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The National Employment Lawyers Association, Georgia Affiliate ("NELA-Ga") submits the following comments in response to the Advisory Committee on Civil Rules Rule 30(b)(6) Subcommittee's Invitation for Comment on Possible Issues Regarding Rule 30(b)(6). We appreciate the opportunity to offer our perspectives regarding the issues identified by the Subcommittee.

NELA-Ga is an affiliate of the National Employment Lawyers Association with over 130 members. NELA-Ga members are all attorneys who practice law in Georgia and, because Georgia has relatively few laws that protect employees, spend much of their time litigating in federal court. As such we are all very familiar with the Federal Rules of Civil Procedure and the effect they have on our ability to represent employees effectively. Specifically, NELA-Ga's member attorneys represent employees in federal court litigation against their current or former employers, which are often large companies. Because such entities generally have custody or control of all or most of the potential evidence at the outset of a case, we tend to be at a considerable disadvantage when it comes to identifying key documents and witnesses. Accordingly, we often use 30(b)(6) depositions early in discovery as an efficient means of identifying the categories of documents and other evidence that may be available for discovery, how they are maintained, and how they may be obtained. Acquiring this information early in a case creates additional efficiencies through its value in helping to identify disputed issues and keep subsequent discovery requests as narrowly-tailored as possible.

In our view, a number of the proposed changes to Rule 30(b)(6) suggested by the Subcommittee would introduce costly and time-consuming motion practice to address issues that the parties in a case can and do resolve without court intervention, thereby increasing the burdens on an already overworked judiciary. Others would encourage gamesmanship and similarly unproductive litigation behavior. Overall, each of the proposals incorporates a perspective that is too solicitous of the interests of organizational litigants at the expense of both individual litigants and broader judicial economy.

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Adopting these changes, would represent a serious and troubling departure for the Civil Rules Advisory Committee, which has worked to issue carefully-calibrated rule changes that do not favor one set of litigants over another. While NELA-Ga is alarmed by each of the proposed changes, of particular concern are the following:

I. Requiring and Permitting Supplementation of Rule 30(b)(6) Testimony

We oppose requiring and/or permitting supplementation of 30(b)(6) testimony. As the Subcommittee points out in its Invitation for Comment, allowing supplementation would encourage wasteful forms of gamesmanship, such as intentionally failing to prepare witnesses or introducing sham testimony. Courts routinely strike sham affidavits, but allowing supplementation would permit 30(b)(6) deponents to provide "I don't know, I will need to review our records" type of answers, thereby transforming the 30(b)(6) deposition into an unproductive, expensive, and largely empty exercise.

Further, such evasions can benefit only organizational defendants, and therefore would create serious inequities without any recognizable benefit. As the Subcommittee recognizes in the Invitation for Comment, existing Rule 26(e) does not require or permit supplementation of deposition testimony. Indeed, supplementary testimony from a plaintiff that changes her prior testimony would be subject to a motion to strike and/or impeachment at trial. It is therefore difficult to understand why organizational parties would be allowed or required to freely supplement, while leaving individual plaintiffs subject to the existing, harsher rule. A corporate defendant already has the advantage of choosing the witness (or witnesses) who are most knowledgeable, so it would be doubly unfair then to allow these witnesses to decline to provide responsive, complete testimony, secure in the knowledge that inadequate or inconvenient testimony could be supplemented later. Individual deponents are not permitted to do so, and there is no principled reason to allow it in the context of 30(b)(6) depositions.

II. Forbidding Contention Questions in Rule 30(b)(6) Depositions

As with the preceding item regarding supplementation, forbidding contention questions in Rule 30(b)(6) depositions would unfairly impose a discovery restriction on individual litigants, but not organizational parties. While the Subcommittee is correct that parties have much more time to respond to contention interrogatories, corporate defendants often ask plaintiffs numerous contention questions during their deposition (e.g., "What support do you have for your claim that you suffered discrimination?"). Allowing these types of questions to be asked of plaintiffs, but not defendants, again would unfairly tilt the scales in favor of one party to the litigation, without any principled justification. Whether a Rule 30(b)(6) witness may be asked to express an opinion or contention depends on the circumstances and should not be the subject of rulemaking. *See U.S. v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996) ("Whether a Rule 30(b)(6) deposition or a Rule 33(c) contention interrogatory is more appropriate will be a case by case factual determination.") .

III. Adding a Provision for Objections to Rule 30(b)(6)

Injecting a formal objection process into Rule 30(b)(6) is problematic for a number of reasons. As we have already indicated, the 30(b)(6) deposition is often the first deposition taken in the case. Encouraging formal objections would create more motion practice at the start of the discovery process, causing long delays that will prevent any productive discovery from being conducted. Further, the additional suggestion of requiring the objecting party to specify what information they will provide despite their objection (similar to Rule 34) would do little to

resolve this issue. Indeed, this would require that a party sit for multiple depositions—one on the topics they have agreed to, and a second after the court rules on an inevitable motion to compel regarding the topics to which they object. These types of inefficiencies can be avoided by leaving the rule as it stands, and allowing the organization to move for a protective order if the proposed notice truly is objectionable. There has been no showing that the few motions for protective orders that may have been filed have been incorrectly decided, and there is no reason to assume that motions for protective orders are not an adequate remedy for a truly abusive notice.

More broadly, this proposal runs contrary to the mandate of Rule 1, as well as the overall direction the Advisory Committee on Civil Rules has taken in recent years, seeking to reduce expense and to improve efficiency. If this provision were enacted, it is highly probable that a majority of noticed Rule 30(b)(6) depositions would face objection. It would increase the workload of already overburdened district court judges, clerks, and staff, and because rulings on such objections would be linked so closely to the particular circumstances of a given case, they would not provide useful guidance in other cases. This would be particularly true if the 30(b)(6) deposition at issue was the first one in the case. Neither the court, nor the litigants, would have a clear conception of how the case may develop, yet the court would be required to make substantive decisions that could be highly consequential to the proceedings.

IV. Amending the Rule to Address the Application of Limits on the Duration and Number of Depositions as Applied to Rule 30(b)(6) Depositions

In our experience, it is the current practice in most jurisdictions to allow one full-day deposition for each witness that an organization designates in response to a Rule 30(b)(6) notice. It is rare for disputes to arise in this area that cannot be worked out by counsel without court intervention. It is also significant that the party receiving the notice is in control of how many witnesses are produced, which also dictates the time necessary to complete the deposition. For instance, in some cases multiple witnesses are designated to cover different time periods. This is done, presumably, for the convenience of the organization. The noticing party should not be required to use an extra deposition due to the needs (strategic or otherwise) of the other side. Further, limiting the amount of time that a party can spend with each Rule 30(b)(6) witness may prevent certain topics from being explored as thoroughly as needed, requiring additional fact witness depositions that could otherwise be avoided, and may encourage organizations to designate numerous witnesses, thereby limiting the amount of time a noticing party can spend on any one witness. In short, this proposed change will encourage even more gamesmanship on the part of organizational parties. This area is not currently a source of disputes that cannot be resolved by the parties, and a rule change would be more likely to increase unnecessary conflict.

Thank you for consideration of our comments.

Respectfully submitted,

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