

SUPPLEMENTAL 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**

March 29, 2019

INTRODUCTION

The National Consumer Law Center (“NCLC”) and the National Association of Consumer Advocates (“NACA”) respectfully submit this Supplemental Comment to the Judicial Conference Advisory Committee on Civil Rules (“Committee”) and its Rule 30(b)(6) Subcommittee (“Subcommittee”) regarding the alternative proposed amendments to Civil Rule 30 set forth in the Committee’s agenda book for its upcoming April 2-3 meeting in San Antonio, TX.

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.

PROPOSED RULE 30(b)(6) ALTERNATIVE 2 MOST FAIRLY CREATES A LEVEL THE PLAYING FIELD FOR DEPOSING CONSUMERS AND DEONENTS

Based on our extensive litigation experience on behalf of consumers around the country, NCLC and NACA supported the originally proposed amendment published for public comment, with minor suggested recommendations for further improvement, in comments submitted to the Committee and the Subcommittee on January 3, 2019. We continue to support either of the two new alternative versions set forth in the April 2-3, 2019, agenda book since they both accomplish most of the goals and respond to most of the concerns raised in our original comments. We believe, however, that Alternative 2 better serves the interests of consumers whose asymmetrical access to information in the marketplace puts them at a distinct disadvantage in litigation brought to enforce their statutory and common law rights and protections.

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. 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.

The proposed 30(b)(6) conferences under Alternative 1, 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.

However, Alternative 2 goes even further in guarantying that the information asymmetry problem truly is diffused and the playing field leveled for all parties in consumer litigation. By requiring organizations in advance of the 30(b)(6) deposition to identify the person or persons it has designated by name and, if it has designated more than one person, setting out the matters on which each person will testify will insure the most efficient, effective and fair discovery process. Combining the identification requirement and the duty to confer in good faith with a provision that the deposing party must give at least 30 day notice of the deposition provides the organization with sufficient opportunity to select and properly prepare its designated witnesses, thus eliminating any excuse for the prevalence of bandying practices that were the target of the concerns addressed in our original comments.

The presentation of Alternative 2 also raises the question of when the organization must identify the person or persons it has designated by name and, if it has designated more than one person, set out the matters on which each person will testify. The proposal suggests alternatives of seven (7), five (5) or (3) days. NCLC and NACA recommend that seven (7) days is the appropriate and fair time period for advance notice by the organization to allow the deposing party to properly prepare for the 30(b)(6) deposition.

Since Alternative 2 already provides that the deposing party must give at least 30 days of advance notice of the deposition and requires that before or promptly after the notice is served the serving party and the organization must confer in good faith about the matters for examination, the organization will have the information it needs to identify the individuals who will be deposed well in advance of the scheduled deposition. Presumably the organization will want to undertake that task as soon as possible in order to maximize the time available to properly prepare the deponent for their testimony.

On the other hand, without repeating all of the comments that the Committee and the Subcommittee already have received and recognize in the Introduction to Alternative 2 (Pages 107-109 of the Advisory Committee on Civil Rules agenda book for April 2-3, 2019), we clearly believe that it is important for a deposing party to be informed as to the identity of the person or persons who will be designated to testify at a 30(b)(6) deposition and, if more than one person is designated, knowing the matters on which each person will testify at a point of time when such information can be used most efficiently and effectively in discovery. Deposing parties, particularly in consumer enforcement cases where there almost always is significant information symmetry between the parties, should be entitled to such information at least one week prior to the scheduled 30(b)(6) depositions both as a matter of practicality and reasonableness.

CONCLUSION

Alternative 2 is the best option for leveling the playing field for consumers seeking to enforce their rights. It helps to eliminate the obstacles created by information asymmetry and deters improper efforts to evade appropriate, efficient and fair discovery practices. Given the notice and consultation requirements included in the proposed Alternative 2 the interests of deponents are more than adequately protected. We recommend that the Committee recommend Alternative 2 to the Standing Committee for approval.