

COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES

and its

RULE 30(b)(6) SUBCOMMITTEE

On Behalf of

**NATIONAL CONSUMER LAW CENTER, INC. AND NATIONAL ASSOCIATION OF
CONSUMER ADVOCATES**

January 3, 2019

INTRODUCTION

The National Consumer Law Center (“NCLC”) and the National Association of Consumer Advocates (“NACA”) respectfully submit this Comment to the Judicial Conference Advisory Committee on Civil Rules and its Rule 30(b)(6) Subcommittee (“Subcommittee”) pursuant to its invitation for comment on the proposed amendments to Civil Rule 30.

NCLC is a 501(c)(3) nonprofit organization, founded in 1969, whose mission is to use its expertise in consumer law to advance the rights of underrepresented low-income people, including through litigation. NCLC's litigation activities focus on cases in which low-income or elderly consumers may benefit from NCLC's specialized expertise, particularly in the areas of credit, bankruptcy, preservation of home ownership, consumer sales and services, and the provision of services to low-income utility users and potential users.

NACA is a nonprofit association whose members are legal services attorneys, law professors, and private and public sector attorneys committed to the protection and representation of consumers. NACA’s mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and

to serve as a voice for its members, as well as consumers, in the ongoing struggle to curb unfair and abusive business practices.

Based on our extensive litigation experience on behalf of consumers around the country, NCLC and NACA support the proposed amendment, with minor recommendations for further improvement.

I. THE PROPOSED AMENDMENT REPRESENTS A REASONABLE CHANGE THAT WOULD FACILITATE FACT-FINDING, PRESERVE PARTIES' RESOURCES, AND PROMOTE JUDICIAL ECONOMY.

Depositions “rank high in the hierarchy of pre-trial, truth-finding mechanisms.”¹ They are so crucial to the fact-finding process that disrupting them can “frustrate the entire civil justice system’s attempt to find the truth.”² Rule 30(b)(6) was an important addition to the deposition repertoire, one that its inaugurating Advisory Committee described as “an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process.”³ And indeed, the Rule has proved a decidedly effective and essential tool in consumer law cases since its adoption.

Moreover, the Rule has struck a fair and appropriate balance between the interests of plaintiffs and defendants: it seeks to keep plaintiffs from having to depose a series of corporate representatives, all of whom disclaim any knowledge of the issue,⁴ while also giving corporate defendants more control over the process, including the power to designate and prepare their own 30(b)(6) witnesses.⁵

¹ *Founding Church of Scientology, Inc. v. Webster*, 802 F.2d 1448, 1451 (D.C. Cir. 1986).

² *United States v. Kattar*, 191 F.R.D. 33, 38 (D.N.H. 1999) (quoting *Damaj v. Farmer’s Ins. Co., Inc.*, 164 F.R.D. 559, 560 (N.D. Okla. 1995)).

³ Fed. R. Civ. P. 30(b)(6) Advisory Comm. Note (1970).

⁴ *Id.*

⁵ Fed. R. Civ. P. 30(b)(6); *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 687-88 (S.D. Fla. 2012) (“The rule [30(b)(6)] gives the corporation being deposed more control by allowing it to designate and prepare a witness to testify on the corporation’s behalf.”) (citing *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996)).

We agree with the Subcommittee, however, that the Rule is not perfect. The plaintiffs' bar complains that corporate representatives too frequently show up to depositions only to claim ignorance as to the matters on which they are to be deposed. The defense bar, by contrast, complains that far-reaching deposition notices require significant preparation costs that are not justified. The proposed amendment's meet-and-confer requirement represents a balanced approach to reforming the Rule that will help ameliorate the concerns raised by each side. As a result, the National Consumer Law Center and the National Association of Consumer Advocates support this recommended addition to Rule 30(b)(6).

A. The Proposed Meet-and-Confer Requirement Would Foster Greater Productivity in 30(b)(6) Depositions and Achieve Judicial Economy by Facilitating Adequate Preparation of Witnesses.

As the Subcommittee is well aware, one issue that often arises in the context of 30(b)(6) depositions is the inadequate preparation of witnesses.⁶ Indeed, this problem has plagued numerous NCLC and NACA cases over the past several decades since Rule 30(b)(6) was adopted. Based on our experiences in the consumer protection litigation realm, NCLC and NACA believe that the proposed amendment directly would address, and help reduce, the incidence of this recurring obstacle to effective discovery in our cases.

First, if the organization's failure to designate or prepare a knowledgeable representative stems from a misunderstanding between the parties (perhaps arising from the serving party's overlong or ambiguously worded notice⁷), then requiring the parties to confer in advance could help clarify any misunderstandings so they can be rectified promptly. Second, the proposed preliminary meeting would deter intentional violations of the Rule since an astute organization

⁶ Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, at 293 ("Particular concerns have included . . . inadequately prepared witnesses.").

⁷ *See id.* ("Particular concerns have included overlong or ambiguously worded lists of matters for examination . . .").

would recognize that courts would be less willing to suffer this type of gamesmanship knowing that the parties were required to confer about the matters for examination and the identities of those best suited to answer these questions beforehand.

By promoting the adequate preparation of witnesses, the proposed amendment would be beneficial to both parties, as well as beneficial for the fair and efficient administration of justice. For the serving party, an adequately prepared witness helps to ensure the most efficient access to relevant information; for the organization, an adequately prepared witness helps to avoid multiple discovery demands or potential sanctions.⁸ Indeed, Lawyers for Civil Justice cited this latter factor in a 2016 comment in which they advocated for amendments to the Rules that would “promote early cooperation between the parties,”⁹ including earlier discussion about “the substance . . . of the 30(b)(6) deposition.”¹⁰ Finally, for the court system, a meet-and-confer requirement that helps clarify the goals of the deposition and facilitates adequate preparation of the witness can help conserve judicial resources that may otherwise have to be expended deciding whether to compel an organization’s representative witness to answer questions beyond the scope of the deposition notice¹¹ or deciding whether to impose sanctions for inadequate compliance with the rule.

In short, by facilitating designation and preparation of knowledgeable witnesses, the proposed amendment and its meet and confer requirement would serve the interests of the serving party, responding organization and the judicial system as a whole.

⁸ See Lawyers for Civil Justice, *Not up to the Task: Rule 30(b)(6) and the Need for Amendments that Facilitate Cooperation, Case Management and Proportionality*, Comment to the Advisory Committee on Civil Rules, at 7-8 n.27 (Dec. 21, 2016) (citing cases involving sanctions for inadequate preparation).

⁹ *Id.* at 3.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 7 n.26 (citing cases demonstrating that case law is divided on whether an organization’s representative witness can be forced to answer questions beyond the scope of the notice).

B. Second, the Proposed Amendment’s Identification Requirement, in Particular, Would Help Reduce the Incidence of Bandyng.

Requiring the parties to confer not just about what information the serving party seeks but also about who within the organization might possess it would help to further curb the specific bandying abuse which Rule 30(b)(6) originally was intended to deter if not eliminate.¹² While the adoption of Rule 30(b)(6) already has helped reduce this practice, it has failed, in its current form, to fully put a stop to it.¹³

By requiring open and frank discussions about the witness or witnesses the organization plans to designate as its representatives, the proposed amendment undoubtedly will help ensure, as the Subcommittee predicts, that the representatives it ultimately designates will be “the right person to testify.”¹⁴ Reduction of bandying would, in turn, hasten fact-finding and “avoid later disputes.”¹⁵

C. Third, the Proposed Meet-and-Confer Requirement Would Help Promote the Fair and Efficient Administration of Justice by Diffusing Information Asymmetry Earlier in the Litigation Process.

Information asymmetry characterizes many of NCLC’s and NACA’s consumer protection cases, and indeed characterizes a great many of the cases in which 30(b)(6) depositions are found useful. A key underlying purpose of Rule 30(b)(6) is to help diffuse this asymmetry by “giv[ing] a requesting party the means to obtain testimony efficiently from the corporation when the requesting party does not know who the appropriate witnesses are, or when

¹² Fed. R. Civ. P. 30(b)(6) Advisory Comm. Note (1970) (“[The new provision] will curb the ‘bandying’ by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it.”)

¹³ For one prominent example of corporate bandying that occurred since the adoption of Rule 30(b)(6), *see* Miles W. Lord, *The Dalkon Shield Litigation: Revised Annotated Reprimand by Chief Judge Miles W. Lord*, 9 Hamline L. Rev. 7, 11 (1986) (“The project manager for Dalkon Shield explains that a particular question should have gone to the medical department. The medical department representative explains that the question was really [for] the quality control department. The quality control department representative explains that the project manager was the one with the authority to make a decision on that question.”).

¹⁴ Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, at 293.

¹⁵ *Id.* at 294.

one witness may not be able to provide the desired information.”¹⁶ Because the defendant-corporation or government agency often has sole knowledge of the events that gave rise to the lawsuit and of its own practices, Rule 30(b)(6) depositions enable plaintiffs to glean relevant information about such practices, which otherwise may be inaccessible to them, sooner in the litigation process and allow defense counsel to better and more efficiently prepare representatives to testify to these practices when deposed.

The fact that plaintiffs’ original notices and deposition interrogations sometimes may appear to be overly broad or entirely off-topic, and therefore characterized as so-called “fishing expeditions”, usually is directly attributable to this information asymmetry which even can persist late into the discovery process. The proposed 30(b)(6) conferences, however, promise to help diffuse this information asymmetry earlier—before the 30(b)(6) depositions are taken—and thereby will enable plaintiffs to narrow the scope of their notices and to focus their depositions more accurately to cover only the subjects that are most relevant to their claims.

Early communication would help streamline discovery for plaintiffs but also would serve the interests of organizational defendants. Rather than being forced by an overly broad notice to designate multiple representatives and prepare them for many potential lines of questioning—one of the very ills at which the proposed amendment is aimed¹⁷—parties could home in on the most relevant areas for examination and organizations would be able to focus on preparing only for those topics that had been designated. This improvement would save the organization significant preparation costs and also limit the need for subsequent, follow up depositions.

¹⁶ Sidney Schenkier, *Turning the Table, Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6)*, 29 Litig. 20, 20.

¹⁷ Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, at 293 (“Particular concerns have included overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses.”).

Indeed, some of the parties now objecting to this proposed amendment have elsewhere lauded rules promoting just these kinds of preparatory, preliminary discussions. Lawyers for Civil Justice, for example, argued in an earlier comment that “[r]equiring the definition of topics that may be noticed in a 30(b)(6) deposition early in the discovery period will assist the parties and the court in achieving judicial economy, reducing unnecessary costs and navigating the early resolution of disputes.”¹⁸ NCLC and NACA agree, and believe that the proposed amendment could achieve precisely these goals.

D. In Any Event, the Proposed Amendment Would Effect Only a Minor—and Unburdensome—Change to Rule 30(b)(6).

NCLC and NACA support the Subcommittee’s inclination only to propose at this time relatively minor changes to Rule 30(b)(6), a highly valuable Rule that has worked in substantially its original form for nearly fifty years and that all can agree provides “a key element of discovery in many cases.”¹⁹ Objections that the proposed amendment imposes a new and unfair burden on corporations are misguided at best.²⁰

In fact, the proposed amendment’s requirements are largely redundant with corporations’ existing obligations. Rule 26 already requires parties, within fourteen days of a Rule 26(f) conference, to disclose “the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses,” as well as “a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or

¹⁸ Lawyers for Civil Justice, *supra* note 10, at 3.

¹⁹ *Id.* at 2.

²⁰ *See, e.g.*, Letter from John H. Beisner, Skadden, Arps, Slate, Meagher & Flom LLP, to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, June 11, 2018; Letter from Kenneth J. Reilly, Shook, Hardy & Bacon LLP, to Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, et al., June 6, 2018.

control and may use to support its claims or defenses.”²¹ The work of identifying these individuals and documents overlaps substantially with the work of identifying Rule 30(b)(6) designees.

Indeed, in some jurisdictions, the proposed amendment would simply codify existing practice. As some Standing Committee members have observed, “making this rule change would not really change practice much in some districts.”²² At least one district requires a party bringing a motion before the court regarding a 30(b)(6) deposition to first certify that the parties “have met and conferred about the matter.”²³ And at least two districts require parties to confer or at least try to confer about scheduling depositions before noticing them.²⁴

The success of the proposed amendment’s provisions in other jurisdictions is strong assurance that the proposed amendment would prove workable—rather than unduly burdensome—if adopted nationally. In brief, the proposed amendment presents a low-burden method of improving upon Rule 30(b)(6) successes and helping to ensure that parties can better “secure the just, speedy, and inexpensive determination of every action and proceeding.”²⁵

II. RULE 30(b)(6) SHOULD BE IMPROVED VIA TWO FURTHER CHANGES.

As discussed in Section I, NCLC and NACA agree that the Advisory Committee’s proposed amendment is a step in the right direction and support its adoption. We believe, however, that the proposed amendment has not gone quite far enough and would be improved via the following two changes.

²¹ Fed. R. Civ. P. 26(a)(1).

²² Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, at 335.

²³ *Id.*

²⁴ See *Civil Local Rules*, United States District Court for the Northern District of California, at 30-31, <https://cand.uscourts.gov/localrules/civil#DEPOSITIONS>; *Rule 30.1: Conduct at Depositions*, United States District Court for the Northern District of Ohio, http://www.ohnd.uscourts.gov/sites/ohnd/files/CivilRules_Rule301.pdf.

²⁵ Fed. R. Civ. P. 1.

A. The Committee Note Should Clarify that the Amendment Leaves the Burdens Between Parties Unchanged.

Under the current Rule 30(b)(6), the burden lies with the organization to move the court to intervene if it disagrees with the scope of a plaintiff's 30(b)(6) notice. The language of the proposed amendment does not indicate an intent to shift this burden, but it would nonetheless be beneficial to make clear that the burden remains with the organization. This confirmation could be achieved by a small change to the Draft Committee Note. Our suggestion is to amend the Note as follows (addition italicized):

The duty to confer as necessary continues if needed to fulfill the requirement of good faith. But the conference process must be completed a reasonable time before the deposition is scheduled to occur. *If the conference process fails to produce agreement between the parties, the recipient of the notice may move the court for a protective order under Rule 26.*

The addition of the above-proposed language, or language similar to it, would forestall any misinterpretations and insure that the relevant burdens between parties would remain unchanged.

B. The Rule Should Indicate that the Parties Should Confer About Which Particular Matters Each Designated Representative Will Testify About.

The proposed amendment currently imposes a duty to confer about the *identity of each person* the organization will designate to testify and the *matters* for examination. The aims of the amendment would be directly and substantially advanced by obliging the parties to take the next logical step and discuss *which individuals will testify to which matters*. This improvement could be achieved by making the following small revision to the proposed amendment (addition italicized):

Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person the organization will designate to testify *on each matter*.

Such a modification would directly further the Subcommittee’s goal of encouraging “candid exchanges” in order to help “reduce the [organization’s] difficulty of identifying the right person to testify,” and help “avoid later disputes” that can arise when the wrong person is designated to testify about particular matters.²⁶ Moreover, the amendment would make 30(b)(6) depositions more efficient and constructive because it would further ensure that all parties are adequately prepared for the deposition.

Any added burden on the parties would be slight considering that the proposed amendment already requires parties to discuss the identities of the representatives and the matters for examination. Indeed, attorneys who are approaching the proposed amendment’s requirements in good faith are likely to discuss this subject anyway. In short, the addition of three words—“on each matter”—would simply move the parties one half-step further in the direction already bidden by the proposed amendment. It represents a minor, sensible enhancement to the amendment as written.

CONCLUSION

The National Consumer Law Center and the National Association of Consumer Advocates support adoption of the proposed amendment for the reasons explained in Section I. NCLC and NACA believe the amendment could be further improved by making the two revisions proposed in Section II.

²⁶ Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, at 294.

Respectfully submitted on behalf of the National Consumer Law Center and the National Association of Consumer Advocates.

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