FOR THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS

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In the Matter of:	)
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Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure	)
	)
Advisory Committee on Civil Rules	)
	)
Civil Rule 30(b)(6)	)
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A P P E A R A N C E S

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PROFESSOR EDWARD COOPER

PROFESSOR DANIEL COQUILLETTE

HON. JOAN ERICKSEN

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HON. KENT JORDAN

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I N D E X

WITNESSES:

John Griffin	6
Lisa LaConte	12
James McCrystal	18
Sandra Ezell	23
John Southerland	30
Nieves Bolaños	36
Mark Kenney	41
John Sundahl	49
Lee Mickus	56
Bradley Smith	65
Bill Rossbach	73
Patrick Fowler	81
Gray Culbreath	88
Michael Carey	95
Bradley Petersen	100
Jennie Lee Anderson	109
Bina Ghanaat	117
Tim Pratt	123
Keith McDaniel	130
Philip Willman	137
A.J. de Bartolomeo	143
Amir Nassihi	150
Donald Myles	156

Francis McDonald 160
Michael Denton 164

P R O C E E D I N G S

JUDGE BATES: Good morning. We're going to start pretty promptly here today.

08:59:47 I'm John Bates, the chair of the Advisory Committee on Civil Rules. I'm joined up here today by Dave Campbell, the chair of the Standing Committee on Rules; by our chair of the subcommittee dealing with Rule 30(b)(6), Judge Joan Ericksen. Other members of the committee are reporters and

09:00:08 the reporter for the standing committee, or the former reporter for the standing committee. And we appreciate your coming here today.

We have a pretty full lineup of witnesses to hear from this morning that will run into this afternoon a little

09:00:23 bit, I'm sure. I want to thank you in advance, all of you, for your appearances today and for the written submissions as well that we've already received.

There are 25 witnesses scheduled. It's a tight schedule. We've only allotted seven minutes per witness. I

09:00:41 apologize for that, but we really have no choice if we're going to hear from all of you.

To leave time for a question or two, I would urge you to try to say what you'd like to say in five or six minutes because there may be members of the committee who have a

09:00:59 question that they would like to ask you. So if you can shoot

09:01:03 for that, I would appreciate it.

Again, we appreciate your cooperation and your input into the rulemaking process as we deal with proposed amendments to Rule 30(b)(6) of the Federal Rules of Civil
09:01:14 Procedure.

With that, we're going to turn to the first witness, and our first scheduled witness is John Griffin.

MR. GRIFFIN: Good morning. What a difference it makes from a few years ago when we had a facet -- a whole
09:01:30 facet of issues before us. Today we talk about a more discrete issue, the venerable uniquely American Rule 30(b)(6).

I come to talk to you from a perspective of representing people with disabilities who have opened up doors through 30(b)(6) and what has been done with that rule in
09:01:48 important cases around our country.

As some of you know, I've assisted court security officers who guard the federal judiciary around the country. And Rule 30(b)(6) has helped make changes to the way the Marshals Service deems CSOs fit for duty. Formerly CSOs, if
09:02:07 they needed a hearing aid in order to pass the hearing test, they were fired. Rule 30(b)(6) allowed us to generate topics about audiology, risks, what's important on the job, that sort of thing, to the point now where the Marshals Service actually judges people's ability to hear, period, with or without a
09:02:25 hearing aid.

09:02:26 Likewise, topics with the Marshals Service and cases involving CSOs has helped the Marshals Service with cardiology, endocrinology, and vision issues when cases have come up with respect to court security officers.

09:02:40 Changes were made that made the judiciary safer because of the discreteness of the topics that allowed witnesses from the agency to candidly talk about the agency's position on these issues.

Now, in other ways, in other important cases, I 09:02:55 practice, as you know from the last time, commercial cases, but represent people with disabilities.

Some of you may recall in Washington, because of NPR and the Washington Post, a case tried before Judge Anthony Trenga, which involved a lot of 30(b)(6) testimony. There 09:03:12 were several issues that the FBI had with a young man who had been selected to go to Quantico. He had his left hand blown off in a grenade. He was an Army Ranger. At Quantico, he was kicked out of academy because of the perception that he couldn't shoot with his weak hand.

09:03:29 What happened in that case where there were topics of deposition testimony under Rule 30(b)(6). The FBI first claimed that agents had to be able to shoot with nondominant hand in order to be qualified, and the notice included that topic.

09:03:45 It turned out that in the history of the FBI, only a

handful of times had any agent ever shot with the weak hand and mayhem generally ensued.

Second, the FBI claimed in written discovery that they never had anyone with a serious hand issue in the force, that they can't have someone and never had people with a blown off hand or a paralyzed hand.

The 30(b)(6) deponent, under oath, shared how the FBI had several agents who had their hands, one even blown off with a grenade, and others with paralysis and other types of issues where the agent was declared fit for duty despite something happening to the off hand.

Third, we learned under 30(b)(6) something else different from the written discovery, that when FBI agents take a firearms test, they don't have to hit the -- take any of the shots with the off hand if they don't want to. They can elect to pass so long as they achieve enough points with their strong hand. In other words, points are points. Not how they accumulate them.

Now, think about that.

The written discovery in those cases did not elicit those frank answers. And following the case of the young man in Virginia, Judge Trenga, the district judge, ordered reinstatement, Director Comey elected not to appeal, and that young man was chosen by his class when he was reinstated and now serves our country.

09:05:12 He came after other 30(b)(6) testimony had changed other ways. The FBI now employs agents who use insulin injections as special agents. It took a jury trial and 30(b)(6) testimony by the FBI and a trial in Judge James 09:05:27 Robertson's court to make that happen.

More recently, we had 30(b)(6) testimony in the first jury trial of the nation presided over by former chief judge Royce Lamberth about a service dog for a veteran with PTSD. 30(b)(6) testimony generated the important testimony the jury 09:05:44 relied on in finding that that accommodation in that workplace was reasonable.

Now, some people say that the committee shouldn't look at such a discrete issue, but I commend the committee; all rules need to be reevaluated. The committee, it seems to 09:06:01 me, hasn't thrown anything else -- what's the word I'm looking for -- hasn't done anything radical or incendiary as some of the comments have stated. Rather, the committee has taken something and made it better by having a conferral process.

Some of you may know that Texas has patterned its 09:06:17 rule after 30(b)(6), and 199.2(b)(1) does have one of the improvements that the committee is considering, a requirement that the organization designate the witness a reasonable time before --

PROF. MARCUS: Can I interrupt with a question.

09:06:34 MR. GRIFFIN: Go ahead.

09:06:34 PROF. MARCUS: We use the word in our rule "designate." You seem to say Texas treats that as meaning inform the other side; is that correct?

MR. GRIFFIN: That is correct.

09:06:46 PROF. MARCUS: Has that caused any problems and would a rule that required that accomplish the goals you think we should be trying to accomplish?

MR. GRIFFIN: It's a worthy goal. In 35 years, there's not a reported case on a disagreement over what's a

09:06:59 reasonable time before the deposition.

JUDGE JORDAN: Is there a difference between identifying a witness and meeting and conferring about a witness?

MR. GRIFFIN: Meeting and conferring, in our view, is

09:07:11 a help. There's been a lot of chatter and overwrought statements about people meeting and conferring about either the top --

JUDGE JORDAN: Is there a difference?

MR. GRIFFIN: Sure.

09:07:23 JUDGE JORDAN: So the Texas rule is an identification, not a meet and confer.

MR. GRIFFIN: Absolutely. It's only identification and the Texas rule has only that facet. I think that the committee's done better with the meet and confer. The

09:07:36 comments as I've read them, some use the words "incendiary"

09:07:41 and "radical," but they're from the vantage point of either the organization or the party who seeks the deposition.

What you've done is create something that's very balanced. The noticing party has to or should confer about 09:07:55 scope of the topics so that you can make sure your topics -- you don't see the judge in a motion for the first time, you can discuss them with the other side. Likewise, the organization's discrete obligation is to name the designee. The meet and confer doesn't require them to -- doesn't require 09:08:11 us to tell who it is. But it does have some help that both sides know the other's perspectives so you know that before you face a motion after the deposition. And of course procrastinating on the designation, waiting for the last minute, invites the very problems the rule is designed to 09:08:29 prevent.

JUDGE ERICKSEN: Does the Texas rule have a meet and confer aspect or is it simply --

MR. GRIFFIN: It does not.

JUDGE ERICKSEN: -- simply notice. Has that worked 09:08:44 all right?

MR. GRIFFIN: It has for 35 years. There are no reported cases on it. In our practice, generally -- if I'm presenting an organization a few days before the deposition, I'm telling them who it is so that they can save their 09:08:56 questions and not waste a bunch of questions that they would

09:08:59 normally ask in a deposition.

But the meet and confer of discrete issues, I think as a noticing party, and I represent companies too, as a noticing party, I want to know problems with the notice. If 09:09:11 there's an argument that it's not sufficiently particularized, let's talk about it. Maybe we can combine some topics.

Likewise, if I'm an organization, I don't want to hear from it after the fact in a motion that my witness was the wrong witness or was not sufficiently prepared or briefed 09:09:26 to address the topics. Those are good things.

JUDGE BATES: Mr. Griffin, any last comments?

MR. GRIFFIN: Sure.

Finally, courts have done a good job policing the rule as it is. It is not a judicial admission, those 09:09:42 depositions. Yet nobody can ambush, a company can't ambush someone when their witness doesn't know an answer to a question. It ought to be supplemented.

If you did nothing it wouldn't be a crisis, but what the committee's proposed is a good improvement on what's 09:09:58 already there and therefore I commend the committee's draft for your consideration.

JUDGE BATES: Thank you very much, Mr. Griffin.

MR. GRIFFIN: Pleasure.

JUDGE BATES: Our next witness will be Lisa LaConte.

09:10:10 MS. LaCONTE: Good morning. Thank you for the

09:10:12 opportunity to come and speak with you. My take is going to be a little bit different.

I want to give you a little bit of background. I'm with the law firm of Heyl Royster Voelker & Allen, and have 09:10:20 practiced for 30 years primarily in the area of mass tort, toxic torts, asbestos litigation in state and federal courts in Illinois and Missouri.

My real issues and comments perspective today come from my role as national counsel representing a corporation 09:10:39 that began in the 1920s in the -- and representing the -- in the asbestos litigation across the country. So we face the issue of 30(b)(6) witnesses, not only in federal court, but state court as well. In virtually every case this is a issue and topic that comes up regularly. And we face notices for 09:11:04 those depositions regularly.

So there's some unique challenges when you are talking about litigation such as the asbestos litigation that deals with companies that have very long history, companies who are a conglomeration of acquisitions, mergers, and sales 09:11:25 over many years, and you're talking about a product or a premises of that company that may no longer exist, it may have been bought or sold or acquired later on. So the idea of identifying someone with knowledge about all these myriad topics becomes quite a challenge. So it's certainly something 09:11:45 to deal with on a regular basis.

09:11:48 I certainly recognize that the committee has spent a lot of time considering the amendment to 30(b)(6). My position and my request is that the committee today consider not adopting the proposed amendment but frankly re- -- 09:12:04 considering some revisions to the proposed amendment that we think will provide real meaningful change as we proceed in the litigation.

The concept of meet and confer is certainly not anything new to any of the lawyers that are in this room, and 09:12:20 I think you would expect that most of us do that on a regular basis on topics and issues in a case regardless of a mandate to do so.

However, the mandated meet and confer requirement in the proposed amendment merely, in our view, creates a 09:12:39 discovery obligation that is new but provides no meaningful change or meaningful means for us to move the litigation forward more efficiently, less costly the matter, or to streamline judicial resources in any way.

Merely mandating the meet and confer aspect of a 09:13:02 30(b)(6) notice is not going to do anything but create an infinite loop and an infinite opportunity for disputes to arise and costs to be incurred because there's no companion outline of a process to raise objections and a means to have those objections to the notices resolve before the deposition.

09:13:28 JUDGE BATES: On the meet-and-confer aspect, we've

09:13:30 been told by others that good lawyers with 30(b)(6) depositions generally do have conversations.

MS. LaCONTE: We do.

JUDGE BATES: They do have a meet and confer.

09:13:41 MS. LaCONTE: We do.

JUDGE BATES: Why would that having as that as part of a rule really change things all that much?

MS. LaCONTE: Well, by making it a mandated process, you interject a requirement that sometimes is not necessary. 09:13:54 Sometimes we can resolve things easily. Sometimes the meet and confer is not going to be the way that you resolve the issue.

JUDGE BATES: But wouldn't that happen even with the language in the rule? If it's easy to resolve, it will be a 09:14:10 30-second conversation.

MS. LaCONTE: And those aren't the problems that we bring to the court. But that doesn't create the issues that we see when we have 30(b)(6) issues.

And I'll be very honest, we don't have an issue that 09:14:24 requires court intervention in every single notice that we receive. But when the parties equally on both sides have an issue that either their clients insist that they hold their ground or the lawyers are adamant about the relevance or other objections to the deposition notices, there's no means for us 09:14:46 to address how we go forward when each side is going to hold

09:14:51 their ground.

JUDGE JORDAN: That's a separate issue, though; right? You're talking about a notice as to meet and confer. What is -- what's the problem with a meet and confer? You've 09:15:03 said it's a problem. If lawyers are doing it anyway, what's the problem with having it in the rule?

MS. LaCONTE: Well, the problem is that you're requiring a process that is not going to resolve the problem. There's an easier way to resolve the process.

09:15:21 Again, I'm not objecting to the concept of meeting and conferring. But to make that a discovery obligation, I think it's not going to get us the meaningful change that we would like to see in the rule.

JUDGE JORDAN: It's not so much that the meet and 09:15:36 confer is a problem as the draft doesn't have things in it you'd like to have? Am I understanding that right?

MS. LaCONTE: Yes. With respect to the topics, the scope of the deposition, yes.

So by providing a means for the parties to raise 09:15:52 objections and a means to have those objections ruled on before the deposition goes forward, I think would provide the meaningful change that the concept of meet and confer you may think is going to get us there, but when both sides hold their ground, there's no means in the rule to address those issues 09:16:11 and get us past that hump to produce the witness and have an

09:16:16 appropriate deposition taken.

JUDGE BATES: Is there a mechanism for objections formally in the rules now for Rule 30 -- not specifically 30(b)(6), but Rule 30 depositions?

09:16:27 MS. LaCONTE: I don't believe so. We reference --

JUDGE BATES: So why do we need one for Rule 30(b)(6) if there isn't one for depositions generally? Doesn't the process work all right, not just for 30(b)(6) but for all depositions?

09:16:39 MS. LaCONTE: No, I don't believe so because 30(b)(6) notice is so different than a witness's deposition on the basis of personal knowledge. The usual fact witness depositions, party depositions, expert depositions are focused on specific facts of the case or limited to the knowledge of

09:16:57 those witnesses, as opposed to 30(b)(6) witness who is speaking on behalf of the corporation.

And, you know, the notices that we receive have 50, 75, sometimes 100 areas of inquiry that go back into history, back way beyond the personal knowledge of the witness, outside

09:17:18 of the scope of the particular limited facts of the case, and that's where we get into the disputes of the scope of the 30(b)(6) deposition.

JUDGE BATES: Do you have any final comments you'd like to make for us?

09:17:32 MS. LaCONTE: Well, the final thing that I'd like for

09:17:34 you to take away is that by providing a framework for the parties to address their objections and resolve their objections before the depositions go forward would be a very meaningful change. It would streamline the deposition 09:17:48 process, the objection process, it would eliminate unnecessary motion process practice, and that just bogs down the whole process of the case. And I think you would find that it resolves a number of the issues that you're going to hear about today.

09:18:03 Thank you for your time.

JUDGE BATES: No further questions.

Thank you, Ms. LaConte.

The next witness will be James McCrystal.

Welcome.

09:18:15 MR. McCRYSTAL: Morning, Your Honors.

I'm here this morning on behalf of the DRI, which is a membership group of over 20,000 lawyers that practice in the civil courts of the United States, including federal courts.

And they routinely encounter issues with 09:18:40 Rule 30(b)(6) in the federal courts and the analog in many state courts. And the guidance that this panel creates by writing rules and offering committee notes guides not only the federal judges applying these rules, but state judges that also have to consider issues that arise in the context of 09:19:00 taking testimony from an organization.

09:19:04 Our comments are directed at things that are not included in the present draft that we think are important for consideration. Paramount is that it is unclear in practice whether the limitation on the number of depositions or the
09:19:27 length of depositions conducted under Rule 30 apply to an organizational deposition.

And the reason I say this is that, as you know in rule changes from 2015, the number of interrogatories and the number of witnesses were limited. So now the dynamic has
09:19:52 shifted to potentially, well, let's get the organization to produce someone who will give us all the information that we couldn't have obtained through the 25 interrogatories or the limited number of witnesses in time we have to take testimony from percipient witnesses.

09:20:08 And our concern is that without -- at least in your comments -- knowing that those principles apply to this type of discovery deposition leaves us where we're down the rabbit hole. Where suddenly this type of deposition becomes the dominant and becomes uncontrolled by the normal limits of time
09:20:33 and length and number of witnesses.

PROF. MARCUS: So what you're saying is that your goal is that the committee note add a reference to the existing 26(b)(1) proportionality provision? That's the solution?

09:20:50 MR. McCRYSTAL: I think by noting that this type of

09:20:54 organizational deposition counts as one of the witnesses or that the seven-hour rule applies --

PROF. MARCUS: But the committee in 2000 does address that issue, doesn't it?

09:21:11 MR. McCRYSTAL: With regard to this type of deposition, I'm not sure, Professor, that it does specifically.

JUDGE BATES: If you assume it does, is there really that much of a problem? You say this issue comes up, and I'll 09:21:25 grant you that it probably does come up between the lawyers, they have a discussion. It doesn't wind up with a lot of motions practice or a lot of wasted time or taking the judge's time to resolve that, does it? We haven't seen cases like that.

09:21:42 MR. McCRYSTAL: I think you're correct on that, Your Honor. But what I'm concerned about is the future, not the past. And I think that this is an excellent opportunity for the committee to make it clear in its comments that you believe there is a framework here, because otherwise what 09:21:57 we've done is expanded into another universe where interrogatories aren't important, I'll just issue a 30(b)(6) notice and I'll actually get to interrogate someone who is supposed to know what otherwise I would have done in an interrogatory.

09:22:11 JUDGE JORDAN: Isn't that a separate issue though?

09:22:14 The -- that's -- the issue that you put on the table is that the numbers and length limitation should apply, and we've got a few years experience now with the 2015 amendments. If there were a problem with this, would we see some information that 09:22:35 shows, hey, this is a regular problem?

MR. McCRYSTAL: I think lawyers are reluctant generally to go before the court with issues like this because it's contextual, and some judges are very active in the management of their dockets. Those who say you can't, this 09:22:53 rule encourages the judge can put an order on saying that you can't file papers before you conferred with me or my office first, I don't want that paperwork, let's work it out. And, yes, lawyers do that. But there are a number of occasions where clearly framing the issues for them that, yes, seven 09:23:15 hours, yes, a limited number of witnesses --

PROF. MARCUS: If it's contextual, doesn't that mean the circumstances of a given case are important?

MR. McCRYSTAL: Yes.

PROF. MARCUS: Then a specific across-the-board limit 09:23:30 might be inconsistent with that.

MR. McCRYSTAL: All of these rules were written with the changes over the past 20 years to encourage management techniques to be applied by the district judges and to cause the parties to confer with each other without the 09:23:45 arbitrariness of an absolute rule.

09:23:48 I agree with you, Professor. I don't encourage an absolute rule. But I do encourage the litigants be mindful of those limits and the judges respect the opinion of a committee in its notes that these limits have meaning in the context of
09:24:05 litigation.

Yes, you can have more than 25 interrogatories. Yes, you can take a deposition for longer than seven hours by agreement. Yes, you can have more than ten witnesses by agreement or by court order.

09:24:16 This rule with regard to 30(b)(6) doesn't contain references to that, and I think it would be assistive if it did.

JUDGE CAMPBELL: Mr. McCrystal, what exactly would you have us put in the committee note?

09:24:34 MR. McCRYSTAL: I think I can draft language for you, but my concept would be --

JUDGE CAMPBELL: Concept, yeah.

MR. McCRYSTAL: -- that reference to (1) and (2) of Rule 30 are to be considered as guiding the practice under
09:24:54 30(b)(6).

With that, I appreciate the questions and I look forward to your deliberations.

JUDGE BATES: We appreciate your testimony, Mr. McCrystal. Thank you.

09:25:11 Our next witness will be Sandra Ezell.

09:25:22 MS. EZELL: Good morning.

JUDGE BATES: Good morning.

MS. EZELL: I am here as a 28-, almost 29-year lawyer first admitted in 1990. I'm admitted to practice in Illinois
09:25:34 and Virginia, and as a 54-year-old woman will be admitted in California in a few weeks.

JUDGE BATES: I don't know congratulations or condolences.

PROF. MARCUS: Congratulations.

09:25:50 MS. EZELL: Both, I think, is the answer.

But that's where the trials are and so that's where I'm headed. I'm a trial lawyer. And for most of these, 27 of these 28 years, I have been defending corporate clients who design, build, and make things against people who sue them for
09:26:08 injuries that they allege are caused by them.

And in conjunction with that I have defended or been assistive in defending hundreds of 30(b)(6) depositions or the state corollary depositions, and I'm here today to address the proposed amendment from this experience.

09:26:33 I support this committee's proposed concept of a meet and confer with regard to the matters for consideration or to be addressed.

I particularly draw the committee's attention to your report where you indicate that one of the things that would be
09:26:54 helpful to the meet-and-confer process on the issues for

09:27:00 consideration would be the documents that the noticing party plans to use at the deposition be identified.

In my experience, the noticing party and the responding party don't necessarily speak the same technical 09:27:16 language, the same terms of art. I deal with a lot of scientific terms. And even within the same industry, companies who deal in the same products don't speak the same terms. And so people on different sides of the aisle, and generally the defendant, the defendant and plaintiff don't 09:27:35 speak the same terms.

But if you identify the documents that you're going to be discussing, it makes it much easier to know what that deposition is going to be about. It makes it --

JUDGE BATES: Would it be fair to require the 09:27:49 noticing parties to identify the documents to be used without the noticing party knowing who the witness is?

MS. EZELL: Yes.

JUDGE BATES: How so? If you know the witness, you might choose one set of documents versus another set of 09:28:03 documents or some subset of those documents. It would seem to make it inefficient if the noticing party has to produce the documents but doesn't know who the witness is.

MS. EZELL: So litigation is separated into different events, and the 30(b)(6) deposition is the time to take facts 09:28:24 and information from the company about certain topics. And so

09:28:30 that is not the time, like an expert deposition or a 30 -- a 30 Section (1) deposition, a 30(a) deposition, to take individual information. That is the time to find information from the company about discrete topics. And if you have 09:28:53 through the course of interrogatories and requests for production obtained documents that you want additional information about, putting the company on notice that these are the documents that you want to know more about is the best way to get the information about those documents.

09:29:13 JUDGE JORDAN: How does that answer the question put to you, ma'am? If you know who the witness is, would it not make a difference in the documents selected? And if that's true, why is it fair to demand that the inquiring party identify the universe of documents while not knowing who the 09:29:36 witness is?

MS. EZELL: The witness in a 30(b)(6) deposition is not there in their individual capacity.

JUDGE JORDAN: Given. Understood.

MS. EZELL: They're there as the company.

09:29:50 JUDGE JORDAN: That's understood.

MS. EZELL: And so who the individual is on that day is irrelevant to the exercise on that day.

We had another attorney who spoke --

JUDGE BATES: I don't see how that really would be 09:30:03 true. There might be documents that the witness was copied

09:30:06 on, even though they aren't being examined as to their individual knowledge, you would have documents that would be more relevant to talking to that witness about the company information.

09:30:18 MS. EZELL: Whether or not somebody was copied on a document is something that is -- the document speaks for itself. But whether or not that person knows about that information is not what they're there for. That's about their personal knowledge. They're there to answer questions about

09:30:37 the state of the company's knowledge on particular topics. And I think that the questions that you're asking are merging the two --

JUDGE BATES: If you were conducting the deposition and someone said X and you had a document indicating they were

09:30:52 copied that said, no, Y, wouldn't you want to be able to examine them on that?

MS. EZELL: Well, yes, I'm sure that I would. But that is not the purpose of a 30(b)(6) deposition. Within a company, the larger the company, I imagine, the more

09:31:14 exponential the issue. But even within a small company, if the question is what is the definition of Y, you're going to have multiple documents that would show that different people within that company would define it differently, but the company is going to eventually come up with a definition of

09:31:32 that and there are going to be multiple discussions before

09:31:35 that is defined. And the --

JUDGE JORDAN: Does your approach not lead to an overdesignation of documents? Because what it sounds like you're saying is because the company gets to pick who it wants 09:31:48 to pick and it should be irrelevant who that voice is for the company, the other side, the inquiring side, then has an incentive, strong incentive, to not narrow the number of documents that your party needs to be prepared to answer, but to get a sort of data dump because they don't know who they're 09:32:14 getting in the seat of the witness.

MS. EZELL: In my experience I've never been able to figure out a way to limit the documents that the other side requests. However, I think that they would not permit the company to limit that by saying if you take these documents, 09:32:33 we'll give you a witness. I mean, that's not a decision they would permit the company to make anyway. They're going to decide.

JUDGE JORDAN: So you think this is a data dump anyway?

09:32:48 MS. EZELL: Depends on what the issue is. No, I don't think there's a data dump. I think the questions are asked usually long before the deposition and the documents that are responsive are given.

MR. SELLERS: Well, let me ask a question. When you 09:33:03 select the witnesses to be designated in a 30(b)(6)

09:33:05 deposition, do you take into account the job duties of the person you selected who might be relevant to the subject of the deposition?

MS. EZELL: It depends on the company. In some cases 09:33:15 there's nobody left alive at the company who knows.

MR. SELLERS: Understood. But if there is somebody around who -- I understand that may be the occasion, but if there's somebody at the company who has background or knowledge of a particular subject, wouldn't you -- unless they 09:33:29 are ill-suited to be a witness for other reasons, wouldn't you prefer somebody who has some knowledge on that subject?

MS. EZELL: It sounds like the answer should be yes, but the answer is so often it really doesn't matter. If their purpose within that company is so instrumental to doing that 09:33:50 job, if they really need to be building those widgets and while this litigation is really important to us but the widgets are really important to the company, it doesn't matter if my preference would be to have that witness. I get somebody else.

09:34:06 JUDGE BATES: Ms. Ezell, can I ask you one last question.

MS. EZELL: Absolutely. I'm here for you.

JUDGE BATES: And ask you to be brief in your response.

09:34:13 From your experience, does the person that's going to

09:34:16 testify, the witness, commonly get identified by the organization to the other side before the deposition occurs?

MS. EZELL: No.

JUDGE BATES: And does the subject of who the witness
09:34:30 is commonly get discussed now or would the organization generally refuse to do so?

MS. EZELL: And by identified, I mean their name is not given. Certainly what happens is we would say we will produce somebody who will address this issue and this issue
09:34:49 and this issue.

JUDGE BATES: I understand. I'm asking whether the identity --

MS. EZELL: Well, I'm unclear in this process what your committee means by the word identity, so I wanted to make
09:34:59 sure I was clear.

I'm sorry, your question was?

JUDGE BATES: Appreciate that.

Does the organization refuse to identify and refuse to discuss? And if so, why?

09:35:10 MS. EZELL: I think that -- it's not that there's a refusal. We get a request, we say we will produce somebody to address these issues on this day at this location, and I'm not -- I don't have any recollection of somebody saying tell me who it is and my refusing.

09:35:29 JUDGE BATES: Are you ever asked who the witness is

09:35:32 going to be?

MS. EZELL: Not in my personal experience.

JUDGE BATES: All right. Thank you very much, Ms. Ezell.

09:35:38 MS. EZELL: Thank you.

JUDGE BATES: All right. We'll turn now to the next witness, John Southerland.

MR. SOUTHERLAND: Good morning, and thank you for allowing me to be here.

09:35:47 I come here this morning with 14-plus years of experience, and I have had the pleasure of being able to represent both large corporations and also smaller locally owned businesses, some may refer to as mom and pop businesses. I've done it representing both the plaintiff and defendant.

09:36:06 I've had the opportunity to present 30(b)(6) witnesses as both counsel for plaintiff and counsel for defendant in multiple states and across multiple jurisdictions.

What I want to do this morning is, one, I'm asking the committee to not pass the current proposed amendment. I

09:36:27 believe it is problematic. I don't believe it solves any of the current problems with Rule 30(b)(6). I'm asking the committee to continue this process that you've clearly engaged in, with a lot of effort, to try to actually enact meaningful change to the rule.

09:36:42 When I began analyzing the current proposal, I asked

09:36:46 myself three questions: Does it offer anything new? If so, will it resolve any current problem? And what can be done to enact meaningful change?

I began, and if you read my written testimony I 09:36:58 looked at the advisory committee comments when Rule 30(b)(6) was originally enacted. And what I found from there is there are essentially four purposes for the rule at that time. It was to add a discovery method to improve the discovery process, to reduce difficulty in identifying a particular 09:37:18 witness, and to be advantageous for both sides.

I then took those purposes and I asked myself does the current proposal, does it meet the purpose and the spirit of any of those goals for Rule 30(b)(6) when it was enacted? And I don't believe it does.

09:37:37 JUDGE ERICKSEN: Can I just ask you, it seems from your written commentary that your objection is primarily to the identification of witnesses in advance.

MR. SOUTHERLAND: That is certainly the most problematic area to the proposal. But, as I think 09:37:51 Judge Jordan asked earlier, is there a problem with the meet and confer being part of the rule, and I don't believe that there's necessarily an issue with a meet-and-confer requirement being part of the rule. I believe the current proposal does not provide enough meaningful and specific 09:38:10 guidance to address what that meet and confer would be.

09:38:13 And also the biggest issue is it does not provide any process to allow the parties to resolve the dispute once they've reached an impasse.

JUDGE BATES: Would you identify with respect to the 09:38:32 meet and confer what specifically you would advocate be removed from the proposed language and what specifically you would advocate be added in terms of specificity on the meet and confer.

MR. SOUTHERLAND: Well, on the current meet and 09:38:47 confer language, the issue that I have is that it basically just says you need to meet and confer and you need to continue to do so as necessary. But -- and so --

JUDGE BATES: Anything wrong with the subjects that are identified for meeting and conferring?

09:39:02 MR. SOUTHERLAND: I'm sorry, the subjects that are identified for meeting and conferring?

JUDGE BATES: Topics and the names of the witnesses.

MR. SOUTHERLAND: I think it's fine to meet and confer about the topics. I do believe that there is a problem 09:39:14 with identifying and meet and conferring about the identity of the witness. That is obviously an issue that I have with it.

JUDGE BATES: In your experience, does the identity of the witness get disclosed before the deposition or not?

MR. SOUTHERLAND: It can. I've certainly --

09:39:30 JUDGE BATES: I know it can. Does it usually or not?

09:39:33 MR. SOUTHERLAND: Well, you know -- and I don't mean to mince words with you, Judge Bates, but "usually" is a relative term. In my experience -- the way I would describe usually, I would say usually does not. The identity of the 09:39:47 witness usually in my practice does not get disclosed.

And when I'm asked, you know, the first thing that I do is I ask my client, do you have a position on this? Because really at the end of the day, it's the client's decision as to whether they want to identify who the witness 09:40:03 is.

In practicality I can tell you that having some type of early identification of the witness, and this doesn't even get into what does identifying the witness actually mean in the current proposed amendment, but the practical implications 09:40:20 of having to identify the witness early is problematic in and of themselves. One, who the specific individual is that will respond to a 30(b)(6) notice is irrelevant. The witness in response to a 30(b)(6) notice is the organization. That's all you need to know.

09:40:37 And I believe you asked earlier, Judge Bates, if you know who the witness is, will that affect what documents you may use during the deposition. I submit to you it shouldn't. Not in 30(b)(6) context.

And in a 30(b)(1) context, sure, that's fine, you 09:40:52 have to know the identity of the witness there because you

09:40:56 obviously have a specific reason for wanting to depose that person.

But in a 30(b)(6) context, you've given topics of an organization, and who the person shows up to testify for that 09:41:05 organization, who that person is should never affect your preparation for that deposition because you should be preparing to testify or to depose that individual organization, not the specific individual who shows up on that day.

09:41:21 JUDGE BATES: I understand, though, your position there may not be any advantage to having to identify the witness. What would be the problem or disadvantage to a requirement that the witness be identified? Identified meaning by name and title. Say seven days before the 09:41:40 deposition is scheduled.

MR. SOUTHERLAND: Sure.

JUDGE BATES: What would be the problem with that?

MR. SOUTHERLAND: And, Judge Bates, I'll give you some advanced notice. I know that another of my colleagues 09:41:49 I've worked with over the years is going to speak to you later and give you some more real world examples, but I wholeheartedly agree with them because I've seen them.

Here's the issue: There are times, probably more times than not, where I don't know seven days in advance if 09:42:04 that's the person that's ultimately going to testify on every

09:42:08 single topic in the notice. And I may get to a point in time within that seven-day period where I realize that I'm going to have to have more than maybe the person who I've been working with and preparing up to that point.

09:42:23 So then let's say that I identify that witness in the seven-day time period and then I realize, oh, I'm going to have to identify somebody else or I'm not going to submit that person for the deposition. Now I have to go back to the other side and say, I know I told you that person was going to

09:42:39 testify, but now that's not going to be the case. You know what happens then? Then the other side goes and takes the 30(b)(6) deposition and then they follow that up with a 30(b)(1) notice for the individual I named originally, and that witness has to be subjected to a bunch of questions about

09:42:56 why they can't testify on behalf of the company they work for. That's a very problematic situation, in my opinion.

JUDGE BATES: So it's your view that seven days before the deposition, I could change that to four days, it's commonplace that the identity of the witness is not even known

09:43:14 to the organization and it's lawyer?

MR. SOUTHERLAND: Not commonplace. I'm saying that -- that's not commonplace. I'm saying that that's an issue that can arise. I'm not saying any of that is commonplace. I don't believe that there's any advance

09:43:29 identification rule that could ever be sufficient because it

09:43:33 creates a new discovery obligation on the party that has never been created before and, quite frankly, flies in the face of a very well settled body of case law around this country that recognizes the identity of the witness in a 30(b)(6) context 09:43:49 is irrelevant.

And so I think that my time is up.

JUDGE BATES: Any last question for Mr. Southerland?

Thank you very much, Mr. Southerland. We appreciate it.

09:44:00 MR. SOUTHERLAND: Well, thank you all and I appreciate it.

JUDGE BATES: All right. Our next witness will be Nieves Bolaños.

MS. BOLAÑOS: Good morning.

09:44:11 JUDGE BATES: Good morning.

MS. BOLAÑOS: First of all, I'd like to thank the committee for its work on the rule changes. I understand a lot of effort and time went into these proposed changes, and also thank you for taking so many opportunities to allow 09:44:19 testimony from both sides, defendants and plaintiffs, with respect to these changes.

I'm here today on behalf of my law firm, Potter Bolaños, and as an executive board member for the National Employment Lawyers Association, as well as the 09:44:34 co-chair for their Low Wage Worker Committee Practice Group.

09:44:38 My firm, Potter Bolaños, is a Chicago law firm of about five attorneys, and we exclusively represent employees and labor unions in both individual and class-action cases. The vast majority of our cases are filed in federal court and 09:44:52 pursuant to federal statutes, including Title VII, Fair Labor Standards Act and False Claims Act.

The diversity of our practice provides us the honor and opportunity to represent workers from all walks of life: Executives and learned professionals, as well as low-wage 09:45:12 workers who sometimes don't even make the legally mandated minimum wage.

At the outset of these proceedings, it is absolutely -- there's no question, individuals are at a clear disadvantage when it comes to ascertaining the organizational 09:45:25 structures and inner workings of the companies and corporations that they provide work for.

That fact, taken together with the reality that companies control a disproportionate share of the information necessary to narrow and resolve disputes and also often have 09:45:41 far greater resources to put into litigation for those disputes, demonstrates just how important it is that these rules and the discovery process generally promote efficiency and fairness in order to level that playing field for all those who are seeking justice in our federal courts.

09:45:59 Rule 30(b)(6) depositions, we found to be far more

09:46:03 effective, and one of the most effective ways for plaintiffs with employment claims to learn some very basic information about their claim and the defendants' processes.

These include the identification and description of 09:46:18 timekeeping and payroll systems, methodology and organization and assessment of data that's gathered, as well as just the corporate structure of their workplaces.

JUDGE JORDAN: Can I ask you, Ms. Bolaños, how does knowing the identity of a 30(b)(6) witness in advance do 09:46:36 anything to advance those goals?

MS. BOLAÑOS: Knowing the identity of a 30(b)(6) witness allows us to, in the meet-and-confer process, which we find already often takes place with the more seasoned attorneys on both sides of the table, it allows us to discuss 09:46:54 whether or not that witness is going to be sufficiently able to testify to the topics that are outlined in the notice.

JUDGE JORDAN: Does that imply, then, that this rule would make a substantive change in who gets to say who the witness is? Because the assertion from the defense side, as I 09:47:12 understand it, is the plaintiff's lawyers, the inquiring lawyers, should never have the opportunity to tell us who our corporate representative is.

MS. BOLAÑOS: I did not read the proposed changes to give me the power to say who should be testifying. I read it 09:47:33 to require a meet and confer on who those witnesses would be,

09:47:38 and then be able to offer my suggestions on why or why not that person might be appropriate or able or -- able to be prepared to testify on a particular set of topics.

JUDGE JORDAN: Can you respond -- I realize this is 09:47:53 not oral argument with one side or the other side, but we just heard from Mr. Southerland that that would raise practical problems, and he said specifically if we have to identify in advance, you heard what he said, that if we have to change somebody or add somebody, now we've got a dispute that we 09:48:10 would otherwise wouldn't have.

Do you have a response to that?

MS. BOLAÑOS: Well, I heard two things being said, and one was that we might not know until four days before, seven days before who we're going to designate. I find that 09:48:24 problematic because I think that one of the biggest problems we've run into in 30(b)(6) depositions is that a witness is not properly prepared to testify on a designated topic. Four days before a deposition may be too soon for that witness to become fully prepared on a particular topic. So I found that 09:48:43 concerning.

As to the second piece, I think -- we're a plaintiffs law firm and we represent folks with pretty limited resources, so there's no reason for us to notice up another deposition simply to harass or harangue an individual about why they can 09:49:02 or cannot testify with respect to certain topics. The goal is

09:49:05 to get the information, to get it from the person who is most prepared and able to testify as fully as possible.

JUDGE BATES: Do you think -- I take it you think there should be a requirement in the rule that there be 09:49:25 conferral as to the identity of the witness.

MS. BOLAÑOS: That is correct.

JUDGE BATES: Aren't there considerations with respect to choosing a witness that an organization might not want to or indeed should not have to share with the other 09:49:41 side? And wouldn't a conferral requirement expose that?

MS. BOLAÑOS: Not necessarily. A conferral requirement would identify the scope of the communications that have occurred. If there's then a problem at the deposition, we have a record and we've already done some of 09:50:03 the groundwork for the judge if there's a reason to bring a motion and have any issue that's come up be decided by the judge.

JUDGE BATES: And since you haven't used all your time, I have one more question for you. And that is, some 09:50:17 have suggested a numerical limit on the number of topics. How do you think that would affect the process? Would that cause plaintiffs lawyers, if they were the ones noticing the deposition, as they usually are, would it cause them to have unreasonably broad topics if they have to fit it within 09:50:38 numerical limit?

09:50:40 MS. BOLAÑOS: I think that absolutely could be the result of a strict numerical limit. I think that the committee's decision to reject that as an inclusion into the proposed changes recognizes that there's not a one size fits
09:50:55 all in these circumstances, and that the number of topics, the breadth of topics will always depend on the underlying claims and the nature of the cases.

JUDGE BATES: Any other questions for Ms. Bolaños?

Thank you very much.

09:51:11 MS. BOLAÑOS: Thank you.

JUDGE BATES: Our next witness will be Mark Kenney, please.

MR. KENNEY: Good morning.

JUDGE BATES: Good morning.

09:51:24 MR. KENNEY: I'm a member of a firm called Severson & Werson in San Francisco. I spent 40 years in federal litigation all over the United States. I am a trial lawyer, too, but I don't have a particular subject matter focus. Way down deep I'm shallow.

09:51:39 But today I want to focus pretty narrowly on this one requirement for a meet and confer about what's called the identity of the 30(b)(6) witness. And I want to just ask what I've been asking myself and anyone I could talk to about this for weeks now, which is the existential question "Why?" What
09:52:01 is it -- why is it that we want to pose this requirement to

09:52:05 meet and confer about this thing we call identity?

And here's how however good the intentions of this committee and the ultimate decision-makers are, you know and I know that we lawyers will mess with it. And this is where the 09:52:21 trouble can start. So I ask why.

Presumably --

JUDGE BATES: At least you're saying the trouble starts with the lawyers, not with the rule.

MR. KENNEY: First thing we'll do, we kill all the 09:52:34 lawyers, we'll be fine.

But we start with the proposition that in an already fraught litigation environment and 30(b)(6), there is some contention about it, you ask, but if lawyers are already talking now, if they're already meeting and conferring with 09:52:48 each other about any other topics, why not force them to meet and confer about this one. I do not. I have probably promulgated as many 30(b)(6) notices as I've been tasked with responding to them. But in responding, I do not identify witnesses, and I counsel my clients not to. I think there are 09:53:06 very good reasons for that.

That begs the question, why would someone want to know what the identity of the person is who is going to be testifying?

JUDGE BATES: Tell us what the good reasons for not 09:53:16 identifying are as well.

09:53:18 MR. KENNEY: Well, here's the thing. Inseparable from this meet-and-confer requirement, if meet and confer means anything, it means we have to have a robust conversation about this thing called identity.

09:53:32 Now, identity, you know that the Oxford Dictionary says identity is not just name, but it's the personal attributes that make that person whom and what they are.

JUDGE BATES: Well, why don't you read identity as being name and title for the moment. Okay?

09:53:48 MR. KENNEY: Okay. Name and title. What could possibly be wrong with identifying name and title? Well, I think one of you asked if I knew that, couldn't I look that person up? Couldn't I do some research on that person?

Now, starting with the proposition that 30(b)(6) is

09:54:07 about the information reasonably known to or available to the corporation, as opposed to the individual witness, regular 30 deposition, what would you be the utility, what would be the appropriate reason for looking up that person in social -- I mean, you all know what a diligent, effective, energetic

09:54:31 lawyer will do. There will be social media research, there will be research as to this person's work history, and that will all likely show up in the questioning of that witness.

The question is whether that is appropriate, and I submit to you that it is not and it is devoutly to be avoided.

09:54:47 And, as I say in this already fraught environment. It is not

09:54:51 fair, it's not appropriate, and it's not -- a deposition can always be taken under Rule 30 of an individual witness if someone wants to get there. But to use 30(b)(6), which is a very different salutary process but for a very different
09:55:08 purpose, to use it to focus on the individuality of the spokesperson is inappropriate.

MR. SELLERS: Let me ask you, when you select -- I asked this before of somebody else. When you select witnesses to be produced in a deposition, do you consider the job a
09:55:27 person held and what their knowledge may be of the subjects that are designated for a deposition?

MR. KENNEY: Of course. Here's the point, and this is why you can't separate meet and confer, in my opinion. If I'm meeting and conferring, you just heard a proponent of this
09:55:43 rule say that the opposing party might want to know so that they can discuss whether it was a proper witness.

Your question suggests that since I'm interested in knowing the qualification of the witness, the other side might be.

09:56:00 Here's the problem that I don't think has been mentioned yet: This gets into my work product. And potentially into attorney-client privileged information. There may be any number of reasons why this, quote, more qualified witness -- used to be a person most qualified. It's
09:56:17 not a PMK anymore. It's not a person most knowledgeable or

09:56:21 qualified. There could be any number of reasons that implicate --

JUDGE JORDAN: It is in California.

MR. KENNEY: It is in California.

09:56:28 JUDGE BATES: But I don't understand, if you think there's a work product or attorney-client problem, the lawyer can handle that by declining to discuss in the meet and confer some subject, just like they can say at the deposition, we object to that question because you're getting into work

09:56:42 product. I don't understand what the problem would be.

MR. KENNEY: In trying to understand this question why, I looked at the committee's comments, and the only comments available about why the committee got to where it is is that it might, quote, avoid future disputes.

09:56:59 But if you look at all of the literature and all of the comments from proponents, it is invariably about avoiding surprise, hiding the ball, hindering counsel's ability to prepare, gamesmanship. Those are all of the reasons why they ought to know who this person is.

09:57:19 There will be an argument that to have a meaningful meet and confer, there has to be a discussion, as you just heard, about the qualifications of the witness. To discuss the qualifications of the witness inherently invades work product.

09:57:35 JUDGE BATES: Let's set aside the meet and confer for

09:57:36 a moment and just talk about identity, whether a requirement that the witness be identified some days in advance of the deposition would really be that harmful.

It sounds like you're advocating the benefits of 09:57:50 surprise, which isn't really what our system elevates to the highest favored level. You think it's better that there be a surprise the day of the deposition as to who the witness is as opposed to telling the other side who that witness is a few days beforehand?

09:58:09 MR. KENNEY: Well, I respectfully reject that characterization. I have no interest -- I don't need to surprise them. What I -- surprise suggests that I'm going to come in with someone who in some way subverts the purpose of 30(b)(6).

09:58:29 JUDGE JORDAN: No, I think the surprise here speaks to your earlier comments, which is I don't want them to be able to look things up about this witness. And in that respect you want them surprised because you don't want them to be able to look up things about the witness.

09:58:41 What is it about your desire on the defense side to not allow advanced notice of the witness to provide an opportunity for research that is significant enough to outweigh the opportunity for a person on the other side to at least know who is showing up in the witness chair?

09:59:04 MR. KENNEY: I don't want them to know because I

09:59:06 don't want the work of this body to be institutionalized, a subversion of the salutary purpose of 30(b)(6), which is to provide what the corporation knows. To respond honestly and as fully and completely as possible to questions posed about 09:59:22 what the corporation knows.

JUDGE JORDAN: So the question --

MR. KENNEY: What is the value --

JUDGE JORDAN: The question put to you is how, if at all, how would identifying the witness, not meeting and 09:59:31 conferring, but identifying the witness by name and title subvert those purposes?

MR. KENNEY: Because it would -- it encourages -- I can't think of any good reason for it other than -- and for the life of me I can't think of a good reason -- other than 09:59:50 encouraging behavior which is completely apart from the purposes of 30(b)(6).

JUDGE BATES: Might it not make the deposition more efficient because the deposing noticing party would have the opportunity to look over the documents and help to ascertain 10:00:08 exactly what topics this person really had the background to talk about?

MR. KENNEY: I'm trying to think. Maybe in a nominal sense, like that first half hour of the deposition. That typically is what have you done, what's your resume. It might 10:00:23 do away with that. I think you'll spend far more time in the

10:00:27 meet-and-confer process than in the first half hour of the deposition.

JUDGE BATES: All right. Any other questions?

JUDGE CAMPBELL: I have one for you, and I'd

10:00:33 appreciate other folks addressing this as well.

We've heard from folks who take these depositions that they can't learn the identity of the witness before the deposition, that's a general practice, that there is a frequently recurring problem that witnesses who appear are not

10:00:51 prepared to testify. And we've been hearing that for 15 years.

How do we solve those problems? What can we do in the rule to help ensure that the correct witness is put in the chair and is prepared to testify?

10:01:08 MR. KENNEY: As a trial lawyer, I'll tell you that I -- I know you've probably heard that anecdotally. I think probably in any statistical sense it is de minimis for the following good reasons. Federal judges come down with a hammer when an improper 30(b)(6) witness has been put forward.

10:01:30 I, as a promulgator of 30(b)(6) notices, have made miserable the lives of people who have put on witnesses who aren't properly prepared, both in motion practice and most certainly at trial, where you can play havoc with someone that comes in not having taken their responsibility seriously. So I don't

10:01:49 think it's a problem.

10:01:53 JUDGE BATES: Thank you.

MR. KENNEY: Thank you.

JUDGE BATES: Our next witness, John Sundahl.

Mr. Sundahl.

10:02:02 MR. SUNDAHL: Members of the committee, thank you. I am John Sundahl from Cheyenne, Wyoming, and I'm here on behalf of the Defense Lawyers Association of Wyoming. Primarily defense attorneys, not exclusively that. We come in opposition of the rule.

10:02:18 When I was sitting here, I was thinking what am I going to say to this august and obviously well-intentioned group that has thought this thing through and has very, very poignant questions, and I want back to the first presenter that we had, and I think what we learned from that presenter

10:02:37 is that the rule seems to work just fine. We don't have any reported cases indicating that there's a problem with it. To the extent that there is a problem, we have a mechanism in place where if the plaintiff believes that the witness is inadequately prepared, he can go seek a motion for sanctions

10:02:58 in the federal court system. And he can do that.

So we have a situation in which, in Wyoming, we would maybe describe as flawless. If it ain't broke, don't fix it. So we have a situation where we really don't have a problem to speak of.

10:03:17 And to the extent there is a problem, we have very

competent federal judges that can handle.

People always informally discuss things. Our particular opposition is to the identity issue. In our written comments that we provided on the 14th of December, I sent in a couple of cases just as an example of things that can go haywire when you get into a dispute about who's the most knowledgeable, and if you allow the opponent to come in and challenge the person that you have selected to be the spokesman, and inject the deponent into the process of who is to testify, you're creating an interesting and very problematic situation.

JUDGE JORDAN: What if instead of meet and confer it was identification only?

MR. SUNDAHL: I think the other would actually be in a sense better because I don't think you have any obligation to confer -- excuse me, to identify at this point. I don't see any reason why it needs to occur.

JUDGE BATES: But what would be the harm if that were a requirement?

MR. SUNDAHL: Well, to follow up on a couple of the cases that I mentioned in my presentation, it promotes rather than reduces the chance of challenge ahead of time regarding the competency qualifications of the witness.

The one case that I mentioned, the one from actually Arizona, was a case in which the person who likely was the

10:05:06 most problematic and the most knowledgeable, both, was the supervisor of the employee who's suing on the basis of harassment and discrimination. And that person wanted the supervisor, who was the perpetrator, to be the one designated 10:05:24 as the witness because he was the immediate supervisor. And that was not allowed in that case, and I think for good reason. He was diametrically opposed in theory to the position of the defendant organization because he was acting within the scope of his employment. That's the position he's 10:05:50 going to be forced to take.

That's one example, and only one.

JUDGE BATES: Let me ask you this question: We've heard from numerous federal judges, district judges, and magistrate judges, that there really aren't Rule 30(b)(6) 10:06:04 issues that are brought to the court for resolution that often. That to the extent that there are any issues that arise, the lawyers tend to work them out. And maybe that's an inefficient process and somebody needs to address that. But the judges don't get burdened with it.

10:06:24 Do you believe if there were a requirement to identify the witness seven days, five days in advance, that that would lead to motions being brought to the judge that this is the wrong witness? Is that really what would happen?

MR. SUNDAHL: In answer to your question, let me 10:06:41 break it into two components. Currently, where you do not

10:06:45 have the obligation to meet and confer, you're advising me, and I concur with you, that the federal judges don't see a lot of this problem being brought to their attention.

So we have a known in the past. If we want to 10:06:59 replace that known in the past with an unknown, which is what happens if you now impose this requirement, then I would respectfully submit that we are entering into a very gray area that's unnecessary to go to.

JUDGE BATES: I'm not sure you answered my question, 10:07:15 though. Do you really believe that it would lead to more motions practice with emergency motions being brought to the judge immediately before the deposition?

MR. SUNDAHL: Yes.

Yes, I do. Because if there's a conflict about who 10:07:27 is or is not the most knowledgeable, the most proper to be able to appear, and you allow your opponent to become involved in that decision, then I think that that really creates something that the body of law that's been established to date does not support.

10:07:50 JUDGE ERICKSEN: So you think that identification is going to lead to resurrection of the concept of the witness needing to be the most knowledgeable? Because there's no reference in the draft rule about the most knowledgeable.

MR. SUNDAHL: I understand that. But that is 10:08:04 inevitably -- we've heard it today. We've heard it in

10:08:06 questions and in the answers, that people are going to be wondering and posing questions about who is or is not the appropriate -- the most appropriate witness for the organization.

10:08:18 JUDGE BATES: What if the committee note said something about this is no change in the law, that you don't have to have the most knowledgeable person, and also was very unequivocal in stating that the choice of the witness remains with the organization? Why would that create a problem?

10:08:39 MR. SUNDAHL: That would certainly help if that were made emphatically, yes.

So essentially, we're coming from in Wyoming, we're comfortable with the relationship that the lawyers in Wyoming have with the federal courts, the willingness on the part of

10:08:56 the federal courts to use the rules of proportionality in evaluating disputes, the willingness of the federal courts in Wyoming to be able to adopt the protective order process if necessary in advance of the deposition.

JUDGE JORDAN: You've got great judges there.

10:09:14 MR. SUNDAHL: We do.

JUDGE JORDAN: So what is the harm, though, if advanced identification -- with the caveats and the advisory committee note on the sort Judge Bates noted, would it not be on balance a helpful thing if a witness were to be identified

10:09:34 and the opposing party could say, look, that's somebody we

10:09:41 were going to depose anyway, why don't we talk about how to arrange this so that that individual only has to appear once? Isn't that sort of -- doesn't that lead to efficiencies that would be salutary?

10:09:55 JUDGE BATES: That combination of 30(b)(6) and normal 30 deposition.

MR. SUNDAHL: I agree. For example, Judge Bates, when you were mentioning that somebody might be copied on a document and therefore you have to figure out who the proper

10:10:07 person is who's going to appear, because the approach to the deposition may be different, the answer to that is that if you know who that person is, know that that person had a copy of the document you want to inquire about, you can always do a 30 witness on them.

10:10:23 JUDGE BATES: I think Judge Conrad -- Jordan's question is isn't there an efficiency from identifying the witness because then there's a possibility of sort of combining the two depositions that might otherwise be occurring of that same individual.

10:10:40 MR. SUNDAHL: To be direct, yes. That is an efficiency. I'm not so sure that it really makes any difference. I think people actually do talk about those things informally anyway. At least we do in Wyoming.

JUDGE JORDAN: So then the question arises if it's

10:10:56 happening, this won't represent much of a change, why the

10:11:00 vigorous concern? About, again, not talking about meeting and conferring at this point, but just the question of identifying the witness by name and title.

MR. SUNDAHL: Well, to answer the question as I have previously, if it's not currently broken and it currently works well, without the identity having to be disclosed and there haven't been reported cases, why do we want to change it in the first place?

JUDGE BATES: So one of the things that the rules process does is receive a lot of information as to what the best practices are, what the good lawyers do anyway. But a rule sometimes is intended to address not just what the good lawyers do, but to take that and to set it for all of the lawyers to follow. If the good lawyers are doing something, why not have a rule that all lawyers will then undertake.

MR. SUNDAHL: If I may be so bold --

JUDGE BATES: You may.

MR. SUNDAHL: If the bad lawyers, and there are bad lawyers out there, want to use the appropriate rule of 30(b)(6) to conduct a deposition, they're going to do it in any way they can do it to create the most difficulty for the organization and to create the biggest advantage for the plaintiff, typically. And so the bad lawyers are going to be the ones that are going to be dragging the good lawyers along if you implement that rule. I think we should really leave it

10:12:38 alone at all costs.

JUDGE BATES: Thank you very much, Mr. Sundahl. We appreciate it.

Next we'll hear from Lee Mickus.

10:12:53 MR. MICKUS: Thank you very much. I appreciate the chance to appear before the committee.

I come to you as a civil litigator with about 25 years of experience. I practice at a firm called Taylor Anderson in Denver, but my practice is national. I

10:13:10 typically represent manufacturers in product liability cases, mass torts, and patent litigation. And over the course of my career, I've been involved in 30(b)(6) practice on dozens and dozens of occasions ranging from working to identify the witness to preparing him to testify, raising objections, and

10:13:27 ultimately defending the deposition.

My perspective on this rule is that the proposed amendment fails to address the real needs of 30(b)(6) and represents a missed opportunity. What is proposed, and in particular the mandate to confer regarding witness identity,

10:13:44 or even as I'm now hearing, the idea of simple disclosure of the name and title, will actually make 30(b)(6) depositions more troublesome and more difficult.

Now, I want to respond to some of the questions that I have heard raised about, what's the problem? Isn't this

10:14:03 just the defense trying to foist a surprise onto the noticing

party.

And my response is no. It's not about surprise. It's about information that is irrelevant and information that is going to become a distraction and ultimately lead to some more disputes.

Why do I say that? Well, first off, it's irrelevant because, as we all know, 30(b)(6) depositions are about the corporate knowledge, and case after case, and I've cited them to you in my written comments, the courts have determined and said explicitly the name of the witness is simply irrelevant.

But why do I care? And I will tell you, in my own practice it is highly unusual for the name to be disclosed in advance of the deposition. Why is that -- that the case? For me, in those instances where the name has been disclosed in advance, it changes the nature of the process and the deposition becomes muddled and it becomes confusing and the record becomes discombobulated.

JUDGE ERICKSEN: Is that because the questioning blurs the line between the corporate representative and the individual?

MR. MICKUS: Exactly. Exactly. Because once that information is put on the table, we can expect that the noticing party is going to use it. Engaging in social media searches, engaging in transcript reviews if the witness has been deposed or testified previously, doing other sorts of

10:15:32 background.

And now the deposition becomes not just about what is the corporate information that is reasonably available on X, Y, and Z issues, it becomes what is the personal experience of 10:15:44 this person. What did they do at a previous employer, how did the previous employer handle this same issue.

JUDGE ERICKSEN: Can you imagine a time when you're meeting and conferring in advance about the number of topics. Let's say you get deposition notice that is one of those 10:15:58 outlier extremes that we heard about where, say, 150 topics or something.

MR. MICKUS: Sure.

JUDGE ERICKSEN: So you're meeting and conferring. Can you imagine a situation in which a discussion about the 10:16:13 person who might be able to testify would help you mutually come to a winnowing down of those topics? There's no way we can have one person know this and this, we might have somebody who would know this subcategory, and the deposition notice could be broken down?

10:16:33 MR. MICKUS: You know, what I'm envisioning, as I think about the scenario you've posed, is frankly a discussion not just about deposition topics, I would imagine about discussion about the discovery as a whole, because rarely is it a case where only a 30(b)(6) deposition occurs. Usually 10:16:54 there are going to be other named individuals. And so the

discussion may go, okay, I've seen your 150-topic notice. All right, Mr. Plaintiff's counsel, who else are you considering deposing in this case? And if they tell me, okay, Joe Smith and Bob Jones, I'm going to say --

PROF. MARCUS: They have to reveal that, you think.

MR. MICKUS: They're going to anyway.

JUDGE ERICKSEN: They have to if they are going to depose them.

MR. MICKUS: If they're going to depose those people, then we have that discussion as part of a broader context of how discovery is going to proceed.

And I've actually suggested that that is the sort of conversation that ought to be happening in preliminary cases.

PROF. MARCUS: And if that discussion leads to identification of witnesses A, B, and C, who would also be probably those you'd designate, you don't want to tell them that?

JUDGE ERICKSEN: I think he's saying you might tell them that.

MR. MICKUS: Conceivably, I might. But what I don't want to have happen is for a deposition to degenerate into this muddle where we're proceeding with a 30(a) deposition as well as a 30(b)(6) at the same time, and then I've got to object every third question that that's outside the scope, the witness is no longer testifying about the corporate knowledge,

10:18:09 he's testifying or she's testifying about his or her personal knowledge. And then, if that deposition ultimately gets presented at trial, you can imagine the distraction that that becomes with having to have instructions to the jury about the 10:18:23 capacity of the witness in giving this answer versus that answer. That makes for a real mess at trial.

JUDGE BATES: Have you had that occur?

MR. MICKUS: Yes.

JUDGE BATES: Has it occurred in situations where the 10:18:36 reason that it occurred was because you identified the witness in advance of the deposition?

MR. MICKUS: Yes.

JUDGE BATES: How often has that happened?

MR. MICKUS: Because I rarely will identify the 10:18:47 witness in advance, and it's because of that. In fact, three or four times come immediately to mind, Your Honor, where I have revealed the name and because of that the information gets used and the deposition just turns into this muddled mess where the -- where it becomes a less efficient process.

10:19:08 JUDGE ERICKSEN: The idea is because in advance of a deposition, the defense or whoever is the recipient of the notice, has to go get a protective order because this is unwieldy or whatever the problem.

Then, you get to the deposition, you have a witness 10:19:27 who is ill prepared, and then you have a fight either during

10:19:30 the deposition or you have to go to court after the deposition, and the idea is to try to minimize those problems on either end. There is a timing difference, obviously, between the -- when the two types of disputes arise.

10:19:46 If there is a meet and confer about the identity of the witness, would that not make it more difficult to complain later that the wrong person was selected?

MR. MICKUS: I guess I don't see that because ultimately if my witness, whoever that person might be, can't

10:20:08 answer the questions because that witness was not properly prepared and I didn't anticipate the direction that the questioning was going to head, then that's ultimately going to be on me. And I can't imagine a scenario where my opponent is going to say, you give me Bob Jones and I guarantee you I will

10:20:28 never object. I don't anticipate any good advocate would ever say that. What they will say is, I want Bob Jones, and, of course, when I hear that, then I immediately become skeptical because it is an adversarial system, and if he wants Bob Jones, then I think counsel on the other side has something,

10:20:44 and I'm concerned about that.

And so I think frankly there is even a risk that the adversarial nature could lead to more of a breakdown than more of the parties coming together.

JUDGE BATES: Mr. Mickus, let me ask you to address

10:21:03 the question Judge Campbell asked earlier of another witness.

10:21:06 The response from that witness was it just doesn't happen. The question is, if there's a problem with respect, as we hear frequently, with respect to the correct witness being produced and that witness being properly prepared, how can we best deal 10:21:20 with that from a rules perspective?

MR. MICKUS: Thank you. I was hoping I would get a chance to address Judge Campbell's question.

In my perspective, some advancement would be gained from the meet and confer about the topics in advance. I think 10:21:38 there's going to be a small step, but I agree with what we have heard, that that is largely already taking place to some extent.

But I think the better avenue is to allow an objections procedure that is defined so that if -- and 10:21:52 ultimately, if a witness is improperly prepared, I will tell you from my perspective, if that happens at a deposition, that is because there was not a mutual understanding of the nature of the topics that were going to be addressed at the deposition.

10:22:05 JUDGE BATES: What do you mean objection procedure? Do you mean just something that is between the lawyers, or do you mean something in the rules that brings objections to the court for resolution in advance of the deposition?

MR. MICKUS: The latter.

10:22:20 JUDGE BATES: That doesn't exist for any deposition

10:22:21 now, does it?

MR. MICKUS: It does not. But Rule 30(b)(6) is very different.

JUDGE BATES: Don't you think that would increase 10:22:27 dramatically the amount of litigation over 30(b)(6) issues that the judges have to deal with?

MR. MICKUS: I do not. I do --

JUDGE BATES: Then what's the purpose of it if it won't do that?

10:22:39 MR. MICKUS: The purpose of it is there are going to be some circumstances, some topics, some noticing counsel where we just can't communicate and we, for whatever reason, both sides are dug in and we have a genuine dispute about discovery. Maybe it's about proportionality of a particular 10:22:53 topic. Maybe it's about relevance of a particular topic. Maybe it's about how far that topic goes into privilege issues or work product. We can envision a bunch of different scenarios.

I never want to bring a discovery dispute to the 10:23:07 federal courts because I know they're not popular things on the dockets. It's going to be a very, very serious issue. And if I have that, then I can actually get some definition. I can force a resolution and force a meeting of the mind where there is an objective determination that is made: This is 10:23:30 what is going to be covered at the deposition.

10:23:33 JUDGE JORDAN: Since this is, in the end, sort of a cost-benefit analysis, right, your arguments against advanced identification are explicitly -- it will cause more trouble than it will solve, does incorporating a Rule 45 kind of
10:23:51 procedure into the 30(b)(6) process, is that going to cause more problems than it resolves? We've heard emphatically from some of your colleagues on the defense bar side if it ain't broke, don't fix it.

Is inserting this into the rule going to, in fact, be
10:24:07 more costly than beneficial?

MR. MICKUS: I don't think so. I think you would get more benefit out of it if there is an opportunity to get the definition of what the topic is and how the witness is going to be able to proceed so the boundaries are established.
10:24:25 Usually, usually counsel can work that out. But if it can't get worked out, it's going to ultimately end up in one of these motions anyway where noticing counsel is going to complain that my witness was not properly prepared. I want my witness to be properly prepared. There is nothing good that
10:24:42 comes out from --

JUDGE JORDAN: It will. If it's really a problem, it will come up. So if we invite the fight before the deposition, when we don't know whether it is actually going to be a problem, how is that beneficial to the system and not
10:24:59 just adding costs and dispute?

10:25:03 MR. MICKUS: I don't know that it's inviting. It's allowing a procedure so that issue can be addressed where we can work it out without having to go through the deposition and then go through motions on the back end.

10:25:15 And another alternative that I know has been considered is working this into the initial case conferences, where discussions about the nature of the discovery plan, and especially 30(b)(6)s, are laid out so I can start the planning process, I can start trying to identify what the documents are

10:25:36 that my witnesses are going to need to review, who else in the department we need to interview, all of those sorts of things.

So, again, it is all about developing a mutual understanding so I can get my witnesses prepared, and wherever that happens, it needs to happen at some point. And when the

10:25:53 process breaks down, that's where the breakdown occurs.

JUDGE BATES: All right. Mr. Mickus, thank you very much. We appreciate your testimony.

MR. MICKUS: Thank you.

JUDGE BATES: Next we will hear from Bradley Smith,

10:26:01 please.

MR. SMITH: Good morning. I appreciate the opportunity to testify here today.

My name is Bradley Smith. I'm from Jackson, Mississippi. I'm with Baker Donelson in the Jackson,

10:26:19 Mississippi office. I've been litigating for 25 years, and I

10:26:25 have defended and taken 30(b)(6) depositions throughout that time.

I want to focus today on this notice provision with respect to the identity of the witness. And if I may, I'd 10:26:35 like to provide you all with two recent examples for two companies that -- and I'll start with one that I think makes it very problematic if this proposed change goes into effect.

There are, as you're aware, litigation with -- I guess some businesses where the businesses are not in a mesh 10:27:01 type litigation or automotive product liability litigation where they have established a very vast resource general counsel procedures they receive and defend -- receive 30(b)(6) notices and defend a great deal.

Recently, defendant, a dram shop case for a global 10:27:21 wine manufacturer, one of the largest in the world, headquartered in California, they sponsored an event in Mississippi. There was an awful accident and the 30(b)(6) deposition notice was received.

I had actually flown to California. We got ready one 10:27:40 round, and then when we were back preparing two days before the deposition, it became apparent to me that the witness was not the appropriate witness because she would not be able to answer the questions. And we had worked with her previously and I had several phone conversations with her.

10:28:03 We had another individual from the company drive down

10:28:06 to San Francisco where the depositions were being held, and worked all night and all day preparing for the deposition. And the reason we did that was because the questions in the 30(b)(6) notice were numerous, but that the plaintiff's lawyer 10:28:21 and I both had agreed that they were arguably relevant, I wanted to make certain that those questions were answered, information was provided.

And, in fact, what Mr. Kenney said with respect to if you're going to make this change, the question of why. And we 10:28:39 talked about harm. But if the purpose of a 30(b)(6) is for that lawyer to obtain the information critical to proving their claims asserted in the complaint and they designate the topics that will enable them to do that, then the identity of the witness is not relevant to that.

10:29:03 And one of -- I think, Your Honor, Justice Bates, you -- I think -- I believe you said if you know the witness, it would not make a difference. You mentioned I think one set of documents may be focused on, and my response to that is it shouldn't make a difference, and your responsibility is to 10:29:25 prove your claims through documents, you should determine which documents are best to establish your claims. And it shouldn't matter who the witnesses is.

In that instance, and I can count on one hand -- go ahead.

10:29:41 JUDGE BATES: You've mentioned specific situation,

10:29:44 and I'm curious as to how a rule that required either or both preidentification of the witness some days in advance of the deposition or meet and confer on the identity of the witness would have made the situation worse in that case.

10:30:01 MR. SMITH: Well, if --

JUDGE BATES: Sounds like it was a bad situation anyway. How would that have made it worse?

MR. SMITH: An opportunistic plaintiffs lawyer. And the plaintiffs lawyer in this case, we have a long

10:30:12 relationship, and all he cared about was getting the information he wanted. He did not care about who was providing the information.

I can count on one hand how many times I've had opposing counsel ask or request identity of a witness, and the

10:30:22 reason is, fortunately for most of my 30(b)(6)s, they know what they want and they want it and they don't care who is providing it because it does not matter because a 30(b)(6) is not for that purpose.

But in that situation, if there were a seven- or

10:30:36 four-day notice period, I would be in violation of that. I would have called this opposing counsel as he's boarding a flight from Jackson, Mississippi, flying to San Francisco, saying she's not going to testify.

JUDGE BATES: There probably would have -- with good

10:30:55 counsel on both sides, it would have caused a conversation and

10:30:58 perhaps a two-day postponement of the deposition, so it would have been better for all involved.

MR. SMITH: Well, I don't think it would have been better for the company. It would have been more work and it
10:31:08 would have been -- it created a difficult circumstance where there was no need.

The other situation was a pedicle screw products liability case in Denver. The identified -- the witnesses that I identified, it was a regulatory submission and approval
10:31:27 witness, and then the chief R&D engineering side of it. So we had three witnesses that I had worked with all of them.

When we got to the preparation phase, and it was two days in Denver preparing for this deposition, it became clear to me that the chief engineer in R&D was not the engineer that
10:31:47 we needed to be testifying. Because of the nature of the claims in terms of failure rates of the pedicle screw, the medical grade surgical steel that was purchased from China, it became apparent during the prep process that the lower engineers are the ones that are more involved directly with
10:32:06 the Chinese manufacturer, those were the witnesses that needed to be designated -- and this was two days before the deposition -- in order to fully and adequately respond to the 30(b)(6) topics.

So I gave you that example. I mean, I was
10:32:21 substituting two engineers.

10:32:23 And I think, Mr. Sellers, when you mentioned, would it not be best to -- and in that case, if I was going to give the identity to the plaintiff's counsel, he would say, I want the chief of R&D engineering. Right? That's who you want; 10:32:38 right? Well, in that circumstance, that's not the best -- I found out after working two days --

JUDGE BATES: But you have the opportunity to say that even with the rule as proposed in terms of an amendment to say, no, I get to choose who the witness is. And I don't 10:32:54 even have to explain all of reasons for it if there are some reasons that shouldn't be shared with the other side.

MR. SMITH: I would, Your Honor, but the proposed amendment as it is now, the opposing counsel would be able to make an argument that would be effective with certain federal 10:33:12 judges in Mississippi that, hey, they switched the witness the day before or two days before. He told me he pulled the chief R&D that I had been preparing for to depose him, and I had to depose those lower engineers.

And so I just -- if the purpose is to advance your 10:33:32 case and get the information you want, I respectfully submit that the identity does not matter. It cannot be relevant. If you are truly trying to advance your claims in the complaint and finding out the information, it might be helpful for preliminary, as he mentioned, but I just don't think it's 10:33:52 necessary, and I think it can be problematic, particularly for

10:33:55 companies that I mentioned that don't have a large 30(b)(6) practice.

JUDGE BATES: How about the companies with the large 30(b)(6) practice that you mentioned who frequently are 10:34:06 dealing with this? We're not looking to benefit one side or the other; we're looking to -- looking for benefits to the civil justice system. And wouldn't it be beneficial for a noticing party to know that the witness was Joe Smith, and Joe Smith then he could look up and had been a 30(b)(6) 10:34:30 deposition deponent for six other occasions and they could look at those transcripts. Wouldn't it make it a more efficient deposition?

MR. SMITH: It might --

JUDGE BATES: It might be more difficult for the 10:34:42 company in some ways, but certainly would be more efficient, wouldn't it?

MR. SMITH: It might be more efficient for that particular lawyer for the preliminary stuff. And I'll give you an example of a --

10:34:57 JUDGE BATES: Not just preliminary stuff if they gave previous 30(b)(6) depositions.

MR. SMITH: That's -- I would respectfully submit that is not the purpose of it. I want to give one example where that's happened for an automotive manufacturer that I 10:35:11 represent where the identity was provided and the plaintiff's

10:35:17 counsel said, I'm not going to depose him, I know what he's going to say. So --

JUDGE JORDAN: Well, isn't that a benefit to the system? Right? Didn't you, by providing that information and 10:35:30 the other side saying we don't need that, that kind of goes to the point.

You've said that there are five occasions, you can count on one hand the number of times people ask. So can you share with us on those occasions when it was asked, did it 10:35:45 turn into a problem or did it turn into something perhaps efficiency producing like the instance you just cited?

MR. SMITH: Well, it was not a problem when the name was given, but it -- if it proves my point, if the particular party lawyer needs the 30(b)(6), then the identity, if the 10:36:09 sharing of the identity makes the 30(b)(6) nonessential to his case, then I question whether the requirement, the proposed amendment requiring the identity to be disclosed, is doing anything to help the 30(b)(6) process and to help those taking the depositions get the knowledge and information they really 10:36:31 need.

JUDGE BATES: Any last question for Mr. Smith?

Mr. Smith, thank you very much.

MR. SMITH: Thank you.

JUDGE BATES: We'll hear next from Bill Rossbach.

10:36:41 MR. ROSSBACH: Thank you, all. I'm Bill Rossbach

10:36:51 from Missoula, Montana. I've had the opportunity to talk to some of you previously as a member of AAJ at a meeting we had informally about this. Some of those topics I'm not going to -- were in my written materials, so I'm going to kind of 10:37:07 try to sort of like a little bit of a rebuttal here, kind of skip around a little bit and try to address some of the questions.

First of all, I start -- in any testimony about any of the rule changes, I start with Rule 1, and does Rule 1 -- 10:37:23 is Rule 1 advanced? Just, speedy, and inexpensive? Are those principles advanced by the amendments? And my suggestion is, is that the meet and confer and identity of witnesses will advance just, speedy, and inexpensive.

Let me -- I gave some examples. I've been a trial 10:37:43 lawyer for almost 40 years. I've tried everything from auto accidents, but mostly I try scientific and medical cases, technical cases, product liability. I started doing individual product liability cases right out of law school. One of the first ones I mention in here was the battery case, 10:38:01 exploding battery case. I took one 30(b)(6) deposition and settled the case. I had hundreds and of engineers and documents and thousands of pages of documents. I looked through the documents. I found a couple of areas that I thought were really important, my expert said. We took one 10:38:17 30(b)(6) and settled the case.

10:38:19 Recently, I'm still involved in an environmental case, and this addresses the issue of identification. First of all, let me say I have -- I can't recall, and I'm talking to my colleagues here who have done many 30(b)(6)s. In 40 10:38:35 years I can't remember a 30(b)(6) where we didn't have the names of the witnesses at some point in the process. I can't remember a single one.

JUDGE JORDAN: When you say at some point in the process --

10:38:45 JUDGE BATES: You mean before the start of the deposition?

MR. ROSSBACH: Let me get to that. Okay. I'll give you my example. In one of them we learned about it two days in advance.

10:38:53 JUDGE JORDAN: Okay. We're hearing really diametrically opposite experiences --

MR. ROSSBACH: I understand.

JUDGE JORDAN: -- people saying, I've practiced for four decades and I can count on one hand with fingers missing 10:39:05 the number of times people have asked and you say, no, it happens all the time, so --

MR. ROSSBACH: It happened every time that I can remember.

JUDGE JORDAN: Can I just ask you real quickly, you 10:39:14 said your opponents, you let opponents provide no good reason

why disclosure of names of witnesses should not be required. You listened here today to people saying it will cause disruption because there will be a blurring of the line between ordinary Rule 30 and 30(b)(6) depositions, we'll get into irrelevant material, there will be multiple objections and perhaps need to go to the court to get the deposition confined to its proper scope. That sounds like a good and principled reason if it's accurate.

What's your response to that?

MR. ROSSBACH: Well, first of all, I never had that experience in exactly that form. Part of the -- part of the reason you have a meet and confer is to be able to go through this and to be able to focus on the topics.

And let me give you an example, is a recent case, the environmental case involving the power plant that I addressed in my -- we had -- originally we set out something like 50 matters to be discussed, and we identified documents that talked about that, and we even quoted some of the material in the notice, in the specific list. They came back and said, well, you know, this isn't very clear to us, how about this, and we had this ongoing iterative process.

JUDGE JORDAN: Great. Meet and conferring about topics. That's really not the subject of my question.

MR. ROSSBACH: But that's what I'm going to get to.

And then they said, okay, we're going to have four

witnesses and these witnesses are going to be available on these dates. We said, fine. We started preparing. They named the witnesses. A week before, they came in and said, well, looks like we can do this with only two witnesses or three witnesses, and we ended up having two witnesses in the case, and those were the only witnesses that we ever needed in the case.

JUDGE JORDAN: And if you didn't know the names of the witnesses but they said we're going to do four, now we're going to do two, would that have made a difference or would you have had the same efficiency?

MR. ROSSBACH: Well, part of the efficiency was by having the names of the witnesses, we were able to then go word search the documents and make sure that we had all of the documents covering those topics for those individuals.

I mean, example in the battery case, I had 100 engineers in various documents. When they identified the witness, I was able to see which part of those documents this witness was involved in and I was able to focus a little bit better the questions that I made.

JUDGE ERICKSEN: Isn't that the exact muddling that we heard one of the other speakers talk about? That if you're asking the person about the things they actually know personally as opposed to the information that they've been made aware of as part of the 30(b)(6) process, then how do you

know when you're asking questions whether you're asking based on the personal knowledge or based on the corporate representative job?

MR. ROSSBACH: I'm not sure it matters. I mean, you're asking the questions what was the corporation doing, and then if you have a document that is dealing with that particular topic, you can show it to him and help him -- I mean --

JUDGE ERICKSEN: It has to do --

MR. ROSSBACH: -- it makes it a more efficient process if you have actual specific documents that talk about it. That's just the reality of taking a deposition.

JUDGE ERICKSEN: And so either one would be admissible as substance as nonhearsay?

MR. ROSSBACH: If -- if -- if the deposition -- if the deposition is -- if you're talking about the topic of the deposition, if it's within the realm of the matter, I don't see what difference it makes.

I see I'm running out of time.

JUDGE JORDAN: That seems to be precisely the point, so I'll try to ask this quickly. The assertion we keep hearing is the identity of the witness should be irrelevant, whoever is on that witness chair has got to speak to those topics and it shouldn't matter whose mouth is giving the answer.

10:43:20 So what is it about knowing the identity of the witness that is relevant and advances the purpose of the 30(b)(6) deposition?

MR. ROSSBACH: Okay. What it matters is that you 10:43:34 might have hundreds of thousands of documents involving a particular topic. If you have documents that a witness has particularly been involved in, it's going to be a more efficient process. You're not going to be fishing around looking at thousands of documents and asking thousands of 10:43:52 questions about a particular topic when you have particular documents that that deponent knows about.

I would like to --

JUDGE BATES: So if in fact there were a requirement that the witness be identified in advance, would it also be an 10:44:13 aid to efficiency to require the noticing party to identify the documents that they were going to use at the deposition?

MR. ROSSBACH: I think there's a value to having some of those documents. The problem is, is it's just like anything, you can't anticipate where it's going to go. I try 10:44:30 to identify the documents. But you're going through something and something comes up that's part of that matter and you have just another document that you remember that may go and help kind of focus the deposition further.

I do try to identify documents. And I think talking 10:44:46 about the documents, as the note says, is a very good idea. I

10:44:52 totally agree with that.

I have a point, though, that I think is important here about the note for the committee and that is, is that we don't -- we have plenty of procedures already in place. We 10:45:06 have Rule 26. Rule 26, if it's the guidepost to our meet and confer, will help you and the lawyers, who are good lawyers, understand. Is this proportional? Are these matters proportional? Is the evidence that's coming out of these matters proportional to the case? And that's already there.

10:45:28 And there's plenty of processes for making objections, motions for protective order, they all exist already. And I think the meet and confer is an important part of that process. I've never had a case where we haven't had some meet and confer and some discussion about who the 10:45:45 witnesses might be and all of that. And as a result I've never had a motion practice after the motion -- after the 30(b)(6).

JUDGE CAMPBELL: So what is your concern about the note?

10:45:55 MR. ROSSBACH: No, my concern about the note was maybe add in something about the processes that already exist, Rule 26, objections at the time, objections after the fact, motions for protective order are all available processes that we don't have to -- we don't have to create a separate set of 10:46:14 processes for Rule 30(b)(6). Plenty of processes exist to

10:46:19 protect the parties in that case.

JUDGE BATES: So let me carry Judge Campbell's order with you and ask you from your perspective, which is the other side of the V, for the most part, do you --

10:46:34 MR. ROSSBACH: I've defended 30(b)(6)s as well.

JUDGE BATES: But do you think, from your experience, is there a problem with having the correct witness and a prepared witness? Is that a recurring problem?

MR. ROSSBACH: It occurs. But I don't -- I think, 10:46:48 you know, when you're dealing -- no. It hasn't occurred in a significant level for me. I mean, that's my personal experience about it. But it has happened. And in those cases you may have to -- you may do another supplemental 30(b)(6) to get the right person or -- or it may have been a problem with 10:47:07 the way you set the notice up, and that's why a meet and confer is important so that both sides understand exactly what the question is, what are you trying to get from this.

And that's what happened in the most recent case, huge case. Millions of dollars at stake, we took four 10:47:25 depositions in the case and it's ready for trial. Four 30(b)(6) depositions and it's ready for trial. And we talked about it extensively before we got there. That's how it got resolved. That's how we -- just, speedy, and inexpensive.

JUDGE BATES: All right. Thank you very much, 10:47:40 Mr. Rossbach.

10:47:41 Next, Patrick Fowler, please.

MR. FOWLER: Good morning, sir.

JUDGE BATES: Good morning.

MR. FOWLER: Thank you for giving me the opportunity
10:47:48 to speak. My name is Patrick Fowler. I'm with the law firm Snell & Wilmer here in Phoenix. And like a number of the other people with gray hair, I have been practicing for about 30 years, primarily representing corporate defendants and product liability and business litigation. I've probably -- I
10:48:04 was thinking back on it, probably defended about a hundred 30(b)(6) depositions, and have taken a number as well.

The point I want to make and my concern with the proposed amendment, and I would urge the committee not to adopt the portion of the proposed amendment concerning
10:48:20 essentially the disclosure of the identity of witnesses in advance of the 30(b)(6). I think it is a solution in search of a problem. I think the unintended consequences of adopting this part of the proposed amendment will inevitably lead to the weaponization of this essentially new discovery
10:48:42 requirement.

Lawyers being lawyers, they find ways to use new rules to their advantage. And I think what will happen here is, as other speakers have addressed, you give the name of the witness seven days, whatever, in advance. The deposition,
10:49:05 which is intended to be the testimony of the corporation, will

10:49:09 then invariably turn into a hybrid 30(b)(6) and percipient witness deposition.

And as Mr. Mickus explained earlier, it will lead to a muddled record where, if I'm defending the deposition and 10:49:28 there are questions asked which are clearly outside of the scope of the topics in the 30(b)(6) but are unique to that particular person, then I'll be having to make objections repeatedly that the question is outside the scope, that it's not binding on the corporation. But I can't, you know, 10:49:47 instruct the witness not to answer because that wouldn't be appropriate.

So you end up with a muddled deposition which will be difficult to use if and when it goes to trial.

JUDGE JORDAN: Has it happened to you before?

10:50:00 MR. FOWLER: Yes.

JUDGE JORDAN: Out of the hundred-plus depositions, 30(b)(6) depositions you've dealt with, on how many occasions, if any, did the question of the identity of a witness come up in advance?

10:50:13 MR. FOWLER: In my experience, and I practice in Arizona and across the country, it's unusual for a plaintiff lawyer to ask me the name of the corporate witness. In some cases they infer it because it is pattern litigation and they may have an assumption of who it is.

10:50:33 JUDGE JORDAN: But it has come up on occasion where

they've asked?

MR. FOWLER: It has come up on occasion.

JUDGE JORDAN: And has that proved problematic?

MR. FOWLER: It has in some cases. Not every case. In some cases it's not been a problem.

Where I see the issue -- if it's a deposition, 30(b)(6), and there are five or ten or 15 topics, something you can manageably cover in a seven-hour time frame, it's usually not going to be an issue.

Where the problem arises is when I get a 95 topic 30(b)(6), which is supposedly going to be covered in seven hours, and of course it isn't. And then the opposing party, the noticing party learns the name of the corporate designee, you spend days, maybe weeks getting ready for a 30(b)(6) where there are 95 topics, and then the deposition spirals into what does that person know, what did that person testify to, not as a corporate representative but as a personal -- in their personal capacity in a deposition three years ago. And in which case the idea of a just, speedy, and efficient process is thrown out the window because of the days and days I spent preparing the witness or witnesses to cover the topics is wasted.

JUDGE JORDAN: Did you ever have an experience where you shared the identity of the witness in advance and it produces something helpful in the way of narrowing topics or

10:51:57 in the way of shortening the deposition or in the way of making it a more efficient process in some other way?

MR. FOWLER: Yes. That has happened in a couple of cases where I've had a longstanding relationship with the 10:52:10 noticing party, plaintiff attorney, and it was a choice that my client and I made as opposed to being mandated.

And I think mandating this, requiring that it be disclosed, is where I think the problem comes in, because if you are working well with the opposing counsel, if it is 10:52:33 pattern litigation where they probably know who the witness is going to be anyway, it usually isn't an issue.

But as I said to start with, this is essentially going to be a new discovery tool. And it will be weaponized, and that will cause problems that are unanticipated.

10:52:52 JUDGE ERICKSEN: You normally do have a meet and confer of some sort; is that right?

MR. FOWLER: I do.

JUDGE ERICKSEN: And during that you may, in unusual situations, reveal the identity of the witness?

10:53:03 MR. FOWLER: No, not typically during that time. Where we have a meet and confer, particularly if it's dozens and dozens and dozens of topics. If it's a small number of topics, we may have a brief phone call if the notice is clear the topics --

10:53:20 JUDGE ERICKSEN: Let me ask you this. Sorry to talk

10:53:23 so fast. If the draft rule does not have the identity of the witnesses, in your view, would the meet-and-confer process have to be iterative? Or is the -- is the language about how sometimes it's going to have to be iterative driven by the 10:53:43 fact that the identity of the witness can't really be discussed until the topics are worked out and -- at least in the rules process that is how that iterative language got in there?

MR. FOWLER: Sure. If there are 65, 95 topics, I'm 10:54:03 not going to know who my witness is, my designees are going to be, until I'm clear as to what the topics actually are going to be.

That's why oftentimes I'll have the opposing side send me e-mails saying, hey, I'm thinking about a 30(b)(6) 10:54:15 with these topics, but they're very general, it's not formal, and I always respond saying, that's fine, but until you send me something more specific as to what you're looking for, I can't really begin my search as to who the designees will be until I know what the topics are.

10:54:33 And so I think the meet and confer to talk about the number, and I think there should be some limit on the number of topics, and the description of the topics is fine and I'm engaging in that already virtually all the time. It's the requirement that I have to tell the other side who my 10:54:50 designees are to be. I just think --

10:54:54 JUDGE ERICKSEN: Do you not have a view right off the top of your head whether or not the process would remain iterative, if the language got changed?

MR. FOWLER: I think the process would remain 10:55:06 iterative because in my practice, my experience is I talk with a plaintiff's lawyer, either by phone or by e-mail, going over the topics they had proposed to try to narrow them down and to make sure that I understand what it is they're looking for. So I avoid the problem at the deposition where we didn't have 10:55:24 a meeting of the mind what the topic is. I just think the section of the proposed amendment asking or including a discussion of who the identity of the designee is going to be shouldn't be included.

JUDGE BATES: Let me ask you about the numerical 10:55:37 limits, since you mentioned it.

What would be the need for numerical limit? Isn't that a problem with the current practice? Takes care of it already?

MR. FOWLER: I don't know, because if I get a 10:55:53 deposition notice that has 95 topics, and that is not an outlier in my practice and the cases that I handle, and there is seven-hour limit, everybody knows there's no way you're going to get through even a third of the 95 topics. I prepare my witness for that.

10:56:10 JUDGE BATES: And that's the inefficiency, that you

10:56:14 have to overprepare.

MR. FOWLER: You have to overprepare, and that allows the noticing party to pick four or five of those topics, knowing that I've had to prepare for 95 and get into the weeds 10:56:25 on four or five --

JUDGE BATES: But isn't that taken care of by meeting and conferring on the topics even without a numerical limit because you've discussed with the other side that, you know, we can't do 95 topics in a seven-hour deposition, so you're 10:56:37 going to have to focus this a little bit better.

MR. FOWLER: I've had that discussion countless times and they say, no, I want to include that.

JUDGE BATES: Seems like a pretty unreasonable position.

10:56:49 But the second question I have on that is, wouldn't limiting the number of topics cause the noticing party to just state broad topics?

MR. FOWLER: I don't think so, because if they know what they're saying to looking for, they ought to state the 10:57:06 topic with reasonable particularity. I mean, I get 30(b)(6) topics, I want you to produce a witness to discuss all of the documents that corporate defendant has produced. Well, that's a nonstarter, I mean particularly in a case where we produced 18,000 pages of documents.

10:57:24 So I don't think putting a limit on the topics, the

10:57:27 number of topics, would be inefficient because it would require the noticing party to think more fully about what it is they want to get out of the deposition as opposed to it just being a sanctioned fishing expedition.

10:57:44 JUDGE BATES: Any other last questions for Mr. Fowler?

Mr. Fowler, thank you very much. We appreciate you coming.

MR. FOWLER: Thank you.

10:57:48 JUDGE BATES: Before the break, one last witness, and that will be Gray Culbreath.

MR. CULBREATH: Good morning. My name is Gray Culbreath. I practice law in Columbia, South Carolina with the law firm of Gallivan, White & Boyd, which has offices

10:58:02 in both North and South Carolina.

I practiced law for 30 years first as an officer of the Judge Advocate Generals Court representing the Department of the Army, and then subsequently representing corporations and insurers. I'm a past president of South Carolina Defense

10:58:17 Attorneys' Association, a member of the American Board of Trial Advocates, Federation of Defense & Corporate Counsel, and Lawyers for Civil Justice.

The other piece I bring to this is I have taught on a number of occasions, both at the state and federal level,

10:58:32 continuing legal education courses on Rule 30(b)(6) and

10:58:37 authored papers about the same. That experience, coupled with the practical experience, tells me that oftentimes Rule 30(b)(6) is confusing at best. The case law that comes from it is contradictory often and, as I wrote in one paper, 10:58:53 it can be a trap for the unwary.

Currently the rule lacks specifics and procedures, which have resulted in these conflicting standards. And my concern with the proposed amendments is that continues that. They create potentially a new discovery obligation through 10:59:13 this meet and confer without even procedural guidance as to what happens when that breaks down, which it does. As a result, those amendments have a clear potential to create more litigation. Inconsistent with Rule 1.

So what happens?

10:59:33 JUDGE BATES: What are the procedures that you think should be added to the rule?

MR. CULBREATH: Judge Bates, I think something along the lines of Rule 45 would be an appropriate procedure. I think about my other experience in South Carolina --

10:59:47 JUDGE BATES: Essentially an objection procedure?

MR. CULBREATH: An objection procedure and a time period. Because I think my own experience in South Carolina, I can think of district judges that do at least three different ways. So you have a motion for protective order 11:00:02 under Rule 26, but does that mean the deposition is held in

11:00:07 abeyance until there's a ruling? If not, do you go forward and the witness has to testify about the topics there's an objection to? All of that is confused. And there's often no resolution for anything.

11:00:20 I asked about the practical problems, does this really happen? And albeit this is a state court experience, in South Carolina the asbestos docket, state rules of civil procedures, model federal rules. Last year -- went back with one of my partners last night, and on the asbestos docket 11:00:41 there were 29 motions for protective order filed over 30(b)(6) depositions, many of which, by different judges, didn't resolve some of these issues.

And so this new procedure could create at best a chaotic scenario because you meet and confer and you can't 11:00:59 agree on the topics, what's next? What's the responding party's obligation?

JUDGE BATES: Does that not happen already in terms of discussion of the topics or does the noticing party identify the topics and then there's no further discussion?

11:01:15 MR. CULBREATH: I would say my experience, Judge Bates, sometimes that -- sometimes there's a meet and confer and there's a resolution, and sometimes there's not. It's really dependent on the personalities and the individuals involved in the case.

11:01:31 JUDGE BATES: Are the cases where there is a meet and

confer less efficient than the cases in which there isn't? I would think the problems would be greater in the cases where there is no meet and confer.

MR. CULBREATH: Again, I think it depends on the personalities because lawyers are sometimes wont to argue and so you get into a meet and confer and there's no resolution because one side believes it's X, topic X; the other believes it's Y.

So let me move into the identity of the witness because I think that has equally practical problems. And the panel's clarified that identity means apparently name and title of the individual. But --

JUDGE BATES: Well, I asked you to assume that. I don't want to speak --

MR. CULBREATH: Well --

JUDGE BATES: -- for the subcommittee or the committee.

MR. CULBREATH: But the rule remains it's the testimony of the corporation. And the comments -- previously the case law and the comments proposed make clear the organization gets to designate who it wants.

It's acknowledged by the proposed committee notes that the choice of a designee is ultimately the choice of the organization.

As one of my colleagues before said, this sounds like

11:02:47 a solution in search of a problem.

And let me finish up with really my own experience, this happened in the past two months with a case, where some of the evils that could come from this identity of the witness 11:03:01 came up, and if there had been a meet-and-confer requirement, if we have had to go forward with it, I don't know how we would have resolved it.

In that case what happened -- first, my client wasn't a party to the litigation. We get a subpoena for a 30(b)(6) 11:03:18 deposition, documents already produced, and the other side has a knowledge of the individuals involved in this discrete incident that caused some damage to a product in excess of a million dollars.

So they came to me and said, we've got these topics 11:03:33 and, oh, you're going to have Mr. Smith testify, aren't you? I said, no, I don't think Mr. Smith's going to be the witness. And I knew why Mr. Smith wasn't going to be the witness, but that was based on my meeting with every witness, my evaluation of those witnesses and making a decision in the best interest 11:03:48 of the client.

If we had gone forward, depending on the judge in South Carolina, and I said we had to have a discussion about the identity of the witness, I would have at some point said to the judge, I can't tell you that. That's work product, 11:04:03 that's attorney-client privilege.

11:04:05 This lawyer was insistent. Although it got resolved through some cooler heads involved in the case.

JUDGE BATES: You think the identity of the witness at some point shortly before the deposition takes place is 11:04:17 protected work product?

MR. CULBREATH: No, Your Honor. My mistake, I didn't clarify what I meant by that.

They wanted to know why we weren't going to use Mr. Smith as a witness.

11:04:30 JUDGE BATES: All right. That, I understand.

MR. CULBREATH: And I said since we're not going to use Mr. Smith, we had to do an evaluative process, and it was several days before the deposition where we actually determined who that witness would be.

11:04:42 But here, without some clarity what the process is to the procedures, then you could have motions seeking to want to know why this person is the witness versus that person.

JUDGE JORDAN: You quoted one of your colleagues with the line of a problem in search of a solution -- a solution in 11:05:00 search of a problem. What's the -- is that not equally applicable to the importation of Rule 45 into 30(b)(6) if, in fact, it's the case that these seldom produced disputes that have to go to the court?

MR. CULBREATH: Well, I think there are two pieces to 11:05:22 that, Your Honor. There's -- in the first instance, the

11:05:26 Rule 45's the topics. If you look at the case law that comes out of 30(b)(6), there's far more dispute over topics, numbers, so forth, as opposed to disputes over identity. And when I say that, there's just not as much, appears to be, 11:05:43 dispute over identity as the other.

JUDGE JORDAN: But they are getting worked out apparently. Otherwise, we'd be hearing from judges this is a problem, which we're not.

MR. CULBREATH: Well, in my experience, at least, 11:06:01 again, in the district of South Carolina, some of our judges have meet-and-confer requirements with the court and they get worked out. Or you end up with a text order that says this is how it's worked out, so there's no published decision.

One of our federal judges has got two asbestos cases 11:06:20 now that popped up in our federal system, which is rare in South Carolina. And he's going to get ten, 12 motions, protective order motions over 30(b)(6) this year, I'd venture to guess.

JUDGE JORDAN: So there is a mechanism in place 11:06:38 that's being used to address it?

MR. CULBREATH: There's a mechanism, but there's not clarity on the process because you can file a protective order but, again, it goes to does the deposition go forward? Does it not? What happens to the topics in dispute? Does the 11:06:54 witness have to answer those questions? Or can they be

11:06:57 deferred? You can't certainly instruct the witness not to answer because there's no privilege to that. And that's handled all over the board if you look at the cases.

JUDGE BATES: Mr. Culbreath, let me just ask you the 11:07:11 same question that others have been asked to respond to, and that is whether you have seen a problem frequently with the wrong witness or an unprepared witness being put forth?

MR. CULBREATH: I've only seen that on a handful of occasions, Your Honor. And those instances, the party who 11:07:30 failed too put up a witness was sanctioned. I think for my clients, we have no interest in going to a deposition, having ill-prepared witness, and then going and having the wrath of the court because we didn't follow our obligations under the rule that already exists.

11:07:50 JUDGE BATES: Fine. With no further questions, Mr. Culbreath, thank you for coming. We appreciate it.

We'll take a short break now. We'll try to limit it to ten minutes. That means we'll resume -- I'll say we'll resume at 11:20.

11:08:14 (Recess taken from 11:08 to 11:20.)

JUDGE BATES: We will resume. And our next witness will be Michael Carey.

MR. CAREY: Thank you. Good morning.

JUDGE BATES: Good morning, Mr. Carey.

11:20:16 MR. CAREY: Michael Carey from Minneapolis,

11:20:17 Minnesota. Apologize for bringing my weather with me.

I practice at the defense firm of Bowman and Brooke.

JUDGE BATES: We actually blame Judge Ericksen for that.

11:20:30 JUDGE ERICKSEN: I was trying to say it was not our fault, so thanks.

MR. CAREY: Started off on the wrong foot.

I have been practicing for only 11 and a half years. Compared to most of the speakers this morning I think it's on 11:20:43 the lowest end, which gives me the benefit of having a long horizon to practice under the new rules. So this isn't as important to them as it is to me, obviously.

And I say that to emphasize the point that this is important. We can take our time to make sure we get it right. 11:21:01 And I think the process so far, I've never done this before, is very interesting, and I don't know exactly how it goes back and forth over the years before it finally becomes a rule, but what I'm hearing so far is this notion of the identity question being something that should this be a requirement and 11:21:21 I'm going to get to that and -- but first I want to share the perspective of what I've been trained as, as a lawyer and a litigator, is that you always need to be collegial, professional, and that's not only it just helps you sleep at night, but it's good for your client. Avoids costs, it's good 11:21:40 for efficiency.

11:21:40 And it's from that perspective that I think that the spirit and the intent of including a provision about meeting and conferring is the right place. And the concern, though, is that the formulation and implementation of this
11:21:56 meet-and-confer obligation may be flawed.

And the reason I say that is it gives a new requirement. I don't think that you can read this specific language of this amendment without reading into it that there is a requirement, however we're going to assume "identity" is
11:22:16 defined today, that the organization doesn't have to reveal the name and at least the title of the deponent. And that is an absolute new requirement that has never been in this rule before.

And so the question I have is, if you're going to do
11:22:33 that, like, you know, maybe an analogy would be the expert disclosure rule, and there's a good reason that we need to know the experts' identities, to know what type of topics they're going to cover, what areas of expertise, look at past transcripts. And that's relevant to that determination.

11:22:50 If we're going to do that for corporate witnesses and read into and insert a new requirement about identity, I think it needs to go clear back to the drawing board and say we're going to do that, and actually insert a notice requirement and a timing thing, and that's not what this rule does directly.
11:23:12 It does that by slipping it in through a meet-and-confer

obligation.

And I think that's the problem here, is we're going to be in a situation where it's ambiguous when you look at the rule what the identification means, and when you get into the situation where, if you look at the new requirement, it says promptly, and then continuing when that obligation has to be met.

It actually even says before you even do the notice you should meet and confer about who this person's going to be. In some cases that could be six months, eight months. Not the seven days we're talking about.

And so you have this obligation to identify this person long in advance, change -- and if that person's name changes, you have to amend and call counsel again and tell them over and over who the witness or witnesses are going to be.

JUDGE BATES: Are you advocating that there be instead of the meet and confer as to the identity of the witness, instead there be simply a requirement to identify the witness some days in advance?

MR. CAREY: Absolutely not. And that's what I'm trying to point out, that this is what the rule I think in effect will do because of its language, will kind of create that requirement. It could be read that way by district judges. And so if that's really what it's going to do, we

11:24:44 have to evaluate is that a proper purpose for the 30(b)(6) deposition, and a lot of witnesses today have said, no, that's absolutely irrelevant to a 30(b)(6), it's not the point, it's to find out what the company knows, not anything about the 11:24:59 individual. There's case law separating those two notions.

And by slipping it in through the back door of a meet-and-confer obligation, you're effectively, and very vaguely, creating this requirement that wasn't in the rule before and -- and has no place in it.

11:25:18 That's a whole separate discussion whether identity should now be in the 30(b)(6) question. But -- and if it is relevant to that determination. It's not. But this amendment would effectively insert it into it.

And then the last point I want to make, I see I'm 11:25:38 already on yellow, is sort of a practical point which is I like to think of the Federal Rules of Civil Procedure as sort of the rules of playing in the sandbox, and we want, as litigators, want to get to the merits of the case.

And all this does, really, in my mind, is just 11:25:54 creates another rule. And I like to think that the rules should be simpler, not more complicated. As sort of fresh off of being an associate, I would always be worried about the pitfalls and the things I would miss. And if you go through the federal rules you can find 30 or 40 different requirements 11:26:17 you have to hit and elements of each rule and procedures and

11:26:20 hurdles you have to jump over, and this is just adding one more in.

And it's necessarily going to create pitfalls for litigators who don't practice in federal court that much. In 11:26:30 every single case it's going to add costs that, you know, I think a lot of people here are strong advocates for defending corporations when this is being abused, but there's just lots of cases where corporations sue each other and they want to use 30(b)(6), and it just doesn't need to happen that you have 11:26:48 this extra additional obligation that really isn't necessary.

I mean, if it ain't broke, don't fix it, according to the Wyoming Lawyers Association. I think that's the saying that goes in Minnesota, too.

So that's all I have unless there are any questions.

11:27:05 JUDGE BATES: Any questions for Mr. Carey?

Thank you very much. We appreciate it.

Our next witness will be Bradley Petersen.

Mr. Petersen.

MR. PETERSEN: Thank you all very much.

11:27:15 My name is Brad Petersen. I'm with the law firm of Slattery Petersen here in Phoenix, Arizona. I practice both here locally and nationally in civil litigation. A large part of my practice is defending product liability cases for manufacturers.

11:27:34 Over the years, dozens of Rule 30(b)(6) depositions,

but also had the opportunity to notice and take Rule 30(b)(6) depositions like one of my colleagues before me. I have had the opportunity to prepare and present CLE presentations, both locally and nationally through webinars on Rule 30(b)(6). I've done a lot of research, read a lot of cases.

And through it all, I have seen this develop over the years. I think there's still a lot of uncertainty in the practice, particularly for younger lawyers and folks who haven't spent the time going through all those, and there's some inconsistencies in the way it is applied throughout the various jurisdictions. And that can be a problem.

I think the amendments that we've had to Rules 1, 26, and 37 have had a positive impact on the way we practice law over the years and securing both the just, speedy, and inexpensive determination, but also focusing on the merits. Yet I still spend a significant amount of my time, perhaps the most significant amount of time in any one case dealing with Rule 30(b)(6) depositions. Some of these are those outlier notices with 149 topics, 95 topics. Those things happen.

I have the luxury of doing some pretty high profile, high stakes litigation, so we're generally dealing with very good lawyers. But there's -- you know, plaintiff lawyers can be good for lots of reasons, and sometimes it's because they want to focus on the merits and win on the merits, and some of them do seek to weaponize rules like this, which is why we end

11:29:22 up with 149 topic notices.

JUDGE JORDAN: Excuse me. You like the meet and confer when it deals with the topics and notice; correct?

MR. PETERSEN: I advocate for it in every CLE. The 11:29:35 first thing I do when I get one of those notices or an e-mail, like Mr. Fowler said, is to call up the other side, because the first thing I want know when I've got all of these obligations on me to identify, to prepare, and to supplement, when I have those obligations I want to know what do you want 11:29:50 and how can I get there, but I think those are already baked into the rules that we have.

JUDGE JORDAN: Have you had the experience with the 30(b)(6) practice that you've had of being asked for the identity of the witnesses?

11:30:03 MR. PETERSEN: I have.

JUDGE JORDAN: And has that proved problematic?

MR. PETERSEN: In some cases yes, and in some cases no.

As part of the meet-and-confer process, I think that 11:30:15 is part of what I would call the arrows and the quiver. We have to meet and confer about a whole host of things, not the least of which is the number of topics and the scope and things like that. And if it makes sense in one case with a particular plaintiff's attorney to provide that information 11:30:32 where we think it will be helpful, then that's one of the

11:30:35 things we talk to the clients and have the authority to do. But that's an option out there for the lawyers to use on a case-by-case basis.

JUDGE BATES: Those cases in which it's been problematic, what has been the problem?

11:30:47 MR. PETERSEN: The problem is this, most often and -- and sometimes it even starts before we get the notice or right after, where we say, hey -- let's say we've got a product liability case on two defects, one is very well developed, one of them is brand-new. The very well developed one may have had 30(b)(6) depositions or state equivalent depositions taken multiple times, maybe from the same witness or multiple witnesses, and we say, well, rather than doing this all over again, how about we give you the transcripts so you can get the information. 30(b)(6) is about just getting information to use, for litigating on the merits. Let's give you the transcripts and maybe you don't have to do the deposition at all.

Of course, the answer always is, well, let me take a look at it, I'll read the depositions, and maybe I don't. And in some cases with some plaintiffs attorneys, that has resolved it. In other cases, they weaponize that. So --

JUDGE BATES: What does that mean, weaponize it? Give me an example.

11:31:47 MR. PETERSEN: By way of example, they will search

these multiple transcripts for potential inconsistencies, or where maybe topic wasn't fairly well developed in a notice in one deposition that is now going to be more developed in this deposition. And in some cases they will use that to find out, okay, well, who's the witness going to be, and then get their individual depositions.

And you've heard about some of the parade of horribles in mixing 30(b)(1) and 30(b)(6), which does happen. But inevitably in those cases which I had experience with, some plaintiffs attorneys won't take us up on the offer. It turns into a seven-hour argument about what prior transcripts say, about what this is, about what perceived inconsistencies are. It isn't an information-gathering process.

By corollary, the new area, the new defect they're doing, they're taking a witness on, that may end in two hours or three hours because it's focused solely on getting information in discovery.

So we see this used in that way versus this way. So in some cases it can help, in some cases it simply does not.

For me, and you'll see my written comments address many of the issues I think you've asked here today, but for me, and what I'm hearing again is "meet and confer" and "identify" cannot mean the same thing.

"Identify" is used throughout the rules and used in Rule 26 to mean very limited information, which to me means

when you use meet and confer about the identity it means something more. It presupposes that by talking about who the witness is, that there involves some sort of now a dialogue about that. It doesn't mean merely identify, because that word is used somewhere else to use very discrete information.

Meeting and conferring about the identity means something more. And to me, I think no one other than the organization who is speaking, the person who is speaking, should have a say-so about who is speaking for them.

MR. SELLERS: May I ask a question, Mr. Petersen? In your written statement, you list a number of factors you say you consider in selecting 30(b)(6) witnesses. One is witness's personal knowledge and experience. Why do you consider that?

MR. PETERSEN: Well, I think, and I've talked about this in CLE so I'm not divulging any sort of client confidences here, but I think one of the things you do is you think about how much preparation are they going to need, is this going to be efficient in thinking about their prior experience or could it get in the way.

We talked about it earlier, about the document from witness Smith. Well, maybe that document for witness Smith, who was involved in it, isn't really the corporate story but one cog. Now is witness Smith going to have to go and explain his prior document that we've now disclosed him as a witness

and say, well, yeah, I thought this but my perspective was really a marketing perspective. It wasn't really a design perspective. I can talk about design and I understand why the choice was made but this is the corporate decision and this is the reason why we did it, these are the things that we considered, I just did it, but the other side of it. So, you know, you have to consider it. Sometimes it's good, sometimes it's bad.

JUDGE ERICKSEN: So is it your experience that fights before the deposition involve the scope and specificity and fights during or after involve the preparedness of the witness in general?

MR. PETERSEN: Because I've done some research and looked at the sanctions that are out there, I haven't had very many, if any, experiences as to the preparation of the witness. And, frankly, because of the due diligence we all try to do in advance of it, I try to clear those up immediately, sometimes even during breaks during the deposition saying, geez, I didn't understand your scope to be that specific about that nuance. Let me just see if we can get that information for you today to be able to answer that question.

So I don't see a lot afterwards. Before, it is always about the depth, breadth, scope of the topics.

JUDGE ERICKSEN: So I was going to ask you what ideas

11:36:07 you had if not the current draft for dealing with ill-prepared witnesses, but you might not be the person for that, so let me ask you a different question.

Do you believe that there is any problem that the 11:36:24 iterative nature of the meet and confer makes it amorphous and difficult to understand, whether you've done it or not, and if there were not the requirement to discuss the witness identity, would the meet and confer still be -- have to be specified as being iterative? I mean, there's no problem that 11:36:53 I can think of having to be iterative unless the problem is people don't know whether they've complied or not.

MR. PETERSEN: I think there is a problem. Without guideposts to know what that means, other than what it already means in the rules, we have it in the rules the same way we 11:37:07 have it to avoid discovery disputes as to any sort of discovery device, and that is to try and avoid the dispute in the first place; right?

And so that -- I understand that role. And that may mean, I suppose, different things to different people. But I 11:37:22 think at the end of the day when we reach a disagreement, we know we've complied as much as we could.

I think doing this in advance and without clear guideposts as to what that means, I think it can lead to more disputes that will occur. I can envision -- and I won't name 11:37:42 names -- but a particular plaintiff attorney calling me almost

11:37:45 on a daily basis saying, what are we doing today? What's going on next? What are we doing now? Look, I just need some time; right?

But I do think that is a problem and I don't think 11:37:57 it's necessary. I think you have a roomful of people testifying almost uniformly that to some level meeting and conferring is already happening, and it sounds from the feedback that you've had from the bench that they're not seeing the things because of that already. So adding this 11:38:17 amorphous --

JUDGE BATES: This is another if it's not broke, don't fix it?

MR. PETERSEN: Well, I think there are some things we can fix, and I've included those in my written report. And I 11:38:26 think there are things we can do to make it a little bit better. But as to that, meet and confer, I think we're already doing it. I don't think we need to include that in 30(b)(6) any more than we need to include it in 30(b)(1), or 33, or 34.

11:38:43 JUDGE JORDAN: I have one quick question, if I could. Do you have any suggestion -- I mean, you've written things like a 30-day notice requirement, maybe that's apropos -- but anything specific you could say besides the witness identification that would meet the problem of unprepared 11:39:02 30(b)(6) witnesses?

11:39:05 MR. PETERSEN: In what I've read about why we end up with unprepared witnesses was early gamesmanship, trying -- you know, trying to avoid giving the information, and the sanctions that are out there because of it.

11:39:20 I think for the people in this room at least, and you're probably dealing with a different set here than probably lead to most of those sorts of disputes, we don't really need to worry about that very much. But I think a requirement that these get served far enough in advance for

11:39:38 people to work them out and not, you know, 14 days before some discovery deadline, oftentimes the expert discovery deadline, which is when we receive these types of things. Hey, we need this now because we've got reports due in two weeks or three weeks or whatever it is.

11:39:54 If there's enough time baked in, more than what is the normal notice requirement, I think that could help.

JUDGE BATES: Okay. Thank you very much. We appreciate it, Mr. Petersen.

We'll hear next from Jennie Lee Anderson.

11:40:17 Good morning, Ms. Anderson. Good to see you again.

MS. ANDERSON: Good morning. Thank you for having me.

My name is Jennie Lee Anderson. I know most of you, but I practice at the law firm Andrus Anderson in

11:40:23 San Francisco. We represent plaintiffs exclusively in class,

11:40:27 individual, and mass actions.

I've been practicing in that capacity for almost 20 years, and over the course of that time I've taken multiple 30(b)(6) depositions in the context of antitrust cases, 11:40:39 consumer fraud cases, securities cases, employment cases, and product liability cases.

One of the issues that has come up a lot today is the issue of the value of knowing the identity of a witness.

I always request the identity of the witness in 11:40:57 advance and I have never been denied that information. I've always had the identity of the 30(b)(6) witness prior to taking the deposition.

The reason why that's important is because there are basically two different types of 30(b)(6) witnesses. The 11:41:13 first is one that the corporation has chosen because that person is the person they believe to be most knowledgeable and they want somebody who's knowledgeable and knows what they're talking about to represent the company and testify on behalf of the company. Sometimes that's not always possible and 11:41:31 sometimes 30(b)(6) ends and deponents have to go out and gather information and prepare themselves in advance.

The first scenario is much, much more common for the reasons I stated. There's less preparation that needs to be done, the person is simply more knowledgeable about the topics 11:41:50 in the notice, and the company can rely on them to give

11:41:53 accurate information.

JUDGE JORDAN: How would your knowing the identity make a difference to that?

MS. ANDERSON: Because if I know the identify of -- 11:41:59 say I've a 30(b)(6) deposition about research and development, and I am told that the person being designated is the head of research and development and has been for the last 12 years, I know that that witness is being designated to testify, but he or she is going to be testifying based on their own documents, 11:42:17 their own knowledge base, and their own experience at the company.

So, therefore, it is going to assist me vastly to review their custodial file and understand their background and their job at the company prior to the deposition. And it 11:42:36 also assists a great deal in finding out exactly what topics they're going to be discussing from their more personal inate knowledge and -- although they're being designated to do so on behalf of the company --

JUDGE JORDAN: Right. That gets into the question 11:42:50 that you've heard discussed, I assume, about the line between regular depositions and 30(b)(6) and that that is a line that shouldn't be crossed and creates more difficulties in deposition than it is. What is your experience with that?

MS. ANDERSON: I disagree with that because, as I 11:43:07 mentioned, say the deponent is the -- we'll stick with the

11:43:12 research and development example. That deponent is testifying on his or her personal knowledge and experience. Because their personal knowledge and experience makes them the most knowledgeable, the corporation has chosen to designate that 11:43:30 testimony to be on behalf of the corporation.

If I -- I should be able to cross-examine and ask that witness about the testimony that is being proffered on behalf of the corporation even though it is also coextensive with his own personal knowledge. And I think that's different 11:43:52 than trying to ask a 30(b)(6) witness about something unrelated to the topics at hand.

And I think it's very helpful and I think that it is the common practice to -- you know, even if the witness was not going to be head of R&D, I would still want to look at the 11:44:11 custodial file of the head of R&D. The fact the witness is the head of R&D is going to be more efficient and more effective and yield more information across the board.

I think that most corporations prefer to identify a knowledgeable witness who will speak with knowledge and 11:44:34 represent the company and have the background information and history before speaking on behalf of the company where possible.

JUDGE BATES: As to the identity of the witness, what is the additional advantage from a requirement to meet and 11:44:52 confer with respect to who the witness is?

11:44:57 MS. ANDERSON: Well, as I mentioned, I always request the identity of the witness in advance and I've never been denied that opportunity by defense counsel in my experience.

I think that -- I disagree with my esteemed 11:45:13 colleagues who are here who think that it adds a requirement. I don't read it as a requirement, and several people have said they have plaintiffs attorneys who don't choose to ask for the identity. I don't -- I can't speculate on their decision to do so. Maybe it's a discrete issue.

11:45:31 JUDGE JORDAN: It would have to be a new requirement; right? If it's not in the rule now, they don't have to give it. But if we put it in the rule and they do have to give it, then it's a new requirement. Right? That's -- just is a problem they're identifying. They're saying you're making us 11:45:44 do something which has been discretionary with us before in deciding how to deal with counsel we trust versus counsel we may not have any experience with and do not trust as much.

So how do you address the concern they're expressing, which is there are lawyers out there who will use that 11:46:01 information to an inappropriate end, they will use it in a way that leads to cross-examination questions that have nothing to do with corporate knowledge of the company?

MS. ANDERSON: Well, I personally don't see any downside in my practice of knowing the identity of the witness 11:46:18 in advance, but I appreciate your question.

11:46:21 I think that there are already in the rules procedures and remedies for abuse of discovery procedures. I don't think that it's -- I haven't heard any -- most of the people -- sorry to be inarticulate. Most of the people who 11:46:39 have testified today have indicated that this doesn't present a lot of problems. There have been one or two examples of a rogue situation, but overall, anyone who's taken a deposition, I think, would say knowing who the person you're going to be deposing for the next seven hours in advance is helpful. It's 11:46:57 helpful in preparation. It's helpful to know the person's background. It's helpful not to be surprised. It can result in shortening the length of the deposition insofar as learning what that person already knows versus what they had to do to prepare for the -- to be the voice of the company for those 11:47:14 seven hours in the deposition chair.

So I think that there are other procedures that already exist for that and any other discovery abusives -- abuses.

JUDGE BATES: Would the meet-and-confer requirement 11:47:28 in the rule or an identification requirement in the rule, in your view, lead to more disputes, more litigation, or less? Or have no effect?

MS. ANDERSON: I think it would -- I don't know that it would -- I would say no effect or less. I already meet and 11:47:48 confer on my topics with most cases. Every now and then I'll

11:47:52 have a 30(b)(6) topic that is very discrete and it's not necessary, but usually I want to talk to opposing counsel about, well, what -- what am I trying to get to with these topics? Do they think that they have a witness who can cover 11:48:06 them all? Do they feel like -- sometimes they say, look, Jennie, we've got the R&D guy, he's going to try to cover sales too. I'm going to say, are you sure you can get him prepped enough? We've got a lot. This is big case that covers ten years of information. Are you sure you can get him 11:48:23 prepped? And opposing counsel might say, we're going to try, and if the questions aren't answered we'll work on getting someone else. But that is part of this process.

So I already do that in my practice. And I think having and encouraging more open dialogue about the identity, 11:48:38 the -- who's going to be testifying about what, and the topics themselves just make the process flow a lot better.

Frequently, there will be outstanding issues that we don't know whether we're going to resolve, but we can still move forward with what we agree upon with that R&D depo, for 11:48:54 example. And if there are other topics that weren't covered and opposing counsel feels it's unreasonable, we can talk about that afterwards.

But this process, I think, is important and that's why I think that there's no downside in encouraging people to 11:49:07 meet and confer on these issues.

11:49:09 JUDGE CAMPBELL: You explained why knowing the identity of the witness is helpful in the first category of 30(b)(6).

Does it help to know the identity in the second 11:49:18 category where the person had to go collect the information and is testifying solely on the basis of their due diligence and collecting the information?

MS. ANDERSON: I think it's still helpful. I think it's not as important, but I still think it's helpful to know 11:49:32 the identity of any witness.

Is that person an employee at the corporation? Is he somebody who's hired to come in as a 30(b)(6) deponent? That's information that I would like to know in advance.

Many times a 30(b)(6) witness will be testifying on 11:49:51 behalf of the company based on his or her own experience in one area, but not in another. So I can know that he's going to have personal experience about maybe HR and I can ask more questions at the deposition what did he do to learn about the sales division: Who did he talk to, and how did he gather 11:50:09 that information.

So I still think it provides a lot of efficiencies and is very helpful, although it may not be as core as when the person who's going to be covering all the topics is also the person most knowledgeable.

11:50:24 JUDGE BATES: Any last questions for Ms. Anderson?

11:50:27 Thank you very much for coming. We appreciate it.

MS. ANDERSON: Thank you very much.

JUDGE BATES: Our next witness is Bina Ghanaat. Morning.

11:50:41 MS. GHANAAT: Good morning. You pronounced my name perfectly. That's rare. I appreciate that.

JUDGE BATES: Blind luck.

MS. GHANAAT: Thank you for opportunity to be here.

My name is Bina Ghanaat and I am an attorney with the 11:50:51 law firm of Lankford Crawford Moreno & Ostertag based in Walnut Creek, California.

A little bit of background about my firm. We primarily represent corporate defendants in product liability and other tort actions, and part of that representation 11:51:08 includes serving as national counsel and asbestos counsel for various corporations, numerous jurisdictions, both federal and state.

Now, my perspective is slightly different from the others who have testified before me given the unique nature of 11:51:22 asbestos litigation. Specifically, in asbestos litigation, we're dealing with claims that happened 30, 40, 50-plus years ago. So the fact of the matter is the corporation does not currently have someone with it who has personal knowledge going back that far, and that's what informs the opinions I'll 11:51:42 provide today regarding the proposed amendment to

11:51:45 Rule 30(b)(6).

I'm going to break down my thoughts into two categories. First, the proposed amendment to meet and confer regarding the identity of the corporate witness is an 11:51:58 attempted solution at a problem that doesn't exist, as others before me have said; and, secondly, I think there are certain common sense solutions and amendments that could be introduced to streamline the 30(b)(6) process and fix what are the problems that we see coming up.

11:52:17 JUDGE BATES: Is it a problem that doesn't exist because, as some witnesses have said, they routinely ask and receive the identity of the witness, or is it a problem that doesn't exist because they shouldn't be entitled to the identity of the witness?

11:52:34 MS. GHANAAT: Well, a little bit of both. First, the identity of the witness is not relevant because, as others before me have stated, in the context of a 30(b)(6) deposition we're dealing with a corporation's knowledge, not the identity of the witness. And there is case law going to that. I'm not 11:52:52 going to list all the cases, but footnote 11 of the LCJ comment, for instance, lists all those cases, saying the identity of the corporate witness is not even relevant.

And it's also not an issue because of the safeguards that are already in place. I -- for instance, if a 11:53:09 corporation foolishly puts up an unprepared witness, then

11:53:17 they're subject to severe sanctions, and what they're going to have to do is they're going to have to spend the time and money and effort and prepare someone properly and put that person up and have another deposition.

11:53:29 JUDGE JORDAN: The argument I assume I'll be hearing from the other side is to the effect there's a transaction cost there; right? That defense lawyers will sometimes play the game where we don't have a fully prepared witness, but they weren't so bad that you'll burn your credibility going to the court. That's the way the fight seems to go.

11:53:52 So what, if any, practical advice do you have for how to address the problem of unprepared witnesses? If it's not meeting and conferring about witnesses and discussing it, what do you suggest be done? Because it apparently is a problem.

11:54:17 MS. GHANAAT: Two suggestions. One would be to put in a framework into the current rule to encourage early discussion about the topics at issue.

If the other side tells me early on, such as in the context of the Rule 26 conference, what specific topics

11:54:31 they're looking for that are relevant and specific to the case at issue, that will help me go to my client earlier and try to figure out, in conjunction with my client, who is the best person to speak for the company, be the face of the company, provide binding answers for the company. Who has the ability,

11:54:48 especially in asbestos cases, when they don't have the

11:54:53 personal knowledge, to go through thousands of documents, to go through decades, 50-plus years, of corporate history. Who has the right ability to actually absorb this information, distill it in their mind, and then take that information and 11:55:09 present it in a clear and accurate manner in a way that is understandable to a jury.

JUDGE ERICKSEN: The draft comment does make reference to the fact that in some cases it might be appropriate to discuss this at that early stage. What we've 11:55:27 heard so far is that that is true in some cases but not in others, and that's why there's not a timing requirement in there.

But does the -- in the Rule 26 stage, there's nothing to preclude that as being a topic of discussion. And then 11:55:46 closer to the 30(b)(6), you can have a meet and confer about the topics more specifically. That's what's in the draft already.

MS. GHANAAT: Right. But the earlier, the better, of course, to encourage parties not to kind of wait to the last 11:56:00 minute to narrow down topics.

Often in meet and confers, I have those so-called outlier cases. In most of the litigation we do, we see those deposition notices with 75-plus topics. We engage in meet and confer and, unfortunately, sometimes parties just get more 11:56:18 entrenched in their positions and the process goes back and

11:56:22 forth. So the earlier we can begin that process, even if it means a mandate to say specifically when to start that discussion, the better it is. And that goes to the issue of making sure we have the most able and prepared person on the 11:56:37 discrete topics at the time of 30(b)(6) deposition.

PROF. MARCUS: Can I ask a question about asbestos litigation in particular, because my guess is as to some of your clients there have been prior 30(b)(6) depositions in fairly similar litigation. Do the transcripts of those prior 11:56:58 depositions play any role in your current cases?

MS. GHANAAT: Yes, they do. And that's a great question. In fact, depending on the client and the case at issue, if we receive a notice with certain topics, the exact same topics we've seen over and over again, what we'll do, 11:57:17 with the client's permission, is we'll actually offer to the other side, you have already deposed our corporate representative on topics A, B, and C. Do you really want to depose him again on A, B, and C? Or we can offer you these prior transcripts on these topics, and we'll stipulate that 11:57:33 those transcripts can be treated as if taken in the current case.

So they certainly do play a role.

JUDGE BATES: Why isn't it helpful for the other side to know in advance who the witness is for just that same 11:57:45 purpose?

11:57:48 MS. GHANAAT: They don't need to know who the witness is for that purpose for two reasons: One, in my type of litigation, you're not dealing with someone with personal knowledge. You're dealing with someone who has been educated
11:58:04 and who learned about the topics at issue. So it is really irrelevant who the person is. And for that reason, they don't need to know the identity of the person. I don't see how that rolls the ball forward or how it helps.

JUDGE JORDAN: Well, they would know, if they knew
11:58:22 the identity, that, in fact, this person had been deposed several times before, so they would be in a position to say to you, even if you didn't say it them, why can't we use those previous deposition transcripts.

MS. GHANAAT: Well, I submit that it doesn't matter
11:58:36 if Mr. X or Mr. Y or Mrs. X or Mrs. Y was the one who was a prior 30(b)(6) notice and there are transcripts of their depositions, because, again, we're not going on personal knowledge, we're going on the company's knowledge.

And my duty is to prepare whoever I'm going to put in
11:58:55 that chair to be able to testify fully, completely, truthfully, and accurately to whatever the topics may be.

So as long as the topics are the same and I've already put up a witness, it doesn't matter who that witness is as long as they can present the company position.

11:59:11 JUDGE BATES: Any further questions for Ms. Ghanaat?

11:59:13 Thank you very much for coming. We appreciate your testimony.

MS. GHANAAT: Thank you.

JUDGE BATES: Our next witness will be Tim Pratt.

11:59:19 Mr. Pratt, good to see you again.

MR. PRATT: Yes. Good morning. Good morning.

I just want to start by thanking the committee and thanking everybody here. I think of the 1.4 million lawyers and judges in a country where only a few spend time working on

11:59:34 these kinds of things, making the civil justice system work better and fairer and even -- everybody who participates, I commend them for it.

I wear different hats today. I spent 30 years practicing law, trying cases around the country, seeing a lot

11:59:47 of the 30(b)(6) issues that some of the defense counsel have mentioned to you.

I'm president of Lawyers for Civil Justice, although I'm not here in that institutional capacity because I'm really here to talk about what I've done in the last ten years. It's

12:00:01 a perspective not shared before.

I'm general counsel of a company called Boston Scientific. I was the client. I had to deal internally with 30(b)(6) notices that we got. I don't want to talk to you about some of the logistical --

12:00:18 PROF. MARCUS: As the client, how would you approach

12:00:20 the question of notifying the other side what specific witness you would be sending to be a 30(b)(6) deposition?

MR. PRATT: How would I deal with that as the client?

PROF. MARCUS: Yes.

12:00:33 MR. PRATT: I mean, first of all, I think this is a nonissue, Professor. I know we spent an enormous amount of time this morning talking about that very issue. I think the plaintiffs lawyers have said it's really not an issue. It was never an issue when I was in the practice of law. I frankly 12:00:46 don't know whether the 30(b)(6) depositions of the company that I led as general counsel, I don't know that we told people that. I'm saying this rule doesn't address the problem that we have.

PROF. MARCUS: In your experience, it's not really 12:01:01 the client's call, but the defense lawyer's call?

MR. PRATT: I don't know. I mean, I guess it's the client's call. But have I ever as a client been asked do we disclose it or not? Never. If somebody asks me I would probably say, I did it when I was in private practice. I 12:01:19 would say I don't think it's actually part of the rule, is my position.

JUDGE BATES: From your perspective, is there any problem with disclosing the identity of the witness in advance of the deposition? Does that create some problems from the 12:01:31 perspective of either the particular organization or the civil

12:01:35 justice system?

MR. PRATT: Well, I don't know. I mean, again, my point is this isn't fixing the problem that we have, Judge Bates. I'm telling you that. There's -- the problem I 12:01:47 see -- and I'll answer the question -- the problem I see is, and we seem to shrug our shoulders at these comments that there are 125 topics in a 30(b)(6) deposition notice, or 70 or 80. I think that's outrageous.

In the pelvic mesh litigation, which I led, was 12:02:09 against my company, from 2013 and 2016, there were 36 depositions of my Boston Scientific people. 49 days, 12,000 pages of deposition testimony.

JUDGE BATES: 30(b)(6) depositions?

MR. PRATT: No, no, no. Individual depositions. 12:02:24 After all -- including four days of 30(b)(6) deposition notices from the state court case, depositions in state court. With noticed 30(b)(6) depositions in the MDL.

After that, we got a 30(b)(6) notice that contained 18 parts and 50 subparts. After all of that.

12:02:43 I just think that is outrageous. I think it's harassing when after all of that you have to deal with that number of topics so they -- we want witnesses to talk about things we had them talk about before.

And what happened, we went to court. We went to 12:03:00 court and had a hearing before the magistrate judge. The

12:03:04 magistrate judge gave us some relief, but the outcome of that was one of our witnesses who testified for four full days before that had to sit through two additional days of 30(b)(6) depositions to talk about some of the things she talked about 12:03:20 and documents she was presented and all of the other testimony.

So if a 30(b)(6) witness is going to be presented to the other side, it's a good thing. I leave it to the plaintiffs counsel to answer that.

12:03:31 But I'm saying I think this rule, Judge -- this thing got started with the ABA task force and Lawyers for Civil Justice joined, the problems we're seeing on the defense side of 30(b)(6), and this rule doesn't fix the problem. It institutionalizes something that's been a part of the practice 12:03:51 for a long time. You get a 30(b)(6) notice, you meet and confer. But you meet and confer in the context of no guidelines. And this rule does not provide the guidelines to drive the meet and confer to getting improved discussion. So that's my primary problem with it.

12:04:09 JUDGE BATES: Does that mean that what you are primarily suggesting is that there be a numerical limit to the number of topics?

MR. PRATT: Yeah. Yeah. Here's my view --

JUDGE BATES: And would that not, just as an example, 12:04:23 say, if 20 is too many topics, if there were a numerical limit

12:04:29 saying there could be ten topics, wouldn't that lead simply to ten more generally stated topics that would still cover the same territory for the company?

MR. PRATT: I don't think so. First of all, the rule 12:04:44 also requires reasonable particularity, so you can't come in and say -- I mean, of the -- of the -- of the topics that we got, the pelvic mesh litigation, they said they wanted to have somebody discuss all aspects of physician training, all aspects of sales rep training. I don't know how much broader 12:05:02 you can get from that.

I mean, so my view on this is that the biggest problem you have if you're the client is dealing with that. If you get 50, 60, 85 topics, 30(b)(6), you don't even know where to start. And you know there's going to be discussions 12:05:17 to try to limit that. Once you get it limited, you have to go find the witness. This isn't -- this is the season of Elf on a Shelf. We don't have a witness on a shelf. We have people who have day jobs, and they've got to be in a position to say I'm willing to participate with lawyers and do this and speak 12:05:34 on behalf of the corporation. That's extraordinarily difficult and emotionally draining for people.

JUDGE JORDAN: But that's true for any 30(b)(6), even if there were one topic; right? I mean, it's an imposition, but that's a piece of the system. And I don't take you to be 12:05:50 saying eliminate 30(b)(6) depositions.

12:05:52 So getting to the point of they can be harassing and over the top, what is -- what is wrong with the system as it exists, which you took advantage of and went to get a protective order. Go to the court and say this is an over the 12:06:11 top kind of demand on this 30(b)(6) deposition notice we've got, and give us relief.

MR. PRATT: You've got judges who say, I have no idea what's reasonable in terms of numbers. Is 70 reasonable? 50? The rules don't say that. So judges look at it and go, it 12:06:25 makes sense. In this case there was no limitation on the number of topics.

JUDGE JORDAN: How could that be done in the abstract, though, Mr. Pratt? How could we say for all cases ten is the presumptive right number?

12:06:39 JUDGE BATES: Isn't an individual employment discrimination case much different than a pelvic mesh case in terms of the number of topics that might be appropriate?

MR. PRATT: Maybe, maybe not. But you also have a presumptive limit of 25 interrogatories you somehow work 12:06:54 around that, I suggest, has prevented motion practice.

You have a presumptive limit of ten witnesses in a case. No matter the case. And I'm sure there was outrage then about, wait a minute, all cases are different.

And I'm not saying if ten's a presumptive limit that 12:07:10 that's going to cause, you know, all kinds of difficulties. I

12:07:16 think what it will do, it will tether the process.

I want to talk about just emphasizing if the presumptive limit is ten, then you have some tether to what is reasonable. It doesn't mean it's always going to be ten. If 12:07:29 you have an opportunity to object, you have the court who can get involved. And I think the prospect of the court getting involved on these kind of things incentivizes reasonableness.

And I think the prospect of avoiding duplication -- I think these are things that we propose as to problems. I 12:07:48 think identifying the witness in advance doesn't seem to a huge problem. I hear about the problem of unprepared witnesses. I don't even know what that means. I have never had that, I've never seen that in my practice.

But I will tell what you contributes to it, if it 12:08:03 exists. If you have to present five witnesses on 50 topics, you're probably going to have somebody on the plaintiff side say this person wasn't prepared to deal with this question when I asked him or her the question.

So I think part of the unprepared witness situation, 12:08:18 which I don't fully understand, is more based on the idea that the process is being abused and there are too many topics, and trying to prepare a witness, manufacture a witness, manufacture a witness, take someone who may not know it all and kind of invent them into this person who can be the person 12:08:39 who looks at documents and comes up with this story, there's

12:08:43 an inherent risk that it's not going to match up perfectly with what the plaintiff's lawyer is going to want.

And I think if you limit the topics, put some more control over this process, I think you can eliminate a lot of 12:08:56 the problems that the ABA talked about in the task force report and what else they may have talked about in their submission.

JUDGE BATES: Any questions, other questions?

Mr. Pratt, thank you very much.

12:09:07 MR. PRATT: Thank you. I Appreciate it.

JUDGE BATES: Next witness is Keith McDaniel.

MR. McDANIEL: Good morning. I'm Keith McDaniel from the McCranie Sistrunk firm in New Orleans.

JUDGE BATES: You are the first witness who should 12:09:23 say good afternoon.

MR. McDANIEL: Apologies. Good afternoon. Greetings from New Orleans.

I'd like to start by thanking the committee. You have a task before you, and it's one I'm sure that is not that 12:09:31 welcome, but I commend you for that.

More importantly, I commend you for the work that has been done by you and others on the committees with respect to Rule 16, 26, and the proportionality considerations that have been worked in the discovery process.

12:09:46 For 30 years I have litigated largely on the defense

12:09:49 side in the areas of product liability and toxic tort. I have defended at this stage more 30(b)(6) depositions than I care to think about, although I've taken a number myself as well.

I think when the amendment was first talked about 12:10:06 with respect to 30(b)(6), the thought was that ultimately we would see what I think everyone here agrees with has been an outstanding outcome with respect to 16, 26 to the discovery process the same sort of clarity brought to what is a very, at least in my view, contentious area, and I would submit to you 12:10:29 that the amendment as proposed will not do that, and I would urge you not to pass it.

Anecdotally to the question of identity of witnesses, early in my practice I was defending a corporate deposition for a Japanese manufacturer. Plaintiff's counsel came to me 12:10:45 and said, can you tell me ahead of time who's going to be testifying, we don't know anything about this manufacturer. I did, because I thought it was the right thing to do. We had three witnesses coming from Japan. None could speak English so there was an interpreter involved. We spent four days of 12:11:01 depositions going through their social media, where they had worked in the past, and all of these things and, quite frankly, hardly touched on any areas of the notice.

So anecdotally, I can tell you that the identity of witnesses can lead to muddying of the water in the sense of 12:11:21 confusing the individual deposition right that one may have

12:11:26 versus the corporate deposition.

The identity of the witness is given in the rule. It's the corporation. The person that is speaking, is speaking for the corporation.

12:11:40 Now, I will tell you to the other questions, certainly I have been asked for the identity of the witness, and as the meet and confer which I do progresses, I can't think of a deposition that I have defended that before the deposition I have not said it's going to be Joe Blow. But

12:11:59 that is not something I could have said through a mandated meet and confer when I'm also talking about the areas of the deposition to be covered. There's just simply not that time.

JUDGE JORDAN: I'm sorry, I'm not understanding. You're saying that you do give -- you do regularly identify

12:12:19 the witness when asked --

MR. McDANIEL: I do as a matter of practice so that when someone comes into the deposition they know the person. But that may be two days before the deposition.

JUDGE JORDAN: Okay. So you said but that would

12:12:37 create a problem with the meet and confer about the topics? Did I hear that right?

MR. McDANIEL: At the time the meet and confer is happening, typically we have a draft notice. In my practice I can't think of one that does not have at least 30 items. I

12:12:52 have no way of knowing at that time who's going to be

12:12:56 addressing those. I'm just seeing those.

Now, as that process develops, that gels and you begin to get it. But just as counsel from Jackson, Mississippi noted, there have been times where that person has 12:13:11 changed for whatever reason, business related, personal, whatever. And if the meet and confer and identity requirement suggests something that is now concrete, it is, in my view, creating something that is only going to cause problems in the rule. And there are other areas where this rule needs clarity 12:13:34 that would be much more useful than interjecting this.

JUDGE JORDAN: What you're doing is not creating a problem. The way you're handling it now with some identification maybe as late as a couple days in advance, that hasn't created a difficulty in your -- or it hasn't muddied 12:13:51 the waters in the deposition?

MR. McDANIEL: In my view, still more time is spent on personal information with respect to the witness that has been dug out of today's information world, that that is unnecessary, again, in the context of what a person is 12:14:08 there -- and the problem is so much time often is used for some of that. You then run into the issue of, well, in our seven hours we didn't cover this. Well, if you had not --

JUDGE ERICKSEN: Have you ever had the experience of opposing counsel refusing to engage in a meet and confer 12:14:28 process on topics?

12:14:35 MR. McDANIEL: I will say that I always try to get as part of the 26 this discussion going, and I can say to you without fail, I have never had a plaintiff's counsel at the time of 26 be willing to talk about whether he's even going to 12:14:50 have one, much less the topics. The time --

JUDGE ERICKSEN: Do you think that a rule -- I know you don't believe that it goes far enough. But that -- but inserting a meet-and-confer requirement, do you think that that would nudge people to be more willing to talk about it 12:15:09 because they know the rule is going to require the discussion at some point?

MR. McDANIEL: I like the concept, again, of clarity with the rule. I think a meet and confer with a certain time limit would also control the late notices we get, because 12:15:27 invariably you will get the corporate notice of deposition after written discovery is done, oftentime after personal depositions have been taken of corporate witnesses, right on the eve of when plaintiff's expert report is due, and it's usually, oh, our experts need this.

12:15:46 JUDGE BATES: What do you mean by the time? When the 30(b)(6) takes place?

MR. McDANIEL: The meet and confer with respect to the 30(b)(6). I'm talking about clarity with respect to a process relative to -- if that process is out early enough, I 12:15:59 would submit, and you try to have it and then nothing happens,

12:16:03 and then you get 15 days before the end of discovery we're going to have this, then I think at that point I'm in a position to say, hey, we had this deadline ages ago to do this, either you weren't prepared or didn't want to do it. 12:16:21 I've got something then. Just a generalized meet and confer that is not specific in time, in the same way that perhaps limiting the topics.

There needs to be more clarity into the process to include objections if you can't solve things in the meet and 12:16:39 confer.

PROF. MARCUS: Have you ever asked a judge under Rule 16(b) to set a time limit for 30(b)(6) depositions?

MR. McDANIEL: I've had the conversations with the judges in Mississippi and Louisiana, and most, at least at 12:16:55 that conference, say let's get the discovery going and see where it goes. So, no, I have not gone back and said let's set a time.

JUDGE BATES: Sounds like you don't have that much of a problem with meet and confer as to the topics, and in your 12:17:08 own practice, you do tend to divulge the identity of the witness, at least a couple of days before the deposition. But you do have some problems with meet and confer, timing and other considerations, with respect to the identity of the witness.

12:17:21 But you've also said that there needs to be other

12:17:24 things addressed in the rule. Could you just list the two or three most important things that you think are necessary in a modification of 30(b)(6)?

MR. McDANIEL: Time frame for the notice. Time frame 12:17:38 with respect to a meet and confer --

JUDGE BATES: For the notice? What do you mean the time frame for the notice?

MR. McDANIEL: Emphasis of the notice of the 30(b)(6). Relative to either a discovery cutoff or something 12:17:51 so that we know that you --

JUDGE BATES: So the rule should dictate when a 30(b)(6) can take place?

MR. McDANIEL: Yes.

JUDGE JORDAN: You mean like 30 days in advance of 12:18:00 the deposition, you should get the topics?

MR. McDANIEL: Yes. Yes. And then you have a period of time, just like in 45, to meet and confer and work it out, and if you don't, ten days to file an objection. So that when you go into the deposition, there is a ruling. Because, as 12:18:15 the cases as you've seen showed, it's all over the place with respect to what benefit a motion for a protective order.

In my practice, more times than not they're filed and I don't have a ruling by the time of the deposition, so we go forward with it, sort of not knowing what the outcome is going 12:18:32 to be.

12:18:32 And to your question, Judge Bates, earlier about witnesses being prepared to testify, in all of my years of practice, I have never had that raised. And at least for the defendants that I represent, the last thing we want, from an 12:18:51 expense and any other number of reasons, is to have a witness not prepared to testify. So it's interesting to me that I hear you suggesting that that is a common occurrence. I just have not seen that in my practice. And I don't think identifying the witness any earlier is going to change the 12:19:11 preparation.

JUDGE BATES: All right. Thank you very much, Mr. McDaniel. We appreciate your testimony today.

We'll next hear from Philip Willman.

MR. WILLMAN: Let me be the second person to wish you 12:19:25 good afternoon.

Thank you for allowing DRI to participate in this process. I'm here not in my individual capacity, but in my capacity as president-elect of DRI.

DRI is a voluntary membership organization of lawyers 12:19:43 who defend individuals and organizations in civil lawsuits. We have 20,000 members. It's a large, sprawling membership. Many of our members devote either substantially or exclusively their practice to federal court. Others are in state court. But both categories are going to be impacted or affected by 12:20:07 these rule changes.

12:20:09 Rather than get into reasons why DRI has taken the position that it has, I would like to describe the process. But the position that DRI is taking is that the meet and confer is a laudable goal with respect to discussing the 12:20:27 topics, the number of topics, but DRI does oppose the identity provision in the proposed rules.

In addition to that, we have put together a list of improvements that we think should be considered by this committee.

12:20:46 So how do we get there? DRI has a number of parts to it. One part is called the Center for Law and Public Policy. And that center, we rely on volunteers to help provide us with improvements to the civil justice system. And there's a rules committee that is in that center that is specific to rules.

12:21:12 The other source of information, we have committees that are in substantive law areas, such as medical device, such as medical liability.

Now, to get to these requirements, we asked the leaders of those different groups to get information from your 12:21:30 members of your committees as to how they perceive this rule change and what problems they've had with this.

We're not a pure democracy. We can't get information from all 20,000 members, but we rely on those two sources of information to come up with our position.

12:21:48 And so that is how we got to the list of suggested

12:21:54 improvements that's in our -- in our presentation. And that's how we got to the position that the identity provision is something that our membership is opposed to.

JUDGE BATES: So from that process what is the 12:22:10 disadvantage of requiring meet and confer with respect to the witness identification so long as the rule or the committee note is really clear on the fact that the choice of witness remains with the organization?

MR. WILLMAN: I think that the comments that we've 12:22:29 received is it's not all that clear. The language is ultimately it's the responsibility of the responding party to designate it, but what does that mean? How does that work that the responding party --

JUDGE BATES: Well, if it were made clear through the 12:22:46 committee note or otherwise, then what would be the problem?

MR. WILLMAN: The other information -- you've heard some anecdotes. For example, we've heard lawyers say, well, we will identify somebody, and then two days before the deposition we have to substitute that person for someone else 12:23:05 for various reasons. And that puts them in conflict with that. And so there are problems that they've brought up to us, our members, with respect to identification.

And you've heard also why. What's the reason for it.

The other -- this is truly a representative 12:23:26 deposition. Then why does it matter who is the person who is

providing that representation?

So you asked earlier, Judge Bates, I think, what are the two or three recommendations that the defense bar -- the defense lawyer would like to see. I would like to list out of our suggestions, one is a clarification of notice, notice requirements. Two would be a process by --

PROF. MARCUS: By that you mean time?

MR. WILLMAN: Time, yes.

The second would be a process by which objections can be put to the court and resolved if there is not an agreement.

And the third would be to include 30(b)(6) party conferences in the pretrial conferences and scheduling orders as other discovery matters are enfolded into that.

JUDGE BATES: The second of those topics, aren't your members able to bring objections, issues, disputes to the court now through protective order motions or otherwise?

MR. WILLMAN: Well, some courts don't allow -- will say, we don't won't protective orders before the deposition. Go ahead and take the deposition and then afterwards we'll deal with any problems there.

So there's a lack of consistency.

PROF. MARCUS: In those courts you expect that it will be welcome to have an objection process that requires going to court before the deposition?

MR. WILLMAN: I'm sorry, I didn't understand the

12:25:03 question.

PROF. MARCUS: I thought that's what your objection process would lead to.

MR. WILLMAN: Right. Would be before. But what I'm 12:25:12 saying is there are courts that won't even take up objections until after the deposition has been completed.

PROF. MARCUS: So we're supposed to tell them they have to change?

MR. WILLMAN: If there was an objection process 12:25:24 before the deposition takes place, then all of that can be ironed out before --

JUDGE BATES: Put another way, wouldn't the objection process that you're looking for inevitably lead to more litigation about 30(b)(6) issues?

12:25:39 MR. WILLMAN: Not necessarily. Again, you did your due diligence in asking the magistrates, do you have problems in this area. We did the same thing, and this is something that our membership said is clearly a problem they've experienced. The lack of consistency in the way in which to 12:25:55 deal with disputes about what is going to happen at the deposition.

JUDGE ERICKSEN: It's hard to believe that it wouldn't increase the number of cases that are brought to the magistrate judges in advance, though, because what we've heard 12:26:09 from the defense bar early on was that there's a great

12:26:12 reluctance to bring these objections to the court because there's no procedure and courts don't like it, it's fact specific, and all the rest.

So you put in a rule that compels courts to accept 12:26:26 these motions and makes it a more -- puts grease in the process. It's really hard to imagine it's not going to greatly increase the number of disputes in court about it.

MR. WILLMAN: Then why have the process of objections with the other discovery tools --

12:26:46 JUDGE BATES: Well, it only exists for Rule 45. It doesn't exist for other depositions.

MR. WILLMAN: That's true. But why have Rule 45, then? I mean, there's a reason for it. One of the wonderful things I --

12:26:59 JUDGE JORDAN: One of the reasons is because it's usually third parties. So that's the difference. It's not a -- it's a difference with no distinction. It's a real difference.

MR. WILLMAN: I understand.

12:27:10 But one of the beauties of the federal rules is providing uniformity, and I think that's what the defense bar is asking for, uniformity in the way in which objections are taken care of.

Again, when you have jurisdictions that deal with it 12:27:24 in different ways, there's a lack of uniformity.

12:27:29 JUDGE BATES: Any other questions for Mr. Willman?
Thank you very much.
MR. WILLMAN: Thank you for your time.
JUDGE BATES: We appreciate it.
12:27:34 Next witness will be A.J. de Bartolomeo.
That look was I took a passing shot at the correct pronunciation.
MS. de BARTOLOMEO: Yes, Your Honor, and that's fine. Thank you very much for the passing shot. When you have a
12:27:49 name that looks likes mine, any attempt is really appreciated.
But, yeah, my name is A.J. de Bartolomeo. I'm a partner at Milberg Tadler Phillips & Grossman, and this is my first time testifying, and I'd like to say thank you very much. It is really a privilege and an honor to see this
12:28:05 process unfolding right before your eyes and to be here.
Milberg Tadler is a national law firm and we represent primarily plaintiffs, and I practice in the area of class actions and mass torts.
And first of all I'd like to thank the committee. I
12:28:23 know the hard work that goes into to do what you all do, and it really is -- has a great result. And I think the number of people that want to come to testify to be heard before you speaks volumes there.
I support the amendments as presented for a number of
12:28:44 reasons and -- first of all, I think it presents a fair and

12:28:47 balanced rule. And I think it promotes early cooperation among the both sides of the -- I think it promotes early discussion about the topics and how the witness is going to be presented to present competent testimony on behalf of the 12:29:04 corporation early on.

JUDGE JORDAN: Can I ask you a question about that --

MS. de BARTOLOMEO: Yes, Your Honor.

JUDGE JORDAN: -- based on your letter. Why should the plaintiff's representative have a say in whether or not 12:29:23 the corporate representative is, quote, competent to speak.

I think the way you framed it raises a question. Is it really the obligation of the corporation to let you have input into who you think is competent to speak if it's to be their representative? I think that's how they would ask the 12:29:47 question if they were sitting here.

MS. de BARTOLOMEO: If my note or my submission gave you that impression, then that was inartful drafting on my part. I believe the corporation has absolute designation power. I think the meet-and-confer process, as many others 12:30:01 have testified earlier today, when you talk about the witness, who the witness is, whether the witness is speaking as based on personal knowledge or first-hand knowledge or educated knowledge, I think that meet-and-confer process helps enable us to know whether the witness is going to be speaking 12:30:18 competently as to the topics that maybe I need to be more

12:30:23 specific or surgical about. To make sure both sides -- you understand what I'm asking for so that you can give me a witness that can speak competently about it.

I don't think I'm trying to interject my side into 12:30:36 their work product and their discussions with their clients. That's their business.

But what I found in my practice is, unfortunately, once we get to the actual 30(b)(6) deposition, I have a witness who is not properly prepared, who is not competent to 12:30:53 speak to the topics that we have been through and made very clear.

And I'd like --

JUDGE JORDAN: Does knowing the witness's name in advance affect that? I mean, if you knew it, would that -- 12:31:05 how does knowing the witness's name in advance make it more or less likely that the witness who is produced will have been properly prepared?

MS. de BARTOLOMEO: I think to the extent that other people have testified earlier, and you asked the question 12:31:18 earlier today about knowing the identity as to an individual deposition, 30(b)(1) versus 30(b)(6).

Quite frankly, in all candor, the only reason I want to know the name of the witness is because it may be somebody I am going to be deposing individually or -- and then I -- 12:31:40 also I have corporate clients and I have to defend them. If I

12:31:43 am putting forward a witness that is also going to be on their list for individual, I want to be a part of that meet-and-confer process to talk about, okay, should we go through the individual knowledge first and then we'll go 12:31:53 through the topics? Or how is the most efficient way to handle this?

Because I don't want to bring my witness back and forth and I don't want him or her to get the same question over and over again, but I also want the information to be on 12:32:06 the record when he's an -- he or she is an individual or he or she is a 30(b)(6).

And as Ms. Anderson testified earlier, and it often does happen that there is somewhat of an overlap. Maybe not for every topic, but your witness will be speaking as to their 12:32:25 personal knowledge because they are the senior VP of research and development, but they also have personal knowledge and first-hand knowledge based on the people they supervise, based on their knowledge of the company, based on their knowledge of the product.

12:32:38 So in order to separate that, when it's necessary to separate it, it's helpful to know who, the identity of the witness.

JUDGE ERICKSEN: But that would be a help to the party responding to the subpoena. You say you don't want to 12:32:54 bring the person back if it turns out that they're going to be

12:33:02 a regular 30(b)(1) witness. But if the corporation knows that that's a possibility, then currently they could say this is the identity of the person.

But how does it help you? It's an efficiency for the 12:33:22 responder, but how does it help you to know that you're going to be able to do two kinds of depositions on the same day instead of just one?

MS. de BARTOLOMEO: As the noticing?

JUDGE ERICKSEN: Right, as the noticing party.

12:33:34 MS. de BARTOLOMEO: Well, I think it depends on what's in my notice of the deposition topics. I'm going to be preparing one way for the corporate discussion. And why am I deposing this person as an individual? They're not necessarily on 30(b)(6) topics, but there's some reason I want 12:33:51 to depose that person. Either they have personal knowledge as to many of the documents, maybe they were involved in the decision, let's use mass torts as an example since I do pharma drugs. Maybe they were involved in the marketing of that.

Oftentimes with mass torts, one of the problems is 12:34:10 that marketing gets ahead of R&D and they might get a little too enthusiastic or aggressive and say things that the R&D people would not necessarily want them to put out the way they did.

And so I want to talk to the marketing guy, but I 12:34:25 also want to talk to the corporation as to what the

12:34:31 corporation's position was on marketing.

JUDGE BATES: I assume from the perspective of the noticing party that advanced notification of the identity of the 30(b)(6) witness would add some efficiency because it 12:34:44 would enable you to decide, well, I want to depose that person anyway and let's try to do it all at the same time, and that would be more efficient for both sides.

MS. de BARTOLOMEO: Absolutely, Your Honor. I'm a plaintiff's lawyer and I don't really want to go back and 12:34:59 forth and take this five times if we could do it in one day.

JUDGE JORDAN: Is there a reason to not have advanced notice of topics, like 30-day advanced notice provision in the rule as you've heard some people suggest here today?

MS. de BARTOLOMEO: I personally have no objection to 12:35:16 that, Your Honor. When I represent a defendant, I want as much notice as possible because I need to prepare that witness.

As a plaintiff, I know I have to get that advanced notice because I have to think about what I need to prepare my 12:35:28 case and actually prove my case. So it's not like it's going to just dawn on me two days before the end of the discovery period.

The time seems to have started again. Do I still have 53 seconds?

12:35:44 JUDGE BATES: I'll give you another 30 or 40 seconds

12:35:47 to make another point.

MS. de BARTOLOMEO: To wrap up. Okay.

I would like to point out that I do take issue with the -- I think my submission said it, the number, and many of 12:35:57 the people on the panel identified it and so did some of the witnesses. Artful drafting, we can come up with -- if it's ten topics, you can make ten very broad topics. That doesn't get us where we want to go. We want to be efficient. We want to be surgical. Both sides want to know what we're talking 12:36:13 about, what we're seeking. And I think the meet-and-confer process can help limit that. And at the same time, one size does not fit all.

PROF. MARCUS: When you say you --

MS. de BARTOLOMEO: -- that might be five topics --

12:36:26 PROF. MARCUS: But when you say you have a problem with the number, one thing you might be saying is a flat across-the-board limit is a number that is likely to be a problem.

MS. de BARTOLOMEO: Yes.

12:36:37 PROF. MARCUS: What the draft says is that the number of topics is something open for discussion. Are you saying that shouldn't be open?

MS. de BARTOLOMEO: No. I think the discussion is good. But I know there was some submissions that said there 12:36:49 should be a limit on the topics, and the response is that's

12:36:54 just going to result in very broad topics, so that doesn't accomplish anything.

JUDGE BATES: All right. No further question. Thank you very much for coming. We appreciate it.

12:37:04 MS. de BARTOLOMEO: Thank you.

JUDGE BATES: Our next witness will be Amir Nassihi.

MR. NASSIHI: Good afternoon, everyone. Thank you for letting me come and talk to you and provide my comments in my individual capacity.

12:37:20 I'm an attorney with Shook, Hardy & Bacon in San Francisco. My practice involves working with product manufacturers, distributors, and retail clients in individual, mass torts, and class-action litigation.

And most of my practice is California based.

12:37:39 Sometimes in federal court, more often in state court, which essentially has a similar approach to corporate witness depositions as 30(b)(6), mimics the rule, doesn't require any identification. Although California, in state court practice, does have an objection procedure, which is tremendously

12:38:00 helpful so you don't get the kind of disparity that you have in federal court as to whether Rule 37(b) default sanctions apply, et cetera, and the split in decisional law there.

So the focus of my testimony today is on complications of injecting into the 30(b)(6) process by adding

12:38:23 the identification requirements.

12:38:26 For one thing, the timing of the proposed disclosure of the witness identity will be fraught with disputes. 30(b)(6) witnesses are --

PROF. MARCUS: California state courts have a PMK 12:38:39 requirement; right?

MR. NASSIHI: They have a PMQ requirement, correct.

PROF. MARCUS: That does not lead to any discussion as to who the person is going to be?

MR. NASSIHI: It -- it's -- there's no requirement to 12:38:50 identify the person. As a practical matter, just like with 30(b)(6), when it comes to the PMQ, I generally discuss with the other side when the timing is appropriate. And it differs from case to case. But, again, the absence of a notice situation, notice requirement or any rulemaking or notice kind 12:39:13 of compounds that issue.

JUDGE BATES: Well, if there were to be a witness identification requirement, how long? Four days before the deposition? A week before the deposition? What's the problem with that?

12:39:32 MR. NASSIHI: The problem that I've experienced with disclosure, there's been times I've disclosed too early and it's caused problems because --

JUDGE BATES: What's too early?

MR. NASSIHI: It depends on the situation. There may 12:39:45 be a situation where you're trying to prepare a witness on

12:39:48 topics or for corporation who has never put up for corporate witness before. There may be times where, given the absence of any notice in the rules, where you have short period of time to meet the witness, prep the witness, see that, you know 12:40:02 what, this is not the right witness, we need to swap him out. By that point where you run into trouble is where you've identified that witness to the other side and then suddenly you get a 30(b)(1) dep notice because some litigation advantage might be sensed from the fact you suddenly changed 12:40:20 witnesses, and there is no protection in that situation.

Then you also have a situation where you might disclose too early, which I've done as well, and then you have the other side want someone else to be the witness, so they'll notice him up in their individual capacity and essentially put 12:40:39 you in a position where you have to change designees for the sake of efficiency.

And invariably you get disputes arise as well on -- on occasion as to whether someone else should be a right witness. The biggest disputes I've had on that has been --

12:40:58 JUDGE JORDAN: How does any witness identification impact that, sir? If you didn't identify the witness and they discovered they had to take that particular witness, they would notice the person they wanted in the individual capacity anyway; right?

12:41:15 MR. NASSIHI: They certainly may, but they wouldn't

12:41:17 be able to influence your selection of 30(b)(6), your selection by trying to notice up an individual who -- for example, if you put up someone as a 30(b)(6) witness on prior occasions and you need to move away from that and develop 12:41:32 someone new and the other wants that particular person and expects you to put that person up, you'll suddenly get a deposition notice setting that person a couple of days earlier. In that situation you have to go ahead and, out of efficiency, continues those hearings. You have to go ahead 12:41:47 and make sure to have --

JUDGE JORDAN: I'm having trouble following that because if they really want that person, when you say they're influencing your decision about who to put up for 30(b)(6), I suppose that's true, but you have the right to put up whoever 12:42:00 you want and they have the right to serve an individual notice; right? So you could -- if there were no change at all in the rules and they were just as they are now, that would -- would that play out just the same way?

MR. NASSIHI: No. Respectfully, no, it would not, 12:42:16 because they would want that person as a 30(b)(6) in their corporate witness capacity. And so suppose the corporate witness is noticed for July 10th. Suddenly you'll get a deposition for that individual they want to be their corporate rep for July 8th, and you have a position where you have to 12:42:34 essentially look at efficiencies for the corporation. If

12:42:37 we're going to have to put this person up anyway, let's just have him be the 30(b)(6).

JUDGE BATES: If identification of the witness to testify were only five days before the deposition was
12:42:49 scheduled, then there wouldn't be time to have a notice of another deposition occurring before that deposition. I don't see how that would occur.

MR. NASSIHI: Well, depositions can be easily -- you just get a new deposition notice in that situation. But the
12:43:05 point's well taken. Oftentimes, depending on when disclosure occurs, oftentimes if it's close enough to a deposition, you're going to go ahead and proceed with the deposition. It's an easy process to renotice the deposition for a different date, and there's no rules in terms of priority that
12:43:27 are actually institutionalized.

And the reality is having a rule on identification presents a problem when -- on timing disputes, and we're injecting a whole new source of conflict in here where there currently isn't any recognized dispute. This issue was never
12:43:50 raised in the original litigation section letter which prompted a close look at 30(b)(6). A whole host of other issues which are more appropriate to be dealt with, I think, we're the focus of the issues that were raised there.

JUDGE BATES: In your practice, do you normally
12:44:10 identify the 30(b)(6) witness sometime before the deposition?

12:44:15 MR. NASSIHI: Almost always I do at some point before the deposition. There's been two particular opposing counsel who have engaged in some gamesmanship where they've learned the identities before the deposition. In that case, if I have 12:44:33 cases with them in the future, I precondition it more so. But generally I do at some point. And, again, there's no one size fits all as to the timing of that.

JUDGE BATES: We have time for one last point you'd like to make, please.

12:44:49 MR. NASSIHI: Certainly.

JUDGE BATES: I'm sorry to cut you off.

MR. NASSIHI: Oh, by all means.

I would just suggest or urge that the standing order that Judge Donato has in the Northern District of California 12:45:05 which provides presumptive limits on the numbers and treats 30(b)(6) as issues which have some presumptive contours to it, be looked at and considered because that's been tremendously helpful in the Northern District of California, and even when cases are assigned to different judges. And pointing to that 12:45:23 as providing guidance, which can be deviated from case to case, but provides some kind of guidance.

JUDGE BATES: What's it deviated from if there's a disagreement where it requires going to the judge for a resolution?

12:45:38 MR. NASSIHI: Just like you do with a ten deposition

limit and other limits, you have an initial case management conference right around the same time as the discovery opens up and you address this as part of the requirements of that, what deviations there should be from the standard rules. If it's class action, you'll say we need 15 depositions, we need to deviate from this, for example.

JUDGE BATES: And you say as well we need 40 topics for the 30(b)(6).

MR. NASSIHI: Exactly.

JUDGE BATES: Okay. Thank you.

MR. NASSIHI: Thank you.

JUDGE BATES: Appreciate your testimony.

Our next witness is Donald Myles.

Good afternoon, Mr. Myles.

MR. MYLES: Good afternoon. Welcome to Phoenix.

JUDGE BATES: Thank you.

MR. MYLES: I've been here for 37 years practicing at the law firm of Jones, Skelton & Hochuli. My practice is mainly representing major insurance carriers across the country in bad faith litigation here.

With regard to 30(b)(6) depositions, almost every single case involves at least one to three of these depositions, and categories usually are ten to 25. We get together, we negotiate that down to a manageable number and we reach an agreement.

12:46:45 So the meet and confer, which is actually required by the local rules, is done with regard to all of this. So it's something being put into the rule that really is unnecessary in which most practitioners do anyway.

12:46:57 JUDGE JORDAN: Can I ask --

JUDGE BATES: Not every state has the same local rules that you have.

MR. MYLES: Fully understand that. But with regard to common sense and practicalities and ethics, that's how 80 to 90 percent of us act all the time.

12:47:07 JUDGE JORDAN: But if you've got it in a local rule, why wouldn't it be salutary to have in a national rule?

MR. MYLES: I'm not saying meet and confer is bad. I do it in every single case. I would do it if it didn't exist.

12:47:23 We're talking about rules that are for really 10 to 15 percent of people practicing law. Otherwise we wouldn't need these rules.

The NFL used to have a rule they would not stop the clock when players were injured in the last two minutes. They

12:47:37 did because people complained that they needed to get -- that player safety was important.

They then learned that 50 percent of all injuries happened in the last two minutes of a football game. You watch a game in the NFL now, there's a run-off because of that

12:47:52 because people took advantage of a rule that everyone put in

12:47:56 place that they thought would be positive.

And this rule either should not be touched or it needs to be completely redone with a lot of things that both the plaintiffs bar and defense bar have mentioned here.

12:48:07 Otherwise leave it alone.

If we're going to meet and confer, the moment you say what we should meet and confer about, someone is going to utilize to their advantage.

Identity. We like identity. There's social media.

12:48:21 We can find out so much about so many people and every witness, what they've said, where they eat, who they're married to. You name it, we'll have that information. It's an advantage. It will be used.

The fact of the matter --

12:48:37 JUDGE BATES: In your practice, is the identity of the witness to testify usually disclosed sometime, maybe a short time, in advance of the deposition?

MR. MYLES: Any lawyer asks me, whenever I know definitively I will tell them. Not a problem.

12:48:50 Now, I will tell you I represent the insurance industry. There are big cases, medium cases, small cases. I get a 30(b)(6) case of a $100,000 case, I'm really not that concerned about who I put up there as a 30(b)(6). I'll tell them. They're not going to spend that much time; the case

12:49:08 isn't worth that much.

12:49:09 But in something where it's institutional in nature, 20-, $40 million, that gets people's attention. That's a big deal. It's a fire drill at these companies when that happens. People are prepared properly.

12:49:25 I share that information. But in the smaller cases, candidly, I'll tell them, look, we need to prepare, we need to get someone. But it may be days in advance of the deposition that I even meet the person.

And I learn by my preparation we have the wrong 12:49:41 person. We need to get somebody else or we're going to be in a situation we do not want to be in.

Now you're going to make that mandatory in every case that the identity has to be disclosed five days before in a very compressed standard of time in cases in which there's 12:49:58 really an imposition on corporations.

Depositions of major insurance companies in this country, I have 20 going on right now, and that's in Maricopa County. I can't imagine what it is in California. It's going on every single day all the time, and they all are the same. 12:50:18 Who knows most about the claims handling? What was the training of all of the claim handlers? Who drafted the policy language? Every single case I've seen that.

And like I say, 80, 90 percent of the time, no problem. The people on the plaintiffs bar and the defense bar 12:50:33 are friends.

12:50:37 Half of the plaintiffs bar in this county right here used to be defense lawyers. Some of them were my partners. We can work this out.

But making it mandatory will make it a game for that 12:50:49 small percentage of people that don't, that are difficult.

I really don't have that much more to add. I would encourage you either start over, which I know you do not want to do, and really address a lot of the things that people have raised here, or, really, if you want to put a meet and confer, 12:51:07 great, nationally, do it. All the good lawyers in this room, plaintiffs and defense bars, do it anyway. It's not a big deal.

But I think to put something in there that could be utilized by that small percentage will be a problem.

12:51:21 Thank you very much.

JUDGE BATES: Thank you, Mr. Myles.

Next witness. Francis McDonald, please.

Good afternoon.

MR. McDONALD: Good afternoon. Thank you, 12:51:30 Your Honor. I appreciate the opportunity to appear here today in Phoenix.

I practice in Orlando, Florida. I've been doing about the same thing for the last 37 years. I represent corporations, most frequently corporations that find 12:51:46 themselves in pattern type litigation. And most of the

12:51:51 comments that I would make, were I the number one witness this morning, are going to mirror most of the things that you've heard already today, and I'm not going to repeat them. But let me just tell you what my position is as succinctly as I
12:52:03 can and get to the point.

I'm not so much concerned about an amendment to this rule that would add a meet and confer provision with regard to the number and the topics of the 30(b)(6) notice. Like many of the other lawyers that you've heard from already today, we
12:52:20 engage in that already.

When we conduct a Rule 16 meeting -- or, excuse me, a Rule 26 meeting with our adversaries I encourage them to agree to a provision in our report that we send to the court that we will engage in a meet and confer, not so much about the number
12:52:38 of the topics because I don't think I could ever get a pre-notice agreement on that, but certainly let's agree to sit down and talk about the extent, the number, and the topics so that we can at least try to work it out before we bother the court with some agreement or some dispute that could be
12:52:59 resolved were we meeting.

So I'm not so much so concerned with that if it is the province of the committee that we really feel we need to add that and codify that best practice. So be it.

I'm a little bit more concerned with the
12:53:15 identification requirement as -- for all of the reasons you've

12:53:18 heard already today. I think it has the potential, and I know it's not the intent of this committee that has put in a lot of time and effort to try to better the civil justice system, but I think it has the potential to counter the designation 12:53:34 mandate that's already in part of the rule, and I would not want to see that become used by some, not by all, but by some as a vehicle by which they could gain an advantage over an organization or a corporation.

JUDGE BATES: In your experience, is the identity of 12:53:53 the witness usually disclosed in advance of the deposition?

MR. McDONALD: It is. And I was sitting there thinking, I've had a lot of time to sit and think and recall since listening to the beginning of today's proceedings, and a lot of times I don't get asked. And when I think back on the 12:54:11 times I don't get asked who the witness is going to be who's going to be designated by the corporation, I find myself recalling that I didn't get asked because the opponent on the other side was either new to this type of litigation or he was even new to 30(b)(6) deposition to begin with, and I had not 12:54:32 seen he or her many times before.

But on those occasions when I am asked about it, if I know who it is, sure, I disclose it. I don't -- I don't ascribe a lot of ill will to my adversaries in doing something untoward with regard to a 30(b)(6) witness because I think 12:54:53 they, in their right minds, know that the purpose of the

12:54:56 deposition or the exercise is to hear what the corporation knows, not so much what the person who's deemed the mouthpiece knows.

So I'm not so much worried about that, but sure, I do 12:55:07 disclose it when asked. But -- and listening to all of the comments today, I think I can kind of coalesce this. This timing of when notification may be required or mandated, given the situations that corporations, large and small, find themselves in when confronted with a 30(b)(6) notice, it would 12:55:32 be problematic to require something that goes a little bit even beyond 24 hours' notice or 48 hours' notice.

If it was something the day before, maybe that's starting to get into the area I would think could be reasonable. But, beyond that, you create the potential for 12:55:52 misuse, and you create an obligation that the corporations simply may not be able to comply with given their circumstances.

So I think I'm going to be the first witness to release my time to the next one. If there's no questions, 12:56:08 I'll be glad to sit down. But thank you for engaging in this process.

JUDGE BATES: Thank you very much for coming. We appreciate your testimony.

And the next witness should know that they do not get 12:56:18 any additional time.

12:56:21 The next witness will be Michael Denton.

Good afternoon, Mr. Denton.

MR. DENTON: Good afternoon. Thank you for having me. I'm from a little town called Mustang, Oklahoma, which is 12:56:32 a suburb of Oklahoma City, sort of kind of in a separate county.

And unlike all these folks, I don't litigate stuff all over the country. I've traveled a bunch taking depositions. And that's kind of one of the reasons I wanted 12:56:44 to come here and speak, because from my perspective as a small-town lawyer, I spent the first eight years doing insurance defense work, representing Suzuki in product liability and doing medical malpractice defense work. Since then, in the last 20 years I still represent a lot of small 12:56:59 businesses and banks, small construction companies. Don't have any big global or corporate clients like that.

But when I have to go somewhere and take a deposition, we've talked a lot about the identity, and it's important to me because -- give you an example. In GM 12:57:12 litigation involving a resistive seat heater case, I know Troy, Michigan so much better than I should ever know it. I didn't know there was a Troy, Michigan until I went there. And that's the place to stay, not in Detroit.

We took numerous depositions because we were playing 12:57:28 a game about who was who was who. We went through this

process as a 30(b)(6). Or actually it's a 3230(C)(5) in state court.

I think everybody here would agree those are the exceptions to the rule when you have counsel who's playing games.

The reason it's important to me to know the identity of a witness that I'm going to be deposing is do I want to combine that in one trip. Can I please get on that two-hour flight up to there and rent a car and drive out -- fascinating how they number the streets up there in Detroit because of Henry Ford's home -- but drive out there and take that witness's deposition. First of all, on one, whether it's a 30(b)(6) first or the 30(a) or 30(b)(1), however -- 30(b)(1) is the notice part, 30(a) just says we get to take depositions.

JUDGE BATES: Would knowing the identity of the 30(b)(6) witness only three or five days in advance of the scheduled deposition satisfy that need that you just expressed?

MR. DENTON: It would be ideal to have it further in advance, but if they said, hey, by the way, the first thing we're going to give you on the who's -- who supervised the testing done by the outside laboratory on behalf of GM is this person. Great, I know I've seen that person's name on a lot of e-mails and a lot of stuff. I'll call up opposing counsel,

look, let's make one trip instead of two. Can we agree? We can either do them -- I'm thinking we can do them the say day or we will make it a two-day process.

So the earlier we can get the information, the better informed I am, and I can make a decision then and there and avoid the extra costs, the extra time, which ultimately winds up costing my client. My client has to pay for all these trips back and forth, assuming there's a recovery at the end of the day. It's going to deminimize -- minimize that amount because he's got a --

(Telephone beeps.)

MR. DENTON: Was that me?

JUDGE BATES: Don't worry.

MR. DENTON: Okay. I don't have anything on me.

So I can see it being very beneficial to having that identity provided. I don't understand the objection because when I presented witnesses for 30(b)(6), I want to know who it is too.

I will sit down with my client and I grill them because, obviously, I'm the lawyer and I'm the one getting chastised by the judge if I don't have somebody who is adequately prepared. And so I don't have any problem telling the other side, hey, here's who I think we need, we got Jim Bob, he was the guy that did all the training. I know Jim Bob now has been moved out to marketing, but at the time all this

12:59:48 stuff went down, the time frame you're looking for, we know it's Jim Bob, so here's who you want to depose.

I don't have any problem doing that.

If they want to dig up stuff on Jim Bob, so be it. 13:00:00 We're allowed to dig up information on our adversaries and on witnesses and impeach them. That's a part of this process. It's an adversarial process. So I don't understand any difficulties about the identification.

There's been a lot of talk about the number of 13:00:15 topics, and I've heard several people congratulate this committee, which I didn't know anything about, not directly, about what was going on when you guys were doing the proportionality stuff.

But my thought was Rule 26 handles this. If somebody 13:00:28 gives them 145-topic notice for deposition for 30(b)(6), they have the means to go to the court and get that resolved. I think most lawyers will get that resolved anyway.

I also want to point out, though, when you look at limiting artificially in advance the number of topics to be 13:00:46 included in a 30(b)(6), you've got to understand sometimes plaintiff's counsel doesn't know. When I sued GM over this resistive seat heater, my paraplegic client got burned when he and his wife were on a mission trip and he turned it on thinking he turned on the low-back part, but he turned on both 13:01:02 parts and his buttocks got blistered.

13:01:04 I didn't know anything about resistive seat heaters. And I sure as heck didn't know anything about how GM controlled all its documents and what all they contained and how they -- what names they use. I can't go to GM, or if I 13:01:15 went to Ford and said, hey, I want to know exactly A, B, C. I don't know what they call it. And it turns out a lot of these big corporations will change the names and change the file names and change this and change that.

So sometimes there's a reason that the topics are 13:01:30 broad. Which goes to the point of conferring. And we've all talked about meet and confer, but I think in reality confer is what your draft rules shows us.

And I think it's a great idea. Why not? Why not make it an obligation. Because for that small percentage of 13:01:46 our practitioners that otherwise wouldn't do it, now they have to.

And we're all going to keep notes and we're going to exchange e-mails, and we're going to document our positions and say, look, we've talked about this and I asked you to tell 13:01:57 me -- you tell me what the database is. An example is how does a product manufacturer keep track of consumer reports and complaints. Because they're going to tell you there's been no litigation. That's not what I want to know. And I don't know how to ask that. I don't know.

13:02:12 Robert Moss Tool Corporation calls it one thing. GM

13:02:17 calls it something else. Greentree Financial Services calls its consumer products or consumer complaints something else.

So that interactive process can really help us all in trying to sort this down and keep the court out of it, if at 13:02:31 all possible, because none of us want to be in front of the judges if you don't have to be. We want to show that we can be grownups, we can all get along and do what we're supposed to do.

Does anybody have any questions? I hit the high 13:02:43 points. I'm like the 4:00 p.m. CLE speaker at Lake Tahoe. Everybody wants to go to the lake, you don't want to listen to me.

JUDGE BATES: Any questions for Mr. Denton?

MR. DENTON: Thank you so much. And everybody here, 13:02:54 we appreciate your work, your time. And this is, by the way, a beautiful building.

JUDGE BATES: As they say these days, back at you.

Thank you very much. We appreciate you coming today and all the valuable information which we have heard. And 13:03:08 we'll now try to assimilate and do our best with it.

Thank you once again. We appreciate it.

And that completes this proceeding.

(End of transcript.)

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C E R T I F I C A T E

I, PATRICIA LYONS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 7th day of January, 2019.

s/ Patricia Lyons, RMR, CRR
Official Court Reporter