



**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.