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February 11, 2019

Advisory Committee on Civil Rules,
Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States
One Columbus Circle, NE
Washington, DC 20544

RE: Proposed Amendment to Rule 30(b)(6)

Dear Judge Bates and Members of the Advisory Committee,

Washington Legal Foundation (WLF) offers this comment on the Committee's proposed amendment to Federal Rule of Civil Procedure 30(b)(6), which governs depositions of both party and non-party organizational representatives. While the current Rule has many defects in need of fixing, the Committee's proposed change addresses none of them. And rather than improve the practice of Rule 30(b)(6) depositions, the Committee's proposal would only make matters worse.

Founded in 1977, WLF is a public-interest law firm and policy center with supporters nationwide. WLF often litigates before the federal courts to promote free enterprise, individual liberty, limited government, and the rule of law. To that end, WLF has provided formal comment and testimony to the Committee during previous overhauls of the Federal Rules of Civil Procedure. *See* Public Comment of the Washington Legal Foundation on Proposed Amendments to the Federal Rules of Civil Procedure (October 7, 2013).

The most glaring defect of the Committee's Rule 30(b)(6) proposal is its extraordinary mandate that the parties confer on "the identity of each person the organization will designate to testify." That sweeping change to organizational depositions would upend a uniform body of law holding that "[i]t is ultimately up to the organization to choose the Rule 30(b)(6) deponent." 7 James Wm. Moore, et al., *Moore's Federal Practice* § 30.25[3] (3d ed. 2013); *see Resolution Tr. Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993) (placing "the burden of identifying responsive witnesses for a corporation on the corporation"). Simply put, the identity of the organization's designated deponent should never be up for grabs.

Rather than promote cooperation, the Committee's latest proposal would create a problem where none exists by mandating conferral over the *identity* of the witness. But imposing such a requirement would no doubt invite an avalanche of costly and time-consuming discovery disputes. As the proposed advisory note confirms, the focus of the parties' Rule 30(b)(6) exchanges will be on "identifying the right person to testify." So zealous attorneys, under the pretext of securing the "right person to testify," will seize on the Rule to challenge or block the opposing party's designated organizational witness in favor of less capable, less articulate, and less effective representatives. As a result, satellite litigation over the scope of the Rule and the new mandate's meaning will impose greater burden and expense on the parties and tax the already limited judicial resources of the federal courts.

What's more, the additional conferral requirement over "the number and description of the matters for examination" provides no meaningful guidance or direction on what precisely is to be discussed. Likewise, the vague and undefined "continuing as necessary" wording invites more controversy—in particular, disputes over how long the parties must continue to confer and who gets to decide how long the conferral must last and what qualifies "as necessary." Because courts and practitioners won't know what is expected of them, some attorneys will seek every opportunity for discovery sanctions by accusing the other side of refusing to confer "as necessary."

At the same time it adds new uncertainty to the Rule 30(b)(6) deposition process, the proposed amendment offers no meaningful solutions to the current Rule's many failings. By refusing to address well-known and long-standing problems, the Committee has merely kicked the can a little further down the road. Instead, the Committee should reduce practitioners' frustration with Rule 30(b)(6) by providing much needed clarity about the basic process. As other comments have suggested, a much-improved Rule would offer clarity by providing (1) an objection procedure, (2) presumptive limits on the number of topics, (3) clear instructions on how to count the number of hours allowed for a deposition with many topics or individuals designated, (4) a uniform prohibition on questions about the party's legal contentions and strategy, and (5) a safe harbor for circumstances in which an organization no longer has relevant knowledge after the passage of time or for other reasons. Yet the Committee's proposal makes no effort to address any of these glaring gaps in the Rule. The Committee can and should respond to the federal bar's call for genuine Rule 30(b)(6) reform.

In summary, WLF appreciates the opportunity to comment on the Committee's proposed amendment to Rule 30(b)(6). For the reasons given, however, we encourage the Committee to scrap the proposed amendment in its current form and begin anew. Adopting the proposed Rule would not only inject a new source of

uncertainty into the Rule 30(b)(6) deposition process, but it would fail to address the many shortcomings that have long plagued organizational litigants. WLF invites the Committee to draft a new amendment addressing these important issues, while clarifying that the *identity* of the designated witness is always the sole prerogative of the responding organization.

Sincerely,

/s/ Cory L. Andrews
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