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To the Advisory Committee on Civil Rules
Submitted via email: RulesCommittee_Secretary@ao.us.courts.gov

SUPPLEMENTAL COMMENT ON PROPOSED AMENDMENT TO RULE 30(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE: ALTERNATIVE 1 AND ALTERNATIVE 2

The National Employment Lawyers Association (NELA) submits the following supplemental comment to the Advisory Committee on Civil Rules concerning the proposed amendment to Federal Rule of Civil Procedure 30(b)(6). We again express our gratitude for the work done by the members of the Committee, including during the recent comment period.

Earlier this month, the Rule 30(b)(6) Subcommittee issued a report in advance of the upcoming meeting in San Antonio, Texas. The report describes two proposed courses of action concerning the Proposed Amendment, referred to as Alternative 1 and Alternative 2.

We write to express our support for Alternative 2. A key aspect of this alternative is the requirement of advance notice of the identity of witnesses. As we and many others explained during the comment period, making this practice mandatory will eliminate gamesmanship in situations where parties refuse to identify witnesses, hindering counsel's ability to adequately prepare and making the deposition longer and much more costly for both sides. While we agree that conferral over selection of the witness is not necessary, as included in the original proposal, adding a requirement that the requesting party confer over the content of the topics noticed, while not requiring the producing party to even identify the witness, results in an unbalanced proposal that permits producing parties more leeway to engage in gamesmanship. The Subcommittee heard extensive testimony already on the value of knowing the identity of the witness in advance. The producing parties who object to such disclosure relied on a speculative parade of horribles, mostly centered around the notion that requesting parties would waste valuable deposition time asking the witness about irrelevant matters found on their social media. While no actual examples of such occurrences were offered, and it is surely an outlier scenario, to the extent that is a concern, it is not solved by refusing to disclose the identity of the witness in advance, as the name will be revealed at the outset of the deposition, and counsel may then call up social media on his or her phone during a deposition break if that were really the intent of requesting counsel.

We further urge the Committee to require such disclosure no fewer than 7 days in advance of the deposition. This option best ensures that the party taking the deposition will have sufficient time to make use of the information by, for example, searching for documents related to a particular witness, and tailoring their examination to that witness's anticipated knowledge. The 3 and 5-day options, on the other hand, are too short. Both create the potential for the disclosure to happen just before the weekend—when many offices are without full staff—potentially taking away two days of preparation time. Moreover, many Rule 30(b)(6) depositions require travel to where the corporate designee is located, making sufficient notice even more important. We believe that the proposed 30-day notice period for a 30(b)(6) deposition in Alternative 2 is reasonable and have no objection to it.

We thank the members of the Committee and the Rule 30(b)(6) Subcommittee for their careful attention to this issue.

Respectfully submitted,

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