NEW YORK
CITY BAR

March 24, 2006

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

Re: Fed. R. Civ. P. 30(b)(6)

Dear Secretary McCabe:

On behalf of the Association of the Bar of the City of New York (the "Association"), and through the efforts of the Association's Committee on Federal Courts, I respectfully submit these comments on whether problems in practice exist under Federal Rule of Civil Procedure 30(b)(6) that would be best addressed through amendment of the Rule, or whether continued development of case law should suffice.

Several of the issues identified by Professor Marcus in the memorandum accompanying the request for comment were raised by members of the Federal Courts Committee based on their experience with the Rule in litigation. After discussion, however, the Committee agreed that Rule 30(b)(6) serves an important purpose in streamlining the pretrial search for information held by organizational litigants. While our members understand that Rule 30(b)(6) offers the potential for abuse, their experience suggests that abuse of this Rule is no more likely than that accompanying any other discovery device, and that the potential for abuse is suitably managed by the district court's supervision of the process. In addition, existing case law surrounding the Rule provides sufficient guidance about which practices are unlikely to meet with the court approval in the event disputes arise. With this context, the Association does not believe an amendment would improve the effectiveness of Rule 30(b)(6) or provide any greater protection against attempted abuse. Our comments on specific issues under the Rule follow.

1. Witness Preparation

There was a general consensus among the Committee members that preparing a Rule 30(b)(6) witness for deposition requires unusually extensive time from both

the witness and his attorney. Because the witness must testify about information not only known but also "reasonably available" to the organization, counsel must assure that the organization gathers responsive information from all sources. This process is important because the deposition of a witness who is unable to testify about "reasonably available" information may be deemed a non-appearance. *Bank of New York v. Meridien Biao Tanzanie Ltd.,* 171 F.R.D. 135 (S.D.N.Y. 1997) (inability to testify to one of the three subject areas for which the witness was designated constituted lack of preparation). One consequence of a non-appearance might be the inability to present additional evidence in the future. *Rainey v. American Forest and Paper Association,* 26 F. Supp. 2d 82 (D.D.C. 1998) (failure to consult a former employee who had relevant information in order to prepare the witness barred subsequent contradictory evidence by that employee). Yet were the courts to find otherwise, the purpose of Rule 30(b)(6) to eliminate "bandying" would be easily circumvented.

Notwithstanding these aspects of the rule, our Committee members believe that witnesses can be effectively prepared and protected from overreaching during the deposition by giving careful attention to the scope of the examination specified in the Rule 30(b)(6) notice, and challenging or negotiating the terms of the notice if reasonable compliance cannot be achieved. The Rule itself requires that the notice describe the matters on which a party is to be deposed with "reasonable particularity." When a notice fails to do so, a party may negotiate the scope of the notice and /or seek a protective order. In addition, the freedom to designate more than one witness in response to a notice allows control over the breadth of any individual examination.

Existing case law already provides significant guidance to aid witness preparation and informs the bases on which protection should be sought. In *Reed v. Nellcor Puritan Bennett & Mallinckrodt, Inc.,* 193 F.R.D. 689 (D. Kan. 2000), *reversed on other grounds,* 312 F.3d 1190 (10th Cir. 2002) the court struck a notice which stated that it was not limited to the subjects identified in the notice. In *Starlight International, Inc. v. Herlihy,* 13 F. Supp. 2d 1178, (D. Kan. 1998), the court held that inclusion of an additional topic in an amended notice did not excuse a lack of preparation because the party served failed to object, suggesting an appropriate avenue for narrowing the topics about which a witness or witnesses must be prepared. In ruling that even though a witness must respond to proper questions that go beyond the scope of the notice, the court in *Detoy v. City*, 196 F.R.D. 362 (N.D. Cal. 2000) held that answers to such questions will not be attributed to the organization. *Cf. R&B Appliance Parts, Inc., v. Amana Co.*, 258 3d 783 (8th Cir. 2001) (personal opinions will not be considered the testimony of the entity).

2. Attorney Work-Product

One of our members expressed concern that a Rule 30 (b)(6) deposition could invade attorney work-product immunity, where a notice requests a witness to testify about all documents and information supporting the organization's claims or defenses. Because it is reasonable to assume that counsel is involved in gathering the information and analyzing documents that support claims or defenses, the attorney's thought processes may well be revealed. This very issue was addressed in *American National Red Cross & Travelers indemnity Co.*, 896 F. Supp. 8 (D.D.C. 1995), where the court held that an inquiry along these lines would implicate mental processes that are protected from discovery by the work-product doctrine. Our members reported that this issue does not usually arise, however, and were confident that it could be successfully addressed by a court on a motion for a protective order.

3. Attribution of Rule 30(b)(6) Testimony

Although our members touched upon the "binding effect" of Rule 30(b)(6) testimony as heightening their concern about the adequacy of witness preparation, none said that the issue had played an important role in one of their cases. This may well be because few cases reach the trial stage, where the admissibility and effect of deposition testimony becomes important. Moreover, although the decisions on this issue approach it from slightly differing points of view, none appears to preclude additional testimony when the facts suggest it would not be fair to do so.

In *Hyde v. Stanley Tools,* 107 F. Supp. 2d 922 (E.D. La. 2000), the court granted summary judgment to plaintiff based on the admission of defendant's Rule 30(b)(6) witness that the corporation had manufactured the particular tool which was the subject of the action. In opposing the motion, the defendant had submitted the affidavit of one of its engineers, who stated that based on close inspection of the tool with a microscope, the tool had not been manufactured by the defendant. The Rule 30(b)(6) witness was not an engineer, but the engineer had been present at the deposition. In finding that the defendant should not be allowed to defeat plaintiff's motion based on a self-serving abuse of Rule 30(b)(6), the court implicitly found that the defendant's failure to confer with the engineer prior to the deposition constituted inadequate preparation. A similar result was reached in *Rainey v. American Forest and Paper Association, Inc.*, 26 F. Supp. 2d 82 (D.D.C. 1998), where a party attempted to supplement Rule 30(b)(6) testimony with information that had been reasonably available to the corporation at the time of the deposition.

Recently, in *A&E Products Group v. Mainetti,* 2004 U.S. Dist. LEXIS 2904 (S.D.N.Y. 2004), the district court expressed the principle, generally held by other

courts, that the testimony of a corporation is no different from that of any other witness – it constitutes an admission that may be contradicted by other testimony and is subject to impeachment through cross-examination. *See R & B Appliance Part, Inc. v. Amana Co.,* 285 F. 3d 783 (8th Cir. 2001); *A.I. Credit Corp. v. Legion Insurance Co.*, 265 F.3d 630 (7th Cir. 2001); *Industrial Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F. Supp. 2d 786 (N.D. III 2000). The Association expects this body of law to continue to develop and to narrow, if not eliminate, uncertainty about the binding effect of Rule 30(b)(6) testimony.

4. Conclusion

While our research is by no means exhaustive, it reinforced the experience of our members that Rule 30(b)(6) works well under the supervision of the courts and should not be amended. Because the disputes arising under the Rule tend to be fact intensive, the Association believes they are best addressed by the district judge or magistrate judge who can most efficiently assess the nature of the litigation, the legal issues, the history of discovery and the conduct of the parties. Court decisions which have balanced the purposes of the rule and fairness to the parties have assured its continued effectiveness as a discovery tool.

The Association hopes that this letter proves helpful to the Advisory Committee. We are available to comment further, upon request, should the Advisory Committee find further comment helpful.

Very truly yours,

Bettina B. Plevan