PUBLIC JUSTICE
IMPACT CHANGE

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Submitted via e-mail:
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Committee on Rules of Practice and Procedure
Advisory Committee on Civil Rules
Rule 30(b)(6) Subcommittee
Thurgood Marshall Building
Administrative Office of the United States Courts
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Washington, DC 20544

Dear Subcommittee Members:

Public Justice and the Public Justice Foundation (collectively, "Public Justice") hereby submit the following comments in response to the Advisory Committee on Civil Rules Rule 30(b)(6) Subcommittee's Invitation for Comment ("IFC") on Possible Issues Regarding Rule 30(b)(6).[1]

Introduction

Public Justice is deeply appreciative of the Subcommittee's efforts to ensure that Rule 30(b)(6) is operating at maximum efficiency as a vehicle for gathering information from organizations that are parties to civil litigation.

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[1] Public Justice pursues high impact lawsuits to combat social and economic injustice, protect the Earth's sustainability, and challenge predatory corporate conduct and government abuses. The Public Justice Foundation is a not-for-profit, 501(c)(3) charitable membership organization that supports Public Justice's litigation and educates the public about the issues it addresses. The Public Justice Foundation's membership includes trial lawyers, appellate lawyers, consumer advocates, environmental attorneys, employment lawyers, civil rights attorneys, class action specialists, law professors, law students, public interest advocates, and other people who care about justice.

In our view, however, most of the potential changes addressed in these comments—specifically, those addressing (1) the treatment of Rule 30(b)(6) statements as judicial admissions; (2) the need for supplementation of Rule 30(b)(6) depositions; (3) the permissibility of contention questions in Rule 30(b)(6) depositions; and (4) the provision of a formal process for objections to Rule 30(b)(6) depositions—would undermine these goals because they are not balanced. They would create unequal obligations under the Rules in favor of large corporations over individual litigants.

Each of these proposals, moreover, would create inefficiencies for the courts by increasing the opportunities for satellite litigation. Judges would be bogged down in yet more litigation during the discovery phase of cases. The quest for the truth would be tied up in yet more red tape, leading to unnecessary delay and undue expense for individual litigants.

And to what end? None of these areas, in our view, presents a pressing need for change. In each of these areas, any issues that currently exist are being capably handled by the courts on a case-by-case basis. We therefore urge the Subcommittee not to propose rule amendments on any of these items.

We do agree, however, that certain amendments are warranted with regard to the last item identified in the Subcommittee's Invitation for Comment: specifically, "the duration and number of depositions as applied to Rule 30(b)(6) depositions," IFC at 3, although not in the manner proposed. Our specific proposals with regard to this issue are set forth in Part (II), below.[2]

We begin, however, by setting forth our concerns with regard to the Subcommittee's affirmative proposals. It is our position that these proposals

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[2] Specifically, we believe that Rule 30 should be amended in two respects: (1) the 10-deposition limit set forth in Rule 30(a)(2)(A)(ii) should be amended to clarify that it does not apply to party and expert depositions; and (2) Rule 30(a)(2)(A)(ii), which requires that, unless the opposing party agrees, a party must obtain leave of court to depose a deponent who has already been deposed in a case, should be amended to clarify that it does not apply to Rule 30(b)(6) deponents.

would not only harm efficiency and exacerbate the problem of asymmetrical information, but that several would also affirmatively undermine Rule 30(b)(6)'s goal of preventing corporate "bandying"—*i.e.,* the process of thwarting inquiries during discovery ("gee, we'll get back to you…") and unfairly permit an ambush later in the case ("gotcha!").

In our view, any rule change that would make it easier for organizational parties to engage in that type of gamesmanship would be a step in the wrong direction. Unfortunately, we believe that several of the Subcommittee's proposals would do exactly that, and therefore should not be pursued.

I. Opposition to Specific Suggested Amendments to Rule 30(b)(6).

Against that backdrop, we turn to a discussion of those proposals that we view as particularly problematic.

A. Potential Treatment of Statements Made During 30(b)(6) Depositions as Judicial Admissions.

Public Justice opposes a rule amendment to "clarify" that statements during a 30(b)(6) deposition "are not judicial admissions in the sense that the organization is forbidden to offer evidence inconsistent with the answers of Rule 30(b)(6) witnesses." IFC at 2. Such an amendment, in our view, would be unnecessary and harmful. The question of when a statement made during a 30(b)(6) deposition should be treated as a judicial admission is one best left to the courts to be decided on a case-by-case basis.

Most courts and commentators view Rule 30(b)(6) testimony as binding only in the sense of traditional deposition testimony. *See, e.g.,* 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2103 (Supp. 2007); *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001) ("Testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes...") (quotation omitted). Other courts have recognized, however, that attempting to create a bright-

line rule to apply in all situations would undermine Rule 30(b)(6)'s core goal of eliminating corporate defendants' ability to conduct "trial by ambush."

For example, in some cases, courts have rejected declarations contradicting prior Rule 30(b)(6) testimony using reasoning analogous to the "sham affidavit" rule. *See, e.g., Orthoarm, Inc. v. Forestadent USA, Inc.*, 2007 WL 4457409, at *2-3 (E.D. Mo. Dec. 14, 2007) (rejecting declaration as a "sham affidavit" at summary judgment because it "directly contradict[ed]" prior Rule 30(b)(6) deposition testimony); *Casas v. Conseco Fin. Corp.*, 2002 WL 507059, at *10-11 (D. Minn. Mar. 31, 2002) (granting summary judgment based on Rule 30(b)(6) testimony and refusing to consider contradictory affidavits); *Rainey v. Am. Forest and Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) ("[Rule 30(b)(6)] binds the corporate party to the positions taken by its 30(b)(6) witnesses so that opponents are, by and large, insulated from trial by ambush.").

The decision in *Rainey*, 26 F. Supp. 2d 82, illustrates why—where appropriate—it makes sense to treat Rule 30(b)(6) testimony as binding admissions in order to prevent "trial by ambush." There, a former employee sued her employer under the Fair Labor Standards Act, arguing that it improperly classified her as "exempt" from the Act's overtime requirements. In response to the plaintiff's motion for summary judgment, the defendant sought to rely on the affidavit of one of its former managers that directly contradicted the 30(b)(6) deposition testimony of its designated corporate representative. The affidavit on which the defendant sought to rely was sworn to and subscribed nineteen days after the plaintiff filed its motion for partial summary judgment and five days before the defendant filed its opposition. *Id.* at 94.

On those facts, the *Rainey* court refused to allow the defendant to use the former manager's affidavit to rebut the Rule 30(b)(6) testimony of the corporation's designated representation, holding that allowing it to do so would be contrary to the text of Rule 30(b)(6) and would undermine "the purposes underlying its promulgation." *Id.* at 95.

"Foremost among those purposes," the court wrote, "is to '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.'" *Id.* (quoting Rule 30(b)(6) Advisory Committee note). "In other words," the court concluded, "the Rule aims to prevent a corporate defendant from thwarting inquiries during discovery, then staging an ambush during a later phase of the case." *Ibid.*

These observations, we believe, are correct and strongly counsel in favor of a flexible approach to Rule 30(b)(6). Courts are perfectly capable of determining when a statement given during Rule 30(b)(6) depositions should be treated as a binding admission—*vel non*. Attempting to create a bright-line rule to apply in all situations would invite the very gamesmanship the Rule was intended to prohibit by allowing organizations to conduct "trial by ambush."

B. Permitting Supplementation of Rule 30(b)(6) Testimony.

Public Justice also strongly opposes permitting supplementation of Rule 30(b)(6) testimony. We are concerned that any such amendment could similarly undermine the core goals of Rule 30(b)(6) and unfairly advantage organizational litigants over individuals, at a cost to the efficiency of the courts.

First, as the Subcommittee points out in its Invitation for Comment, allowing supplementation might encourage gamesmanship: "Concerns in the past have included the risk that the right to supplement would weaken the duty to prepare the witness." IFC at 2. And, relatedly, allowing supplementation could actually encourage 30(b)(6) deponents to provide incomplete answers, thereby allowing them to tailor their answers after-the-fact. The "we'll get back to you" response could become the norm.

In addition—and importantly—the benefits of this type of gamesmanship would create special advantages for organizational litigants, and thus would create serious fairness issues. Existing Rule 26(e) does not permit supplementation of deposition testimony. So an individual plaintiff

who tried to change her prior testimony via supplementation would be subject to impeachment or a motion to strike. Allowing supplementation by corporations would create a serious additional inequity in an already unbalanced playing field.

It could be responded that special treatment of Rule 30(b)(6) deponents is warranted because only Rule 30(b)(6) deponents have a legal duty to prepare. Any such response should fail to persuade, however, because in practice *all* party deponents face potentially serious legal consequences for failure to prepare for their depositions. And when the deponent is an individual, those consequences might have more serious ramifications than in the Rule 30(b)(6) context, when the corporation is the legal party in interest. Individual deponents, moreover, often have disadvantages as compared to corporate deponents, particularly when it comes to experience in giving testimony, that further counsel against creating a special supplementation rule in the Rule 30(b)(6) context. Individual deponents are often inexperienced testifiers, while corporate representatives are often more comfortable with giving testimony. This would often mitigate in favor of allowing the individual deponent to supplement or amend answers. Thus the fact that corporate deponents have a legal duty to prepare should not in any way justify the creation of a one-way supplementation rule that operates solely in the 30(b)(6) context.

Finally, of course, permitting supplementation for Rule 30(b)(6) deponents would create more work for the courts by generating motion practice over what does—and what does not—constitute permissible supplementation. This is yet one more reason why, in our view, this proposal should not be pursued any further.

C. Forbidding Contention Questions in Rule 30(b)(6) Depositions.

We also strongly oppose forbidding contention questions in Rule 30(b)(6) depositions. Contention questions lower costs and facilitate discovery. Forbidding their use in Rule 30(b)(6) depositions would unfairly impose a discovery restriction on individual litigants, but not organizational parties. It would also hinder fact-finding.

While the Subcommittee is correct that parties have much more time to respond to contention interrogatories, corporate defendants often ask plaintiffs numerous contention questions during their depositions. Allowing these types of questions to be asked of plaintiffs, but not defendants, would unfairly advantage one party to the litigation, without any principled justification.

In addition, contention questions help streamline litigation and are good for both sides. By helping to define the issues in controversy, they help the parties cut to the chase. Eliminating contention depositions in Rule 30(b)(6) depositions would thus not only give corporations a special advantage, it would make litigation less efficient.

To understand why this would be so, it is important to emphasize that Rule 30(b)(6) depositions are used to define the scope of necessary discovery, in addition to narrowing substantive issues. Thus, for example, in a product liability case involving a defective car, the plaintiff's counsel might ask the defendant's (b)(6) designee what vehicle model and model year vehicles have "substantially similar" seatbelts to the subject design. That is plainly a contention question—application of facts to law. But this type of question also helps *everyone* by framing the proper scope of discovery. Eliminating the use of contention questions in (b)(6) depositions would drag out discovery and lead to unnecessary expense—thereby harming both sides of the "v."

Using an interrogatory for the same purpose would not suffice. In order to conduct efficient discovery, the attorney must be able to probe the answer to see if it is supported or whether the description is unduly narrow. Development of these facts in a deposition creates the record by which a court could decide the issues if the parties disagree after the testimony. Eliminating that possibility would create real problems for both plaintiffs and defendants.

There is also a practical problem with forbidding contention questions in Rule 30(b)(6) depositions that raises additional efficiency concerns.

Definition of a "contention" question depends upon the circumstances of the particular case, and it is easy to imagine that both sides will have differing views. Moreover, the Subcommittee's proposal does not suggest a definition, and that's understandable, because it's hard to imagine what definition would work in all circumstances. We can therefore expect this limitation to give rise to refusals to answer and satellite litigation. Once again, efficiency and fact-finding would suffer—and for no good reason.

D. Adding a Provision for Objections to Rule 30(b)(6).

Public Justice also strongly opposes injecting a formal objection process into Rule 30(b)(6). In our view, this proposal is one of the most potentially disruptive of those currently on the table. If adopted, it would make discovery far more cumbersome, dramatically slowing down the proceedings right from the outset, and not advance any affirmative goals.

Because a Rule 30(b)(6) deposition is often the first deposition taken in the case, a formal objection process would cause delay from the beginning of discovery. Nearly every 30(b)(6) deposition would be preceded by objections and a motion to compel. This would de facto place the burden of persuasion on the discovering party. Discovery would come to a standstill while the court considers the motion.

These types of inefficiencies are completely unnecessary because there are existing rules in place to allow parties to file objections. If a proposed Rule 30(b)(6) request is truly objectionable, then the opposing party can move for a protective order under Rule 26. There has been no showing that the courts are overburdened with protective order motions regarding Rule 30(b)(6) motions. Thus, the existing rules are adequate to the task and therefore there is no reason to add a redundant remedy to the rulebook.

In short, only the most compelling need should permit the creating of new mechanisms to allow lawyers to fight about discovery. No such need had been shown with regard to Rule 30(b)(6), and thus we would urge the Subcommittee to leave this proposal on the drawing board.

II. Proposal for Amendment to Address Issues Regarding the Counting and Number of Depositions.

We do agree, however, that some clarification is needed regarding the counting and number of depositions as applied to Rule 30(b)(6) depositions, but not in the manner proposed. Our two proposals are set forth below:

First, we respectfully request that the Subcommittee consider amending the 10-deposition limit set forth in Rule 30(a)(2)(A)(i) to exclude party and expert depositions. Under the current Rule, in multi-party cases, where each party (plaintiff and defendant) must be deposed, the ability to take non-party depositions is severely limited if the party depositions count toward the 10-deposition limit. This is counter-productive and counter-intuitive, as multi-party cases are often the most complex and require *more* non-party depositions.

A related problem exists with respect to expert depositions. In a case of any complexity that involves experts, the combination of expert depositions and party depositions can consume the entire 10-deposition limit, leaving no room to take fact depositions. That certainly isn't the goal of litigation – to develop the facts primarily from parties and their hired experts rather than from impartial witnesses.

A potential approach to these problems is to amend Rule 30(a)(2)(A)(i) to clarify that the presumptive limit is 10 depositions, *exclusive of* party and expert depositions. The Invitation for Comment correctly notes that parties should discuss and work out these issues in most cases. However, if the Rule is changed to specifically exclude party and expert depositions from the 10-deposition limit, then it would fit the needs of most cases and streamline the discussion process.

Second, we propose that Rule 30(a)(2)(A)(ii), which requires that, unless the opposing party agrees, a party must obtain leave of court to depose a deponent who has already been deposed in a case, be amended to make clear that it applies to a "deponent other than a 30(b)(6) deponent."

This amendment is needed, in our view, because multiple 30(b)(6) depositions of the same party are often needed and desirable from both a truth-finding and efficiency standpoint. As explained above, 30(b)(6) depositions are often needed early on to help define the proper scope of discovery and to narrow the issues for further discovery. However, as the litigation progresses, after written discovery proceeds and documents are produced, one or more additional corporate depositions from the same party are often needed later, to address more substantive issues that were not addressed during the initial (b)(6) deposition.

As the law currently stands, however, taking multiple 30(b)(6) depositions from the same party is made difficult by Rule 30(a)(2)(A)(ii), which provides that leave must be sought to take a deposition that isn't taken by stipulation if the deponent has already been deposed. This injects an additional element of unfairness in a system that is already unfairly stacked in favor of organizational litigants.

As this Subcommittee is well aware, many cases brought by individuals against organizational defendants (companies or governments, for example) involve an initial asymmetry of information, with the defendant in possession of most of the critical information on liability. To address this asymmetry, organizational depositions are essential. But a plaintiff has a dilemma in deciding whether to take an initial corporate deposition to help narrow the scope of discovery and of the issues–a type of deposition that serves the purpose of both fact-finding and efficiency. A plaintiff does not know at the beginning of a case whether a court will allow one or more later substantive 30(b)(6) depositions, unless the plaintiff brings a motion early on—but that early motion would have to be heard at a point in the case when the plaintiff does not yet know what such depositions will be needed. That plaintiff may decide to forego the initial corporate deposition in order to preserve her ability to take substantive depositions later in the case. That's a lose-lose proposition for all concerned, because it means that discovery is less streamlined and more cumbersome.

To avoid this outcome, we respectfully ask the Subcommittee to consider amending Rule 30(a)(2)(A)(ii) to provide that it applies to a "deponent other than a 30(b)(6) deponent." That would solve the problem set forth above and ensure that discovery is as efficient as possible for all concerned.

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Again, we thank the Subcommittee for its hard work on this issue and for the opportunity to submit these comments.

Respectfully,

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