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April 3, 2013

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed Amendment to Rule 45 Regarding Subpoenas for Rule 30(b)(6) Depositions

Dear Secretary:

I write on behalf of the Committee on Federal Courts of The Association of the Bar of the City of New York to provide comments with regard to Federal Rules 45 and 30(b)(6). The Association of the Bar, founded in 1870, has over 24,000 members practicing throughout the nation and in over 50 foreign jurisdictions. The Committee on Federal Courts is charged with studying and making recommendations regarding the Federal Rules of Civil Procedure and other aspects of the federal judiciary and federal litigation.

As one of our Committee's projects, we have engaged in a review of Federal Rules 45 and 30(b)(6). We propose that the Federal Rules of Civil Procedure be amended to provide non-parties who are served with Rule 30(b)(6) deposition subpoenas with greater protections against undue burdens. Specifically, we propose the adoption of a minimum notice period for such non-party depositions, as well as an automatic stay of such depositions upon the filing of a motion for a protective order

Our proposal attempts to address the problem that non-party recipients of deposition subpoenas for Rule 30(b)(6) depositions cannot postpone or limit the scope of such a deposition without moving for and obtaining a protective order before the date of the scheduled deposition, which can be required by subpoena on very short notice. This needlessly generates emergency

applications that, in the Committee's view, impose unnecessary burdens on the litigants and the court system, and also results in routine violations of the Rules. We believe a more orderly process would better balance the interests of parties seeking discovery with those of witnesses.

The current rules treat deposition discovery differently than document discovery. Rules 30 and 45 provide an objection procedure for document discovery, Fed. R. Civ. P. 30(b)(2), 45(c)(2)(B), but none for depositions. The recipient of a deposition notice or subpoena may move for a protective order, but the motion itself does not stay the deposition. To avoid having to appear, the receiving party must actually obtain a court order before the deposition date set forth in the subpoena. *See, e.g., Fed. Aviation Admin. v. Landy*, 705 F.2d 624, 634 (2d Cir. 1983) ("[I]t is not the filing of such a motion [for a protective order] that stays the deposition, but rather a court order."); Fed. R. Civ. P. 37 advisory committee's notes (stating that a motion for a protective order is "not self-executing — the relief authorized under that rule depends on obtaining the court's order to that effect"). This can be especially difficult where the target receives little advance notice — a problem compounded by the fact there is no fixed period of advanced notice for a deposition subpoena or notice. Rule 30 requires only "reasonable written notice" to parties, Fed. R. Civ. P. 30(b)(1), and, for nonparties, Rule 45 states only that a subpoena may be quashed if it "fails to allow a reasonable time to comply." Fed. R. Civ. P. 45(c)(3)(A)(i). Of course, a subpoena with an unreasonable time to comply usually entails an unreasonably short time in which to prepare and file a motion to quash.

Rule 30(b)(6) imposes a greater burden of compliance than a conventional deposition. Although testimony is burdensome for any witness, a witness required to testify solely based on their personal knowledge could comply simply by showing up and answering questions, without preparation or any refreshment of recollection. Although preparation is advisable, it is in that case entirely voluntary. Not so under Rule 30(b)(6), which demands substantial work by the organization receiving the subpoena before any testimony is given. Rule 30(b)(6) requires the deponent organization to produce a witness or witnesses with all the "information known or reasonably available to the organization," Fed. R. Civ. P. 30(b)(6), which may include information "from documents, past employees, or other sources." *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997) (citation omitted).

Courts interpret this rule to require the deponent organization to "make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the party noticing the deposition] and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed . . . as to the relevant subject matters." *Id.* These efforts are often burdensome and expensive, especially where there are numerous and broadly phrased deposition topics. And the stakes are high, because a witness's statement at a Rule 30(b)(6) deposition is "a sworn corporate admission that is binding on the corporation." *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 174 (D. D.C. 2003).

This burden is exacerbated where a Rule 30(b)(6) subpoena of a non-party requires appearance on short notice. Of course, this should be rare. However, in some cases Rule 30(b)(6) testimony of a non-party is demanded on unreasonably short notice where the litigants'

counsel have overlooked the need for the discovery until deadlines are looming, or simply have underestimated the burden upon the witness organization.

In the experience of the Committee, the concerns above are incompletely mitigated in practice by at least two common practices that unfortunately entail routine disregard for the Rules' requirements. First, deposition targets sometimes issue written objections to the scope of a Rule 30(b)(6) subpoena (even though this procedure is not contemplated the Rules), and prepare their witness only to the extent the topics are not the subject of objections. Second, deposition targets sometimes move for a protective order and choose not to appear until the motion is resolved. While this is not permitted by the Federal Rules, a party is likely to avoid sanctions for taking this course. Rule 37(d), relating to discovery sanctions, states: "A failure described in Rule 37(d)(1)(A) [including the failure to appear at a deposition] is not excused on the ground that the discovery sought was objectionable, *unless the party failing to act has a pending motion for a protective order under Rule 26(c)*." Fed. R. Civ. P. 37(d)(2) (emphasis added).

This sends mixed messages to the bar: failure to appear is improper, but, at least under Rule 37, cannot alone be grounds for sanctions. Courts have concluded that, "[t]he fact that conduct is not sanctionable under Rule 37 does not render it proper," and that they retain "inherent authority" to sanction a party for not appearing at a deposition, notwithstanding a pending motion for a protective order. *See Amobi v. District of Columbia Dept. of Correction*, 257 F.R.D. 8, 10-11 (D.D.C. 2009); *see also, e.g., In re Steffen*, 433 B.R. 879, 883 (M.D. Fla. 2010) ("Sanctions for failure to appear at a deposition can be ordered in spite of a pending motion for protective order if that motion is found to be untimely, frivolous, or otherwise for the purpose of avoiding the taking of a deposition."). This circumstance calls for a rationalization of procedures, so that the Rules' requirements are more clearly defined and consistently respected.

We have considered proposing an explicit objection procedure for Rule 30(b)(6) deposition subpoenas, akin to Fed. R. Civ. P. 45(c)(2)(B). Such a rule, however, in our view would shift the balance of power too far in favor of Rule 30(b)(6) witnesses, to a degree that is not required to bring about just results and which could create unnecessary delays and disputes. An explicit objection procedure could be used on a routine basis to avoid any meaningful deposition at all, without the discipline of any motion being required.

The different treatment of document and deposition subpoenas in this regard is warranted. Abuse of objections is more easily resolved with respect to document production subpoenas, which are often the subject of an ongoing negotiation based on the production of information over time (under the threat of a motion to compel). In contrast, the Rule 30(b)(6) deposition is a discrete event, for which there is only a single occasion for compliance. Further compliance would require that all parties and a court reporter convene on an additional day, possibly in a locale remote from the litigation. This imposes a structural barrier to the sort of ongoing negotiation that is typical of document discovery. Instead of an objection procedure, we believe that the following amendments should be sufficient.

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We do not propose specific language for rule amendments, but propose three straightforward concepts that we urge the Committee on Rules of Practice and Procedure to consider.

First, we propose a minimum notice period for Rule 30(b)(6) depositions of non-parties. Despite the historical absence of a minimum notice period for subpoenas, such is appropriate in the limited case of Rule 30(b)(6) depositions because of the special burdens involved that are detailed above. The general sense of the Committee is that 21 calendar days (or a comparable time) is an appropriate minimum notice period. Litigants would retain the right to apply to the court for a shorter period if circumstances warrant.

Second, to avoid unnecessary disputes, a Rule 30(b)(6) non-party subpoena should be required to contain an explanation of the party's need for the testimony being sought. *See, e.g.*, NY CPLR § 3101(a)(4) (requiring that non-party witnesses receive "notice stating the circumstances or reasons such disclosure is sought or required").

Third, Rules 30 and 45 should be amended to suspend any deposition that is the subject of a timely motion for a protective order, including a certification that the witness has attempted in good faith to meet and confer with the relevant party's counsel to resolve the dispute. This would provide subpoena recipients some protection akin to that enjoyed by document subpoena recipients through the Rule 45(c)(2)(B) objection procedure, but would require a level of effort that is appropriate and would avoid abuse.

Fourth, to avoid last-minute motions by witnesses that would waste the resources of litigants who were preparing for the deposition, the Rules should require that a motion be filed within a limited timeframe after the subpoena and notice is served (e.g.,14 days) or at least sufficiently in advance of the scheduled deposition (e.g., 3 business days). *See e.g.,* D. Kan. Local R. 26.2 (suspending a deposition upon a motion for a protective order, if filed within 14 days of service of the notice and no later than 48 hours prior to the deposition); Rule 45(c)(2)(b) (requiring objections to document subpoenas be served by the earlier of 14 days or when response is due). In addition, courts would retain their inherent authority to sanction a party who makes a motion that is "frivolous, or otherwise for the purpose of avoiding the taking of a deposition." *Steffen*, 433 B.R at 883.

We thank the Committee on Rules of Practice and Procedure in advance for its consideration of these matters.

Respectfully submitted,

Marilyn C. Kunstler

cc: Honorable John G. Koeltl,
United States District Court, Southern District of New York