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Submitted Via Email to: RulesCommittee_Secretary@ao.uscourts.gov

Rebecca A. Womeldorf
Rules Committee Chief Counsel
Office of the General Counsel
Administrative Office of the United States Courts

Re: Written Testimony of M. Nieves Bolaños Regarding The Proposed Amendment To Federal Rule of Civil Procedure 30(b)(6)

Dear Advisory Committee on Civil Rules:

I respectfully submit this testimony both as a Partner at Potter Bolaños LLC and a member of the Executive Board of the National Employment Lawyers Association (NELA), regarding the proposed amendment to Federal Rule of Civil Procedure 30(b)(6) (Proposed Amendment). I appreciate the Committee's careful attention to the various perspectives provided throughout the process that led to the Proposed Amendment, and thank the Committee for the opportunity to offer my impressions.

Our firm represents employees and labor organizations in individual and class actions, involving claims of employment discrimination, harassment, retaliation, whistleblowing, and wage and hour violations. NELA is the country's largest professional organization that is exclusively comprised of lawyers who represent individuals in employment-related matters, with 69 state and local affiliates around the country. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace.

Our clients come from all walks of life, from hourly workers to executives and other professionals. Like many NELA members and firms, as well as anyone who regularly or primarily represents employees, our cases almost always involve a substantial asymmetry in access to the information and witnesses essential to the claims and defenses at issue. In addition, organizational employers always have access to far greater resources than either our firm or our clients.

I. The Proposed Amendment, as Revised, Adopts Existing Best Practices Regarding Rule 30(b)(6) Depositions

The imbalance in access to information, documents, witnesses, and resources between organizations and individuals necessitates rules that promote both efficiency and fundamental fairness.

We regularly take Rule 30(b)(6) depositions in our cases, and have found them to be an essential vehicle for gathering information. As we described in earlier comments our firm submitted to the Rule 30(b)(6) Subcommittee, in our experience, the current rule is working well, including because in our jurisdiction (the Seventh Circuit), parties regularly meet and confer regarding discovery issues, including the number and description of matters for examination and the identity of witnesses for Rule 30(b)(6) depositions. Therefore, the Proposed Amendment makes an explicit requirement of what is already common practice among responsible counsel representing both individual plaintiffs and organizational defendants.

II. The Committee's Decisions Regarding What To Exclude Versus What To Include In The Proposed Amendment Will Serve The Legitimate Needs Of All Litigants & Promote More Cooperative Dispute Resolution

We commend the Rule 30(b)(6) Subcommittee for its careful review of and ultimate rejection of a number of proposals that would have undermined many of the benefits of Rule 30(b)(6). The Proposed Amendment balances the legitimate concerns of both the defense bar and plaintiffs-side counsel, and essentially codifies best practices that have in our experience improved efficiency, discouraged gamesmanship, reduced disputes, preserved judicial economy, and promoted the just, speedy, and inexpensive resolution of claims.

A. Rejecting The Imposition Of Rigid Topic Limits

Based on our experience, we agree with the Committee's sensible decision to reject arbitrary limits on the number of topics for examination. That decision acknowledges the practical realities of cases and promotes fairness. Parties will not be bound by arbitrary caps, and will retain ultimate control of the subject-matter covered. Both parties will benefit from having clarity on topics that can be refined, narrowed, eliminated, or shifted to a later stage in the litigation in light of the particular circumstances of a given case.

Any presumptive cap on the number of topics for examination would in practice be counterproductive. As a practical matter, it would serve to encourage counsel to broaden the definition of each topic in order to avoid exceeding the limit. This would make it more difficult for witnesses to prepare, which would undermine effective information gathering and lead to costly, wasteful disputes.

While we are aware of the 100-topic 30(b)(6) deposition notices provided by members and representatives of the defense bar, such examples are in our experience anomalous. While such lists might be appropriate in certain cases, we have not found them to be necessary or efficient in

our practice. Engaging in such tactics where not necessary would represent a monumental waste of our firm's and our clients' time and other resources. Our firm, and those like it that operate with limited resources, recognize that serving such a notice unnecessarily would immediately devolve into a series of intractable disputes that would not be directed in any way towards furthering the resolution of the actual underlying claims.

Our firm's clients are largely working people under immense pressure to resolve their claims as equitably and cost-effectively as possible. As such, we carefully tailor the number and description of topics in our 30(b)(6) notices to gathering necessary information from the witnesses possessing it, and for the same reasons, our colleagues in the workers' rights advocacy community do the same. Further, in our experience, judges would limit an overly broad notice on a motion for protective order, which could potentially subject our client to shifting of fees. See, *Rickles v. City of South Bend*, 33 F.3d. 785, 786-7 (7th Cir. 1994).

Our firm has litigated against a number of public entities, which in general maintain systems and rules governing most of their employment practices. These systems and rules are most effectively discovered through initial 30(b)(6) depositions. However, they often need to be explored further, after we have established through fact witnesses whether the rules and formal policies were applied or followed. This is of particular import in section 1983 claims where plaintiffs might have the burden of demonstrating a *de facto* policy was being utilized, despite the existence of a contrary official policy, thus requiring a fact-intensive inquiry into policies both official and not. A rigid limit on topics would present a real risk of preventing plaintiffs from obtaining information essential to their cases.

B. Requiring Advance Notice Of The Identity Of Witnesses

Requiring advance notice of the identity of witnesses is a practical necessity, and in our experience, responsible counsel provide this information as a matter of course. Making the practice mandatory will eliminate wasteful gamesmanship and delays in which parties refuse to identify witnesses, thereby hindering counsel's ability to adequately prepare, and causing depositions to be longer, less productive, and more costly. Of course, the party being deposed will retain ultimate control over the witnesses to be produced. We agree, as stated in the Draft Committee Note, that advance discussion should help avoid later disputes about whether the witness was appropriately knowledgeable or prepared.

Knowing the identity of the witness in advance assists counsel in assessing what personal knowledge the witness will have, in addition to what they are required to discover and prepare to discuss as an organizational representative. This, in conjunction with the meet and confer requirements of the proposed rule, allows for more productive discussions about the scope, timing, and limitations of the deposition. For example, if a 30(b)(6) witness is also a regular witness, the parties can discuss how to structure the examination to ensure that the witness will not be required to attend multiple depositions. We have been able to reach such agreements with opposing counsel in the past, thus reducing the costs of the discovery process considerably.

C. Making Explicit The Ongoing Responsibility To Meet & Confer

Finally, we agree with the Proposed Amendment's clarification that the new meet and confer process will be ongoing, as necessary. As the Draft Committee Note makes clear, the process does not mandate that the parties reach an agreement on all issues. However, specifying that the process should be ongoing is in keeping with the spirit of the rules, will help ensure that all parties take their responsibilities seriously, and recognizes the practical reality that cases and their particular needs can evolve over time.

In the many years' experience of our firm's attorneys, the most common issue that arises in the context of 30(b)(6) depositions is that 30(b)(6) witnesses come to their deposition unprepared to testify about the organization's knowledge and information regarding the designated topics. The identification of a witness in advance of the deposition, coupled with an ongoing requirement to meet and confer, will provide the parties an opportunity to ensure the witness is an appropriate designee and is being properly prepared with respect to the scope of the deposition notice. This practice helps minimize the risk that the witness will come to a deposition unprepared to testify on the topics for which they have been designated. Making the practice an explicit part of the Rule will assist the parties in streamlining and properly preparing for depositions.

III. The Committee Should Consider Amending The Draft Committee Note To Remove The Reference To Discussing Documents To Be Used During The Deposition

We believe that the Committee should consider removing the following sentence from the Draft Committee Note: "At the same time, it may be productive to discuss other matters, such as having the serving party identify in advance of the deposition the documents it intends to use during the deposition, thereby facilitating deposition preparation." During the initial discussions of the proposed rule change, there was a suggestion to mandate a pre-deposition exchange of exhibits. NELA, along with other groups, opposed this because it (1) would cause counsel to over-disclose numerous exhibits out of an abundance of caution, and (2) could effectively turn what should be a cross-examination into a mere live version of interrogatories.

Discovery is a fluid and ongoing process and preparation goes on right up to the date of a deposition. As a practical matter, such a requirement does not recognize that, while not ideal, sometimes documents are produced very near to, or even on the day of, the deposition. A well-tailored set of topics, accompanied by or identifying documents, should be at the discretion of the noticing party. Additionally, such a requirement would bar use of documents the relevance of which only becomes clear after the testimony is heard, for instance, for refreshment or impeachment.

Including the suggestion of an early exchange of deposition exhibits in the Committee Note risks reading into the new rule a requirement that has already been considered and justifiably set aside.

I once again thank the Committee for their hard work in developing the Proposed Amendment, and their attention to the various perspectives provided, including my own.

Respectfully Submitted,

M. Nieves Bolaños
Potter Bolaños LLC
NELA Executive Board