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SUPPLEMENTAL COMMENT OF PUBLIC JUSTICE

TO THE CIVIL RULES ADVISORY COMMITTEE IN SUPPORT OF ALTERNATIVE 2 PROPOSED AMENDMENT TO RULE 30(b)(6)

March 29, 2019

Public Justice, P.C. and the Public Justice Foundation (collectively, "Public Justice") respectfully submit this Supplemental Comment to the Advisory Committee on Civil Rules in support of Alternative 2 to the proposed amendment to Rule 30(b)(6), which would require parties to identify Rule 30(b)(6) witnesses in advance of a deposition.

Public Justice, P.C. is a national public interest law firm that pursues impact litigation to combat social and economic injustice, protect the environment, and challenge predatory corporate conduct and government abuses. The Public Justice Foundation is a not-for-profit charitable membership organization that supports the work of Public Justice, P.C. and educates lawyers, judges, and the broader public about critical social and economic issues that affect the public interest. Its almost 2,800 members, from all fifty states, represent plaintiffs in a broad range of personal injury, employment discrimination and wage and hour cases, consumer, tort (both mass and individual), antitrust and securities fraud, commercial, and civil rights cases.

The Rule 30(b)(6) Subcommittee Report concludes that parties should confer about the matters for examination in a Rule 30(b)(6) notice, and that the Committee should not reconsider various proposed amendments, like new objection procedures or one-size-fits-all limits on the number of topics or duration of 30(b)(6) depositions, that would deny individuals efficient access to the facts and evidence that they need to seek justice.[1] Public Justice fully supports the Subcommittee's decision to preserve the power and flexibility of Rule 30(b)(6), and has already addressed these issues at length in its January 24, 2019 Comment to the Civil Rules Advisory Committee on the Proposed Amendment to Rule 30(b)(6).[2]

The Subcommittee reports that it's divided, however, on whether an organization should be required to identify its 30(b)(6) witness prior to the deposition, and that it's seeking guidance from the full Committee on two alternative proposals.[3] While Public Justice believes either Alternative 1 or Alternative 2 would be an improvement, Public Justice strongly encourages the

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

[2] Comment of Public Justice to the Civil Rules Advisory Committee on the Proposed Amendment to Federal Rule of Civil Procedure 30(b)(6), *Rule 30(b)(6): Empowering Efficient Litigation in the Public Interest* (Jan. 24, 2019), https://www.publicjustice.net/wp-content/upl1oads/2019/01/Public-Justice-Comment-Rule-30b6.pdf; *see also* Testimony Package for Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure, at 14 (Feb. 8, 2019), https://www.uscourts.gov/sites/default/files/testimony_package_for_2-8-19_hearing_as_of_2-6-2019.pdf.

[3] Agenda Book, *supra* note 1, at 101.

Committee to adopt Alternative 2 and require organizations to identify their 30(b)(6) witnesses at least seven days before the deposition.[4]

In litigating a broad range of cases involving environmental, consumer, and worker protection and civil rights issues, Public Justice and our members have repeatedly witnessed the very practical benefits of identifying a Rule 30(b)(6) witness ahead of a deposition.[5] Three benefits, in particular, stand out. First, if the designated witness has previously testified as a 30(b)(6) witness on a similar topic, that earlier testimony can be reviewed and used to make the deposition more efficient. For example, the deposing party can use exhibits that it knows the designated witness is already familiar with to make the deposition easier and faster for both parties. Second, if the designated witness happens to be someone the deposing party is also interested in deposing under Rule 30(b)(1), then the parties can plan for both depositions to take place on the same day or in the same week, making discovery more efficient and cost effective, especially if travel is required. Third, a notice requirement will also ensure the organization is actually preparing for the deposition and not designating witnesses at the last minute, with little preparation. In our experience, one of the biggest problems with 30(b)(6) depositions, and one that has given rise to extensive litigation, is when parties offer Rule 30(b)(6) witnesses who are insufficiently prepared, and this proposal would help reduce that problem.

To maximize these practical benefits of identifying 30(b)(6) witnesses in advance, Public Justice recommends the Committee require organizations to identify witnesses seven days—as opposed to three or five days—in advance. Because Alternative 2 also requires the deposing party to provide at least 30 days notice of a 30(b)(6) deposition, seven days advanced notice of the identity the witness is not unduly burdensome.[6]

Interestingly, while a number of witnesses in this proceeding have argued that organizations should not have to identify Rule 30(b)(6) witnesses in advance of a deposition, we have not seen parties argue (or persuasively argue) that such advanced notice gives the deposing party an unfair advantage; in fact, many admit that they usually *do* disclose the identity of their 30(b)(6) witnesses in advance. Instead, they argue it shouldn't be a requirement because the deposing party could abuse the rule by reviewing the 30(b)(6) witness's social media and asking personal questions, instead of questions aimed at gathering facts and evidence from the organization itself. But there are existing procedures, like Rule 26, to deal with any party that abuses deposition procedures and asks a 30(b)(6) witness personal questions irrelevant to the organization. The Committee shouldn't design rules under the assumption that attorneys will routinely disregard the rules and act in bad faith—both because that's not what the vast majority

[4] Alternative 2A, which requires parties to indicate which witnesses will testify on which topics, but does not require parties to actually identify any of the witnesses, is not advisable. Such a rule does not capture the many practical benefits of identifying Rule 30(b)(6) witnesses before depositions and could even incentivize parties to select just one witness, even when selecting multiple witnesses would be better, just so the parties can avoid the notice requirement.

[5] *See* Agenda Book, *supra* note 1, at 107.

[6] Public Justice opposes adding a thirty-day notice period without also requiring advanced disclosure of the identity of a 30(b)(6) witness. The existing reasonable notice requirement has worked well, and imposing more notice obligations on the deposing party, but not the deponent organization, would upset the balance of the rule. Deposing parties want well-prepared 30(b)(6) witnesses and are therefore already incentivized to provide reasonable notice.

of attorneys do and because that would prevent the Committee from adopting rules, like the conferral rule, that allow for flexibility and encourage cooperation.

Ultimately, the Committee should adopt Alternative 2 over Alternative 1 for the same reason the Subcommittee adopted the conferral requirement: "there is value in extending this best practice to all cases involving 30(b)(6) depositions."[7] Both plaintiff and defense attorneys, in comments and in testimony, explained that it is already a widely adopted regular practice for a party to identify its 30(b)(6) witnesses in advance of a deposition. Surely, if parties already routinely provide such notice, without any requirement to do so, it must not be a very burdensome or harmful practice. And if it's already common practice, then there's no reason all parties shouldn't benefit from the practice equally. Some attorneys testified that they identify their 30(b)(6) witness in advance if they like the attorneys on the other side. But the rules should not operate in a way that's based upon personality and friendships; there should be a set of procedures that apply to everyone. Otherwise, only repeat-players—the legal insiders—receive the practical benefits of identifying 30(b)(6) witnesses in advance. By adopting Alterative 2, the Committee can ensure all parties, no matter their stature, benefit from the best practice of identifying 30(b)(6) witnesses in advance.

Public Justice commends the Subcommittee for carefully balancing the competing interests at stake and proposing two alternatives that both preserve the power and flexibility of Rule 30(b)(6) and encourage parties to cooperate in good faith. Between the two alternatives, Public Justice strongly recommends, for the reasons above, that the Committee adopt Alternative 2 and require organizations to identify 30(b)(6) witnesses seven days in advance of the deposition.

[7] *See* Agenda Book, *supra* note 1, at 101.