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VIA E-MAIL
Advisory Committee on Civil Rules
Rule 30(b)(6) Subcommittee
Rules_Comments@ao.uscourts.gov

Re: Comment on Possible Issues Regarding Rule 30(b)(6)

Dear Advisory Committee:

We respectfully submit the following comments on the EEOC's Proposed Enforcement Guidance on Unlawful Harassment for Public Input. *See* https://www.regulations.gov/document?D=EEOC-2016-0009-0001.

This firm represents employees and labor organizations in individual and class cases, including employment discrimination, retaliation, whistleblowing and harassment cases. Our clients come from all walks of life, from hourly workers to professionals and executives. We regularly take Rule 30(b)(6) depositions in cases we litigate. Rule 30(b)(6) is an essential vehicle for information gathering. In our experience, the rule is working well. In our jurisdiction (Seventh Circuit), parties follow the practice of conferring about discovery issues and only rarely have we had to raise 30(b)(6) issues before the judge.

Inclusion of Rule 30(b)(6) among topics for discussion at the Rule 26(f) and in the Rule 16 report

We do not believe that it makes any practical sense to require parties to discuss Rule 30(b)(6) topics at the earliest stage of litigation. The specific topics of Rule 30(b)(6) depositions vary from case to case and typically cannot be determined until we receive written discovery responses and documents. Sometimes the need for a 30(b)(6) deposition is not apparent before taking depositions. It would be impossible for the parties to have a meaningful discussion regarding appropriately specific 30(b)(6) topics at the stage of initial case planning as proposed. Further, it would be a waste of the court's time to have to raise issues prematurely.

Requiring and permitting supplementation of Rule 30(b)(6) testimony

We oppose amending Rule 30(b)(6) to require or permit supplementation of 30(b)(6) testimony. 30(b)(6) deponents should not be compared to retained experts; like individual plaintiffs; 30(b)(6) deponents are parties too, the hand-picked representatives of a party. It would weaken the duty and incentive to prepare a 30(b)(6) witness to provide responsive and complete testimony to questions about topics they were aware of and had an opportunity to prepare for in advance of the deposition. Further, permitting organizations to supplement 30(b)(6) testimony would create an uneven playing field by allowing the organizational party to add to and change its testimony whereas individual plaintiffs cannot change their deposition testimony without being subject to a motion to strike on summary judgment or a motion in limine or impeachment at trial. There is no principled justification to permit organizational defendants to change their deposition testimony when individual plaintiffs cannot do so.

Forbidding contention questions in 30(b)(6) depositions

The Subcommittee posits that contention interrogatories are "rarely if ever used in ordinary depositions." In fact, such questions are routinely asked of individual plaintiffs in employment cases. For example, "Do you contend that [individual supervisor] discriminated against you on the basis of race?" and "State all facts that support your claim that the company discriminated against you on the basis of your race." Forbidding individual plaintiffs from similarly exploring organizational defendants' affirmative defenses or other aspects of their defense would prejudice plaintiffs. Again, there is no principled justification to favor the organizational defendant over the individual plaintiff. Whether a contention question is appropriate should be subject to the same standards as any other question, which will depend on the circumstances of the case.

Objections to Rule 30(b)(6) depositions

We oppose adding a provision excusing a 30(b)(6) deponent from testifying on any topic that the organization objects to, absent a court order. Such a provision makes absolutely no sense. Organizational defendants do submit objections to 30(b)(6) topics in advance of the deposition. Because it involves discovery, the parties meet and confer in an attempt to clarify the scope of the 30(b)(6) depositions and to resolve other issues – often without having to bring the matter to the judge. Also it is not uncommon for stated objections to become moot during the deposition. Under the proposal, organizational parties would have an incentive to object to topics to delay or prevent 30(b)(6) depositions from proceeding simply by making an objection; 30(b)(6) depositions would be unnecessarily delayed; and judges would likely face a flood of motions involving 30(b)(6) depositions.

On the other hand, requiring organizational defendants to provide objections to 30(b)(6) topics in advance of the deposition – without requiring a court order ruling on those objections – so that the parties can confer in preparation for the deposition, might make 30(b)(6) depositions more efficient.

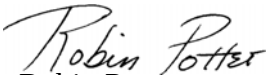
Limits on duration and number of depositions

We believe that Rule 30(b)(6) should be amended to make explicit that a 30(b)(6) deposition counts as one deposition, regardless of the number of witnesses that the organization designates to testify. That would serve to avoid disputes on that issue, which is important in light of the limit on the number of depositions in our and other jurisdictions. Our jurisdiction already limits the length of depositions; however, counsel are permitted and often agree to more time, if needed. We do not believe that 30(b)(6) depositions need to be singled out from other depositions for special treatment as far as length.

On behalf of our Firm and our clients, Potter Bolaños appreciates the opportunity to comment on the Subcommittee's proposals and thoughts regarding Rule 30(b)(6) depositions.

Respectfully,

POTTER BOLANOS



Robin Potter