

March 28, 2019

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

**Re: Comment on Proposed Amendments to FRCP 30(b)(6) –
Alternative 1 and Alternative 2**

To the Members of the Committee on Rules of Practice and Procedure:

In March 2019, the Rule 30(b)(6) Subcommittee published its report outlining the results of the public notice and comment period on proposed amendments to the rule, and its suggestions regarding a potential final rule.¹ The Subcommittee indicated that it remains divided on two different Rule 30(b)(6) drafting options, referred to as Alternative 1 and Alternative 2. The American Association for Justice (“AAJ”) respectfully offers its comments concerning these two proposals.

AAJ thanks this Committee and the Rule 30(b)(6) Subcommittee for its work on the rule and for listening to AAJ members during the formal comment period and public hearings on Rule 30(b)(6). The Committee received many comments and recommendations regarding the amendments to the rule, and clearly carefully considered all of the suggestions in crafting its most recent proposals. These proposals, both Alternative 1 and Alternative 2, successfully focus on the *conferral* between parties without imposing additional burdens on the noticing party.

AAJ strongly urges this Committee to adopt Alternative 2, especially given its balanced approach. Unlike Alternative 1, Alternative 2 includes a requirement that the organization identify the person(s) designated to testify, while also providing a 30-day notice of deposition period.² The key to the balanced nature of this rule is the inclusion of language requiring disclosure of the identity of the witness. AAJ does not suggest that this information be part of a conferral process, and agrees that the choice of the 30(b)(6) witness rests solely with the deponent organization. Disclosure, nevertheless, remains necessary for efficiency and fairness.

First, requiring disclosure of the identity of the witness is a practical way to ensure that Rule 30(b)(6) depositions move forward efficiently. As comments to this Committee previously noted,

¹ See Agenda Book, Advisory Committee on Civil Rules April 2-3, 2019 Meeting in San Antonio, TX, at 101-202, https://www.uscourts.gov/sites/default/files/2019-04_civil_rules_agenda_book.pdf.

² Alternative 1 does not, and should not, include a 30-day notice period if it does not also provide for disclosure of the identity of the witness. Such an addition to Alternative 1 would upset the balance of the rule, requiring even more obligations for the noticing party while not obligating any disclosures or notice from the deponent organization.

with advance notice, the deposing party will be able to more appropriately focus questions to that specific witness, inevitably shortening deposition time. The additional clause stating that the organization must “set out the matters on which each person will testify” if more than one witness is designated would provide additional efficiencies. The deposing party would be able to ascertain whether the witness previously testified on this subject, helping avoid duplication and related costs. Second, this disclosure, even if several days before a deposition, would help reduce pretrial discovery abuses such as the presentation of an unprepared or unqualified witness, purposeful delay, or attempts to prevent the noticing party from obtaining information. To that end, AAJ is in favor of disclosure no later than seven (7) days prior to the deposition. This will allow the noticing party enough time to adequately prepare for the particular witness. Third, the only way that this rule remains fair and balanced is to require this disclosure. Such language ensures that *both* parties are required to make disclosures pertinent to the deposition, not just the noticing party.

With respect to Alternative 1, AAJ appreciates the changes that have been made. These changes, especially the deletion of the directive to confer about the “number and description of” the matters for examination, significantly improve the rule. The focus is now on the “matters for examination” instead of an arbitrary number and description, which will allow parties to focus on the subject matter for the deposition. AAJ also supports the Subcommittee’s decision to delete “continue as necessary,” which deletion would provide parties more flexibility to have the type of conferral they deem necessary for a particular case without unnecessarily obligating them. These revisions are also included in Alternative 2. Both proposals place the focus on the conferral process and allow that process to occur based on the particularities of a given case. This is an improvement to the rule.³

As this Committee recognizes, most good lawyers already confer with one another in good faith about the 30(b)(6) deposition, as both proposals would mandate. Alternative 2 would improve the practice of law, while Alternative 1 memorializes the status quo. The requirement that the organization disclose the identity of the witness who will testify will result in a fair and balanced rule and help solve problems that often arise in cases involving 30(b)(6) depositions.

AAJ thanks the Committee for its time and its consideration of these comments, and strongly urges the Committee to adopt the Alternative 2 version of Rule 30(b)(6).

Sincerely,


Elise Sanguinetti

President

American Association for Justice

³ AAJ does not believe that Alternative 2A, which adds only a requirement that the organization specify which witness will testify on which matters if more than one witness is designated, is a desirable rule. This version would undoubtedly result in organizations selecting one witness to testify in order to avoid the disclosure requirement, even when more than one witness is necessary to provide information that the parties have agreed to during the conferral process.