,<sup>31</sup> and disputes about scope frequently result in rancor and efforts to punish responding organizations and their counsel for being insufficiently prepared.<sup>32</sup> Clarity would reduce such disputes by encouraging both parties to focus on the information relevant to the merits of claims and defenses and by serving as a catalyst for cooperation and case management.

*Numerical limit on deposition hours.* Rule 30(d) sets forth what appears to be a universally applicable rule: a deposition is limited to seven hours absent leave of court. Rule 30(b)(6) depositions, however, are often treated differently. The Committee Notes provide 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."<sup>33</sup> Based on that note, several courts have allowed multiple 30(b)(6) depositions, each for the presumptive limit of seven hours, on the basis

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<sup>31</sup> *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"); *Emps. 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 Sorroof 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. Grp. v. Electrolux Home Prod., Inc.*, No. CIV. 10-1597, 2013 WL 1750019, at \*3 (D.N.J. Apr. 23, 2013) (duty to prepare a witness is "limited to information called for by the deposition notice"); *State Farm Mut. Auto. Ins. Co. v. New HorizonT, Inc.*, 250 F.R.D. 203, 216 (E.D. Pa. 2008) ("[I]f 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).

<sup>32</sup> *See e.g., QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 700 (S.D. Fla. 2012) (barring a company from testifying at trial on any matters on which the company's selected deponent had been unable or unwilling testify); *State Farm*, 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. 683, 687 (S.D. Fla. 2015) (barring a company from testifying at trial on any matters on which the company's selected deponent had been unable or unwilling testify); *Martin Cty. Coal Corp. v. Universal Underwriters Ins. Servs., Inc.*, No. 08-93-ART, 2010 WL 4629761, at \*12 (E.D. Ky. Nov. 8, 2010) (threatening sanctions where a deponent was "unprepared"); *Clapper v. Am. Realty Inv'rs, 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.").

<sup>33</sup> FED. R. CIV. P. 30 advisory committee's note to 2000 amendment.

that the clock “resets” each time a different corporate designee is deposed on different topics.<sup>34</sup> That approach has the perverse effect of penalizing organizations that designate multiple 30(b)(6) witnesses, thereby incentivizing the use of a single witness for as many topics as possible. In many instances, both parties would benefit from the designation of different representatives to address different topics based on their experience and expertise with the organization. More and better-prepared witnesses would result from an amendment to Rule 30(b)(6) that equalizes the application of the presumptive seven-hour limit regardless of whether more than one witness is designated. And of course, because this is a presumptive limit, a deposing party could obtain more time when appropriate—a decision that should turn on whether a longer deposition is warranted by the topics noticed for deposition rather than on whether more than one person is to be deposed.

## **V. RULE 30(b)(6) SHOULD ALLOW FOR A WRITTEN RESPONSE WHEN THE ORGANIZATION HAS NO KNOWLEDGE ON A PARTICULAR TOPIC.**

Rule 30(b)(6) undermines Rule 1’s goal of a “just, speedy, and inexpensive determination of every action” when requiring a witness to be deposed on a topic about which no one in the organization has direct knowledge. This situation frequently arises when the deposing party seeks to explore events that happened in the distant past or circumstances in which the responding entity had only peripheral involvement.<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup> All the witness can do is what the opposing counsel has already done—read the documents and any prior deposition transcripts. This pointless process imposes burdens and invites hostility without advancing the case toward adjudication on the merits.

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<sup>34</sup> *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).

<sup>35</sup> 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.”).

<sup>36</sup> 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.”).

<sup>37</sup> 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.”).

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.<sup>38</sup> The Rule 30(b)(6) should be amended to allow the responding corporation to provide a written response, including a production of documents. We suggest the following language:

An organization receiving a Rule 30(b)(6) deposition notice may respond to the notice, or individual topics contained therein, by providing a written response in lieu of presenting a witness if the responding entity certifies that the written response provides the responsive information reasonably available to the organization and no further information would be provided at a deposition. The written response may include a production of documents, tangible materials or electronically stored information.

Such an amendment should clarify that the organization is not required to obtain knowledge it does not have at the time of the deposition notice by seeking out and interviewing former employees—a point needing clarification because of a handful of overly expansive interpretations of the duty.<sup>39</sup>

## **VI. RULE 30(b)(6) SHOULD FORBID CONTENTION QUESTIONS AND INQUIRY INTO MATERIALS REVIEWED IN PREPARATION FOR THE DEPOSITION.**

Depositions under Rule 30(b)(6) “are designed to discover facts.”<sup>40</sup> Organization representatives should not be asked to express an opinion or contention that relates to the application of law to fact, particularly with respect to contentions in the lawsuit.

Some courts allow deposing parties to seek not only facts but also legal positions, requiring organization representatives to testify to a “corporation’s position, beliefs and opinions.”<sup>41</sup> This permits deposing parties to abuse Rule 30(b)(6) to create oral contention interrogatories in the form of an “impromptu oral examination to questions that require [the corporation’s] designated witness to ‘state all support and theories’ for myriad contentions in a complex case.”<sup>42</sup> Forcing a

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<sup>38</sup> 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.”).

<sup>39</sup> See *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 689 (S.D. Fla. 2012) (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); *FDIC v. 26 Flamingo, LLC*, No. 2:11-cv-01936-JCM, 2013 WL 3975006, at \*6 (D. Nev. Aug. 1, 2013) (requiring entity to prepare a Rule 30(b)(6) witness as to ex-employees’ knowledge of the underlying transaction was unreasonable).

<sup>40</sup> *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 . . .”).

<sup>41</sup> *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).

<sup>42</sup> 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).

representative to answer legal contention questions requires them to “synthesize complex legal and factual positions . . . best left to the contention interrogatories”<sup>43</sup> or other discovery. As mentioned in the Invitation for Comment,<sup>44</sup> contention interrogatories are better suited to that task because interrogatories can incorporate the necessary input from both attorneys and informed individuals.<sup>45</sup> “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.”<sup>46</sup>

For similar reasons, communications between attorney and client in preparation of a legal proceeding should be protected from disclosure as privileged attorney-client communications and work product.<sup>47</sup> Whether a questioning party can ask Rule 30(b)(6) representatives about the documents they reviewed with counsel to prepare for their testimony is not always clear.<sup>48</sup> 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.<sup>49</sup>

Rule 30(b)(6) should not allow contention questions to non-lawyer deponents in a deposition setting<sup>50</sup> or inquiries into materials reviewed in order to prepare for deposition, which are protected by the attorney-client privilege and work-product doctrine. Not only do these practices create friction between the parties and provide a wide avenue for gamesmanship, they also frequently result in depositions being extended, more expensive and invasive.<sup>51</sup> Rule 30(b)(6) should be amended to preclude questions seeking the basis for a party’s legal contentions, claims or defenses.

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<sup>43</sup> James C. Winton, *Corporate Representative Depositions Revisited*, 65 BAYL. LAW REV. 938, 984 (2013).

<sup>44</sup> INVITATION FOR COMMENT, *supra* note 3, at 3.

<sup>45</sup> 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).

<sup>46</sup> *Taylor*, 166 F.R.D. at 363 n.7.

<sup>47</sup> *Montgomery Cty. v. MicroVote Corp.*, 175 F.3d 296, 303 (3d Cir. 1999).

<sup>48</sup> *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 688 (S.D. Fla 2012) (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.*, 2004 WL 739959, at \*3 (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”).

<sup>49</sup> *Evergreen Trading, LLC v. United States*, 80 Fed. Cl. 122, 136 (Fed. Cl. 2007) (analyzing the *Sporck* rule).

<sup>50</sup> See *In re Neurontin Antitrust Litig.*, No. CIV. A. 02-1390 FSH, 2011 WL 253434, at \*7 (D.N.J. Jan. 25, 2011), *aff’d*, No. 02-1390, 2011 WL 2357793 (D.N.J. June 9, 2011) (noting a representative’s testimony is binding and that the representative should be prepared to speak as to the corporations subjective beliefs and opinions).

<sup>51</sup> *Exxon Research & Eng'g Co. v. United States*, 44 Fed. Cl. 597, 601 (1999) (holding contention interrogatories are more appropriate, in part, because “contention interrogatories should be a less expensive method and are a less invasive method of letting [defendant] learn the required information”).

## VII. RULE 30(b)(6) SHOULD PERMIT SUPPLEMENTATION OF TESTIMONY IN ORDER TO ENHANCE FACT FINDING AND REDUCE ACRIMONY.

Rule 30(b)(6) depositions are taken at different stages of different cases, and issues sometimes develop that render 30(b)(6) testimony incomplete or inaccurate. A new fact or allegation, or one that was unknown at the time of an earlier deposition, may cause prior testimony to be outdated, incomplete or even inaccurate. Allowing supplementation in such circumstances would improve the truth-finding function of Rule 30(b)(6) and end a major source of anxiety to counsel.

Uncertainty about the ability to supplement fuels acrimony and costly disputes about the scope of 30(b)(6) depositions—just like the fear of judicial admissions.<sup>52</sup> Courts are inconsistent about supplementation. While some courts have permitted supplementation of Rule 30(b)(6) testimony,<sup>53</sup> or have allowed a party to impeach its own witness and pay the price at trial,<sup>54</sup> others have declined to do so and have stricken subsequent evidentiary submissions as inconsistent with Rule 30(b)(6) testimony.<sup>55</sup> A clear rule allowing supplementation of 30(b)(6) testimony would enhance the completeness of discovery while also reducing the blood pressure around the table.

As the Invitation for Comment points out,<sup>56</sup> Rule 26(e) does not contemplate supplementation of deposition testimony. But individual fact witnesses testify as to their personal knowledge, a subject that is less likely to be improved over the life of a case. An organization's testimony via Rule 30(b)(6) is more analogous to the report of an expert witness, which is subject to supplementation pursuant to Rule 26(e)(2).<sup>57</sup> A 30(b)(6) deponent may have little personal

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<sup>52</sup> As mentioned in the Invitation for Comment, the widespread concern that 30(b)(6) testimony is “binding” on an organization fuels disputes about a variety of matters. INVITATION FOR COMMENT, *supra* note 3, at 2. The Committee should clarify that testimony pursuant to Rule 30(b)(6) does not constitute a judicial admission.

<sup>53</sup> *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 34-35 (2d Cir. 2015) (permitting supplementation of both facts and legal conclusions, noting that Rule 30(b)(6) testimony is not binding in the sense that whatever its deponent says can be used against the organization, explaining that “[a] subsequent witness does not ‘contradict’ a Rule 30(b)(6) deponent when that witness offers information about which the deponent had disclaimed knowledge or expressed uncertainty.”); *Dixon Lumber Co., Inc. v. Austinville Limestone Co.*, 2017 U.S. Dist. LEXIS 88642, at \*13-15 (W.D. Va. June 9, 2017) (While some courts have refused to allow supplementation, Rule 30(b)(6) does not require the court to exclude evidence that contradicts a corporate designee’s deposition testimony in all situations. Courts generally exclude subsequent affidavits to prevent abuse of the discovery process. “Nothing in Rule 30(b)(6) suggests that a company that denies knowledge of a fact cannot produce evidence of that fact from another source.”).

<sup>54</sup> *Radian Asset Assurance, Inc. v. Coll. of the Christian Bros. of New Mexico*, 2010 U.S. Dist. LEXIS 127390, at \*8 (D.N.M. Nov. 15, 2010) (holding that the corporate plaintiff, like any other party did not have the right to supplement its testimony under the Rules, but was free to impeach its own witness and would “pay the price, if any, at trial for inconsistencies in the testimony of its 30(b)(6) witnesses.”).

<sup>55</sup> *Thomas E. Perez v. Five M’s*, 2017 U.S. Dist. LEXIS 28476, at \*21-23 (N.D. Ind. Mar. 1, 2017) (striking statement in subsequent affidavit that contradicts prior Rule 30(b)(6) testimony); *Rainey v. Am. Forest & Paper Assoc., Inc.*, 26 F. Supp. 2d 82 (D.D.C. 1998) (rejecting subsequent affidavit on the basis that “[u]nless it can prove that the information was not known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the Rule 30(b)(6) deposition.”).

<sup>56</sup> INVITATION FOR COMMENT, *supra* note 3, at 2.

<sup>57</sup> Rule 26(e)(2) requires that expert testimony be supplemented because expert testimony is a traditionally troublesome area concerning last minute changes, where courts often exclude last minute changes to testimony on

knowledge related to the role of designated representative, and an organization is more likely to gain rather than forget information during the progression of litigation.

Rule 26(e) accordingly should be amended to allow supplementation of testimony provided pursuant to Rule 30(b)(6) where needed. Any supplementation should be in written form accompanied by an affidavit explaining the reason for the additional information or explanation or, if the parties agree, through another means such as a supplemental deposition. The amendment should provide that any second deposition is limited to the subject matter of the supplement.

### **VIII. RULE 30(b)(6) SHOULD PROHIBIT REDUNDANT DEPOSITIONS.**

Duplicative depositions serve no party's interest, and they can distract everyone's focus away from the merits while adding costs and burdens to the process. Unfortunately, Rule 30(b)(6) serves as an unintentional enabler of such duplication because it permits redundant depositions of the same person twice in a single case.

One way this occurs is, after a relevant employee is deposed as a fact witness, he or she then testifies a second time pursuant to a 30(b)(6) notice. Such notices often identify topics for examination about which the fact witness already testified. It also occurs the other way around: a witness who is deposed as an organization's representative receives an individual deposition notice and answers questions that were asked previously.

In complex litigation, the duplication can be even more significant. Many product liability mass torts cases, for example, involve the same claims in multiple venues, in both state and federal courts, over the course of many years. A defendant organization's witnesses can be subject to numerous depositions even though all of the depositions cover the same topics. A recent example comes from a mass tort litigation involving medical devices that deliver local anesthetic. One defendant's regulatory witness was deposed seven different times, always concerning the same issues and documents. And that was not unique—the regulatory witnesses designated by several other defendants were also deposed repeatedly about the same matters in several identical lawsuits. The pointlessness is obvious, as is the burden imposed not only on the defendant organizations who lose the services of their employees, but also on the individuals who are sentenced to the deposition chair without any possibility of adding anything to the litigation.

The Subcommittee should save the parties and the process from this useless redundancy by amending Rule 30(b)(6) to exclude matters for examination that have been covered in prior depositions, and should include in a new process for objections an effective avenue for avoiding duplicative depositions that add no value to the litigation, in keeping with the spirit of Rule 1.

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the basis of fairness. 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 2049.1 (3d ed. 1998); *S. States Rack & Fixture Inc. v. Sherwin-Williams Co.*, 212 F.R.D. 489 (D.S.C. 2001) (excluding opinion of expert formulated on first day of trial and not disclosed via supplementation). The same considerations of fair play and avoidance of surprise weigh in favor of supplementation of 30(b)(6) testimony.

## **IX. CONCLUSION**

Practices have developed under Rule 30(b)(6) that have rendered it a two-sided rule that fails to work for both sides—and this is observable in the comments received by the Subcommittee. The Subcommittee should return the rule to being “advantageous to both sides as well as an improvement to the deposition process,” as it was in 1970. We urge and support the Subcommittee’s development of proposals to reform Rule 30(b)(6) practice. Specifically, Rules 16 and 26(f) should include Rule 30(b)(6) in party conferences, pretrial conferences and scheduling orders. Rule 30(b)(6) should provide a mechanism for making and resolving objections, and 30(b)(6) notices should be presumptively limited to no more than ten topics. Depositions should not be required where duplicative or when the organization has no knowledge beyond information contained in documents. Rule 30(b)(6) should prohibit contention questions, and Rule 26(e) should allow supplementation of 30(b)(6) depositions. These changes will not only improve Rule 30(b)(6) for all parties, but also harmonize practice under the rule with the spirit of the 2015 FRCP amendments encouraging cooperation, proportionality and early case management.