March 1, 2013

VIA EMAIL ONLY

The Honorable David G. Campbell
Chair, Advisory Committee on Civil Rules
Committee On Rules Of Practice And Procedure
Judicial Conference Of The United States
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The Honorable John G. Koeltl
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The Honorable Paul W. Grimm
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RE: ***Comments On Proposed Changes To The Federal Rules of Civil Procedure Under Consideration By The Advisory Committee On Civil Rules.***

Dear Judges Campbell, Koeltl, and Grimm:

The National Employment Lawyers Association (NELA) appreciates the opportunity to submit the following comments regarding certain proposed changes to the Federal Rules of Civil Procedure being considered by the Advisory Committee on Civil Rules. NELA is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state, and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court, other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws, in addition to undertaking other advocacy initiatives on behalf of workers throughout the United States.

NELA writes to highlight the particular, detrimental impact the proposed limits on discovery would have on employees seeking redress in federal court for workplace violations. In employment cases, where employers typically control the information and where claims are fact intensive, discovery serves as a critical tool for plaintiffs to obtain core facts to prove the merits of their case. Drawing upon the collective experience of our members, NELA believes that the new proposed limits under consideration by the Advisory Committee would unduly restrict the amount and form of information that employees need to seek justice for workplace violations.

NELA supports the Committee's work to encourage early discovery such as through the *Initial Discovery Protocols For Employment Cases Alleging Adverse Actions* (Protocols). We believe, however, that further restrictions on discovery—whether through the creation of new numerical limits on forms of discovery or through the reduction of current limits—would fundamentally hinder plaintiffs in employment cases from asserting their statutory rights in court. While we also endorse the goal of the Advisory Committee to create trans-substantive rules of civil procedure, we urge the Committee to bear in mind the disproportionate impact of these proposed changes on plaintiffs in employment cases, whose cases represent a significant portion of the federal civil docket.[1]

While we agree with the Committee's goals of reducing costs and delay in litigation, we note that Federal Judicial Center (FJC) researchers have found that "[e]mpirical research has not provided support for the prevailing view that discovery costs are necessarily the major cost driver in litigation,"[2] and recommended that "[i]nstead of pursuing sweeping, radical reforms of the pretrial discovery rules, perhaps it would be more appropriate to pursue more-focused reforms of particularly knotty issues (such as preservation duties with respect to [electronically stored information]) and additional, credible research on the relationship between pretrial discovery and litigation costs."[3]

With these issues in mind, NELA urges the Advisory Committee to refrain from submitting the Duke Subcommittee rule package in its current form to the Standing Committee and instead asks the Advisory Committee to conduct further empirical research of the impact of the proposed changes on parties, particularly in employment cases as well as other cases involving discrimination and civil rights claims.

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1 Employment cases (primarily filed under code #442, "Civil Rights: Jobs" or "Employment" on the Civil Cover Sheet) comprise one of the largest single categories of federal civil cases. Kevin M. Clermont and Stewart J. Schwab, EMPLOYMENT DISCRIMINATION PLAINTIFFS IN FEDERAL COURT: FROM BAD TO WORSE?, 3 HARV. L. & POL'Y REV. 103, 103-104 (2009). *See also* Ann C. Hodges, MEDIATION AND THE TRANSFORMATION OF AMERICAN LABOR UNIONS, 69 MO. L. REV. 365, 369 & n.27 (2004) (noting that employment cases comprise between 12-14 percent of the federal civil docket and that such cases have "also substantially increased in many state courts.").

2 Emery G. Lee, III and Thomas E. Willging, DEFINING THE PROBLEM OF COST IN FEDERAL CIVIL LITIGATION, 60 DUKE L. J. 765, 779 (2010).

3 *Id.* at 787.

I. NELA Encourages Procedures That Promote Cooperation Among The Parties And Provide For Early Exchange Of Discoverable Information.

NELA supports the Duke Subcommittee's proposals that encourage early discovery, which may reduce costs and delay in litigation. In particular, the following proposals appear to be most beneficial towards achieving these goals: 1) the proposed addition to Rule 26(d)(1)(B) allowing the service of discovery requests before the Rule 26(f) conference; and 2) the amendment to Rule 16(b)(2) that would reduce the amount of time after service of the complaint before a Rule 16 conference can occur, which comports with the early discovery framework of the *Initial Discovery Protocols For Employment Cases Alleging Adverse Action*.

We also support the proposal to bar generalized discovery objections. The proposed specificity requirement being added to Rule 34(b)(2)(B) is a necessary first step towards encouraging parties to refrain from evading discovery on procedural grounds. Likewise, NELA agrees with the proposed addition of language to Rule 34(b)(2)(C) requiring responsive parties to state whether information is being withheld when a party objects to a discovery request. This will aid parties who have little control and access to documents, such as employees, in determining whether further discovery would produce evidence to support their claim.

NELA further concurs with the proposed addition of Rule 16(b)(3)(v), which would permit courts to require an informal conference between the parties before the filing of a discovery motion. This change will encourage cooperation between the parties, reduce gamesmanship, and generally aid in the efficient and speedy resolution of claims.

II. The Federal Rules Of Civil Procedure Provide For Broad Discovery In Order To Facilitate The Open Exchange Of Information In Litigation And To Safeguard Fairness At Trial.

Pre-trial discovery safeguards against procedural injustice and promotes efficiency in litigation because these rules "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[4] The U.S. Supreme Court has long recognized the importance of complete information sharing in our adversarial civil justice system, stating that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[5] To implement this foundational principle, broad discovery rules enable "either party [to] compel the other to disgorge whatever facts he has in his possession."[6] The fundamental purpose of our of civil discovery rules has remained:

> [to] serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for

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4 *United States v. Procter & Gamble, Co.*, 356 U.S. 677, 682, 78 S. Ct. 983, 987 (1958); *accord Midwestern Pet Foods, Inc. v. Societe Des Produits Nestle S.A.*, 685 F.3d 1046, 1055 (Fed. Cir. 2012) ("The central purpose of the federal discovery rules is to avoid surprise at trial.").

5 *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 392 (1947).

6 *Id*.

> ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.[7]

The specific type of numerical restrictions presently under the Advisory Committee's consideration will require parties to spend valuable time and attention on matters collateral to achieving justice.[8] Indeed, broad discovery rules work to improve the efficiency of our courts given that "busy judges, faced with lengthy and growing dockets, necessarily must rely on litigants to present the relevant facts and law governing the disputes that the judges are asked to resolve."[9]

Empirical data from the Federal Judicial Center demonstrates that the problem of outsized costs in litigation is present only for a fraction of cases on the federal civil docket. After conducting several studies, the FJC came to the conclusion that "[d]iscovery is not a pervasive litigation cost problem for the majority of cases" and that "empirical data show that any problems that may exist with discovery are concentrated in a minority of the cases."[10] While recommending that the Advisory Committee forego changes to the federal rules, senior FJC researchers also reported that "[an earlier] project [of discovery reform] may have failed to reduce costs because it does not address the actual drivers of cost"[11] and "because those costs have a source other than the Federal Rules themselves."[12] Because we believe current discovery limits work for the vast majority of cases, we ask that the Advisory Committee refrain from moving forward with the proposed changes to the numerical limits on written and oral discovery, including for depositions, interrogatories, requests for production, and requests for admission.[13]

The Advisory Committee reported to the Standing Committee earlier this year that the Duke Subcommittee made "little call for drastic revision" and "recognized that the rules can be made to work better by renewing efforts to educate lawyers and judges in the opportunities already available."[14] We believe the Advisory Committee should continue to encourage cooperation

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7 *Id*. at 500-01.

8 *See Duke v. University of Texas at El Paso*, 729 F. 2d 994 (5th Cir. 1984) (extensive discovery in employment discrimination cases is necessary and the refusal to adhere to the "liberal spirit" of discovery would be an abuse of discretion); *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, 304-05 (5th Cir.1973) (same); *Sanchez v. Standard Brands, Inc.*, 431 F. 2d 455, 460-61 (5th Cir. 1970) ("procedural technicalities" that impede liberal discovery are improper).

9 *Powers v. Hamilton County Public Defender Com'n*, 501 F.3d 592, 610 (6th Cir. 2007).

10 Federal Judicial Center, "Presentation by FJC Research Division, Emery G. Lee III," slides 2-3 (January 2013).

11 Lee and Willging, *supra* note 2, at 783.

12 *Id.* at 788.

13 NELA recognizes that there are narrow areas where there may be cost management problems in litigation, such as discovery of electronically stored information (ESI) and in complex business-to-business litigation and encourages the Advisory Committee to focus any reform efforts in those areas.

14 Standing Committee Agenda Book, "Advisory Committee on Civil Rules, Report to the Standing Committee," 218 (Jan. 2013).

among the parties to litigation as well as the early exchange of discoverable information with these goals in mind.

III. Discovery Plays A Critical Role In Employment Cases Where Information Is Asymmetrically In The Hands Of Employers.

In the vast majority of employment-related cases, the employer exclusively controls and possesses most evidence, including documents and witnesses. Such information asymmetry is common across cases involving the workplace.[15] This is in contrast to most business-to-business litigation, where each side to the controversy has relevant discovery. Discovery is often the key to finding factual patterns that point to unlawful motive and discriminatory intent in workplace disputes.[16] Limits on discovery are, by the nature of these work-related claims, imposed almost exclusively upon the employees. Great care must be taken to ensure that employers are not able to evade liability through presumptive limits or via delays in production of critical information. Prompt resolution of discovery disputes are essential to cost-effective and fair proceedings.

Employment claims are typically fact-intensive cases in which plaintiffs rely heavily on discovery to build circumstantial evidence needed to prove key elements of such claims.[17] Complete evidence gathering is essential for plaintiffs in these cases.[18] Indeed, "[d]iscovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her."[19]

For example, because most employment discrimination cases lack a "smoking gun," plaintiffs often must rely on circumstantial evidence of discriminatory intent.[20] As Justice Antonin Scalia described the importance of this evidence for the trier of fact in employment cases, "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation

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15 *See Trevino v. Celanese Corp.,* 701 F.2d 397, 405 (5th Cir. 1983) (vacating a protective order in part because "imposition of unnecessary limitations on discovery is especially frowned upon in Title VII cases."); *Flanagan v. Travelers Insurance Co.*, 111 F.R.D. 42, 45 (W.D.N.Y. 1986) (same).

16 *See Lyoch v. Anheuser-Busch Companies, Inc.,* 164 F.R.D. 62, 65 (E.D. Mo. 1995) ("The plaintiff must be given access to information that will assist the plaintiff in establishing the existence of the alleged discrimination.") (citations omitted).

17 Discovery also plays a critical role in gathering circumstantial evidence in other civil rights claims outside of the employment context. *See United States v. Arvizu*, 534 U.S. 266, 273-74 (2002) (emphasizing the importance of reviewing the "totality of the circumstances" in Fourth Amendment claims because "the concept of reasonable suspicion is somewhat abstract").

18 *See McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 804-05 (1973) (a Title VII plaintiff "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for [the adverse employment action] were in fact a coverup for a racially discriminatory decision.").

19 *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 (U.S. 1989).

20 *See Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989); *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159, 1162 (9th Cir. 1984), quoting *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980) ("The presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive.").

of the words used or the physical acts performed."[21] The U.S. Court of Appeals for the Second Circuit, likewise, has stressed that "if unable to engage in discovery, [plaintiff] cannot prove intent, and without proof of intent, he has no case."[22]

Restrictive discovery provides an opportunity for employers, as the keeper of information relevant to employees' claims, to prevent plaintiffs from readily accessing vital evidence related to their workplace claims. As one federal judge explained, "Today's employers, even those with only a scintilla of sophistication, will neither admit discriminatory or retaliatory intent, nor leave a well-developed trail demonstrating it. . . . It is a simple task for employers to concoct plausible reasons for virtually any adverse employment action ranging from failure to hire to discharge."[23] Broad discovery assists plaintiffs to identify evidence which ultimately enables the trier of fact to draw the rational inferences required in employment discrimination claims. Limitations on discovery, conversely, inhibit this crucial information-gathering procedure and prevent plaintiffs from vindicating their statutory workplace rights.

IV. Overly Restrictive Presumptive Limits On Discovery Hinder The Efficiency Of Litigation And Aggravate The Evidentiary Burden On Employment Plaintiffs.

For many plaintiffs in employment cases, discovery limits are already too narrow. Additional constriction of discovery through presumptive limits would increase motion practice of all parties in order to seek leave to depart from these new, restrictive limits. Whereas currently most NELA members report that they generally do not need to request discovery beyond the existing limits, the proposed limits are so restrictive that members tell us they would likely be required to request departures from the proposed presumptive limits in nearly every case. The following rule changes under consideration cause the greatest concern for NELA members:

- imposition of a numerical limit (25) on Rule 34(a) Requests for Production;
- reduction from 10 to 5 of the presumptive limits found in Rule 30(a) and Rule 31(a) on the number of depositions, written or oral, that may be taken;
- reduction from 4 hours to 7 hours in a single day of the presumptive limit under Rule 30(b) on the duration of depositions;
- reduction from 25 to 15 of the presumptive limit in Rule 33 on the number of interrogatories that may be served on another party; and
- imposition of a numerical limit (25) on Rule 36(a) Requests for Admissions.

Formal discovery is critical for the vindication of many statutory workplace rights because, as

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[21] *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 81-82 (1998) (Scalia, J.).
[22] *Gray v. Board of Higher Educ., City of New York*, 692 F.2d 901, 905-06 (2d Cir. 1983).
[23] *Raymond v. U.S.A. Healthcare Center-Fort Dodge, LLC*, 468 F. Supp. 2d 1047, 1054 (N.D. Iowa 2006).

NELA's liaison to the Advisory Committee Joseph D. Garrison commented, "in many states lawyers representing plaintiffs are ethically restricted from contact with various corporate executives or other employees" and clients "are forbidden by corporate policy to remove documents from the workplace[.]" Without broad rule-based discovery, plaintiffs with meritorious claims may be unable to obtain information required to prove their claim.

Importantly, limitations on discovery may make it economically infeasible for many NELA members working on a contingency fee basis to accept fact-intensive employment matters where discovery needs are high but the likelihood of successfully obtaining necessary information through discovery is low. As NELA member James Carroll, who practices in Western Pennsylvania, commented, "Plaintiffs' attorneys have no interest whatsoever in unnecessary discovery…[A] Plaintiff's attorney working on a contingent basis will be strongly discouraged from taking any case which does not have significant merit…and in an employment case will be motivated to do only that discovery which is absolutely necessary and nothing more. For employment cases to make any financial sense, the Plaintiff's attorney must do them as economically and efficiently as possible." As Christian Bagin, another NELA member who practices in Pennsylvania, wrote in his comments to the Advisory Committee, "an increase in shared information always encourages settlement" and "[i]n the absence of a completely developed record, the parties will be more willing to try cases that are currently being settled."

Each proposed limit on discovery should be evaluated within the whole discovery framework of the Federal Rules of Civil Procedure because a reduction in one manner of discovery compels the need for other forms of discovery. For example, as the president of NELA's New Hampshire affiliate, Lauren S. Irwin, commented, "limiting the number of requests for production will actually increase the need for additional and longer depositions."

Furthermore, an empirical study by University of Colorado Professor Scott Moss, who also maintains a plaintiff's employment law practice, concluded that stricter discovery limits make it more difficult for plaintiffs to prove the merits of their case when the nature of those claims is fact-intensive.[24] With tighter discovery limits, plaintiffs will have difficulty signaling to the court that their claim is meritorious when facing a motion to dismiss or a motion for summary judgment.[25] Although parties could request discovery beyond any presumptive limit, judges are

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[24] Claims requiring proof of intent, such as employment discrimination cases and those that rely on technical information and experts, are examples of such fact-intensive matters that would be hampered by further restrictions on discovery. *See* Moss, Scott, LITIGATION DISCOVERY CANNOT BE OPTIMAL BUT COULD BE BETTER: THE ECONOMICS OF IMPROVING DISCOVERY TIMING IN A DIGITAL AGE, 58 DUKE L. J. 889, 910, 910-15, 921-27 (2009) (using game theory to show that judges, who lack complete information about the merits of a claim prior to discovery, cannot implement discovery limitations without erroneously dismissing or finding summary judgment against meritorious claims). Professor Moss argues that although limitations on discovery and proportionality limits may help reduce unneeded litigation costs, these limitations on discovery are optimal "only if courts can perform the needed economic cost-benefit analyses passably well." Professor Moss concludes that "courts cannot undertake the needed analyses [of the proportionality principle] well—which means that discovery limits are doomed to be suboptimal." *Id.* at 911. Professor Moss has submitted comments to the Advisory Committee on the current proposals under consideration.

[25] Describing the problem of signaling the merits of plaintiff's claim, Professor Moss explained:

placed in the unenviable position of having to "discern[] the probative value of evidence before discovery of that evidence."[26] For example, "[n]obody knows in advance what a witness will say in a deposition, making it difficult to assess the probative value of going beyond the ten-deposition limit."[27] Moreover, because many individual employment discrimination cases and civil rights cases tend to fall within the current numerical limits but above the new restrictions under consideration, Professor Moss' study concludes that stricter discovery limits will tend to force these kinds of cases out of federal courts through reduced initial filings, motions to dismiss, summary judgment, or settlement because workers and other civil rights plaintiffs will lack the discovery needed to prove their merits of their claims.

a. Limits On Rule 34(a) Requests For Production Would Result In Broader Requests And Intensify Pre-Trial Disputes.

Proposed changes to Rule 34(a) would fundamentally alter the manner in which parties approach discovery and trial, especially in employment cases where plaintiffs lack requisite information to pursue meritorious claims effectively and are dependent on information produced during discovery. Under the current federal discovery rules, parties can craft specific, narrow requests without fear of impeding presumptive numerical limits. If a limit on Rule 34(a) production is imposed, requests will by necessity become much broader, reducing clarity about which documents employers should produce and resulting in objections by savvy defendants that will evade the production of otherwise relevant information on the basis of the breadth of the request. As many NELA members have witnessed in disputes over interrogatories, which currently carry a presumptive limit, defendant-employers tend to focus on disputes over parts and subparts of requests solely on grounds that requests have exceeded numerical limits rather than offering meritorious grounds for objection.

The problems stemming from broader Rule 34(a) requests were underscored in comments submitted by Eric Smith, a NELA member who practices in Missouri. Mr. Smith wrote that limits on Rule 34(a) requests "will also increase the likelihood of very broad, all-encompassing requests that in turn will lead to more frequent disputes and related motions practice regarding such disputes, because it will be harder to ascertain what is being requested, and harder to determine whether a given response is complete or a given objection is well-founded." NELA agrees with his conclusion that "submitting a greater number of specifically tailored document requests by both plaintiffs and defendants in employment litigation leads to a clearer picture of what is being requested and where the objections lie, and therefore speeds up the discovery process and typically makes it easier for the parties to resolve disputes among themselves."

> In game theory terms, a decision (here, court discovery rulings) must [be] base[d] on some measure of merit (often in game theory the value of a good for sale, but here the merits of parties' claims) that parties try to communicate. But during discovery, it is hard for courts to tell which cases truly have merit because all the evidence has not yet been gathered. Even if all the evidence had been gathered, courts cannot review all of a case's evidence (essentially holding a minitrial) just to resolve a discovery dispute. *See id.* at 921, 921-27.

[27] *Id.*

Another NELA member, Andrew H. Friedman from Southern California and author of an employment law treatise, [28] noted that without robust discovery, [his firm] would not have been able to prepare our case or defend against the defendant-employer's motion for summary judgment." Mr. Friedman went on to state that "[l]imiting discovery will further encourage gamesmanship as defendant-employers will understand that if they merely thwart a few discovery requests, the plaintiff-employee will be unable to propound additional requests that might get to the sought after information in a different manner."

The Subcommittee noted that the problem with tallying requests would lead parties to reframe requests more broadly.[29] As plaintiffs broaden discovery requests to comport with the new presumptive limits, defendants will likely fight as vigorously over counting parts and subparts of Rule 34 requests for production as is their current practice with respect to interrogatories.

Contrary to its intended purpose, the addition of limits on Rule 34(a) requests for production will increase the burdens on the court and parties, expand opportunities for gamesmanship, and cause inefficiencies both before trial as disputes proliferate and during trial as parties lack complete information to properly present their cases before the trier of fact.

b. Rule 30(a) And Rule 31(a) Reduction Of Presumptive Limit On Depositions Are Lower Than NELA Members Typically Require In Employment Cases.

Reducing the presumptive number of depositions in Rule 30(a) and Rule 31(a) would be burdensome for plaintiff-employees who typically require more than 5 depositions because of the prevalence of multi-layered decision-making and plaintiffs tend not to have ready access to witnesses, like co-workers and supervisors, outside of depositions.[30]

The U.S. Supreme Court emphasized that "deposition-discovery rules are to be accorded a broad and liberal treatment" because they prevent "fishing expeditions" at trial and lead to more efficient court proceedings.[31] NELA member Martin Levin, who practices in Massachusetts, wrote on behalf of himself and his firm, Stern Shapiro Weissberg & Garin LLP, in comments submitted to the Advisory Committee that "deposition is the most vital discovery tool" for employment and civil rights plaintiffs:

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[28] *See* Andrew H. Friedman, LITIGATING EMPLOYMENT DISCRIMINATION CASES, (James Publishing).

[29] *See id.*

[30] Numerous NELA members commented that they are required to conduct more than 5 depositions in most of their cases. Mr. Friedman commented that in order to develop a case or oppose motions for summary judgment adequately, his firm "take[s] significantly more than 5 depositions (and almost all of the depositions are much longer than 4 hours)." Mark Johnson, a NELA member from Pennsylvania, pointed out in his comments that "if a board of directors [or committee] is involved [in an adverse employment decision] …then the number of people to be deposed easily and regularly exceeds 5." James Carroll, another NELA member from Pennsylvania, wrote that the number of decision-makers in an employment case typically ranges between three and seven people, each of whom need to be deposed.

[31] *Hickman*, *supra* note 5, at 507.

in eliciting evidence that may support claims or defeat summary judgment; in explaining the import of documents and developing the necessary foundation to have them admitted into evidence; and in learning the roles and responsibilities of other witnesses to permit us to make educated decisions about the need to depose them, and how best to prepare for each subsequent deposition.

c. Reduction Of Presumptive Duration Of Depositions To 4 Hours Would Render It All But Impossible To Obtain Information Controlled By Defendant-Employers.

Reducing the number of hours allowed for each oral deposition from 7 to 4 would create a hardship for employee-plaintiffs because these plaintiffs often lack the ability to interview witnesses informally. Relevant witnesses are typically supervisors, co-workers, human resource officers, or other individuals controlled by the employer. Without informal access to witnesses before discovery, plaintiff-employees must use depositions to evaluate the usefulness of a particular witness. During depositions, plaintiffs must take time to move progressively from broad to narrow questions in order to establish a witness's specific knowledge. Paired with changes to Rule 30(a), total hours available for depositions would be reduced from 70 to 20 hours, a reduction by over two-thirds.

As NELA member Jonathan M. Feigenbaum from Massachusetts stated in his comments to the Advisory Committee, "[t]he cost savings by shaving 3 hours from a deposition is not that tremendous when weighed against the need for securing information." Moreover, parties will need to spend additional, valuable time preparing for depositions in order to ensure they can reach their information gathering goals within the new time limit. This additional preparation time will likely negate any potential cost savings to be realized from a change of Rule 30(b).

NELA member Christine Elzer, who practices in Pennsylvania, explained in her comments to the Advisory Committee how depositions easily last a full 7 hour day in employment cases where plaintiffs have long work histories. Moreover, she wrote that the length of depositions can easily exceed the proposed 4 hour limit when defendant-employers produce thousands of pages of documents in Rule 26 initial disclosures, because witnesses aid plaintiffs in making determinations on the value of the information produced.

As a result of the imbalance of information in employment cases, plaintiff-employees cannot make determinations before scheduling a deposition about which witnesses will require more than 4 hours of questioning. Plaintiffs would be required to appeal blindly to the court for time beyond the 4 hour limits. NELA expects that courts would be unwilling to depart upwardly from the Advisory Committee's proposed depositions limits merely based on hunches and guesswork.

d. Rule 33 Reduction Of Presumptive Limit On Interrogatories Would Exacerbate Preexisting Discovery Disputes.

The proposed reduction of the numerical limit on interrogatories in Rule 33 would aggravate disagreements over tallying requests towards the presumptive limit. Plaintiffs who lack control over information would frequently be required to create broad (or overly broad) interrogatories to ensure that they receive responsive answers. Replying with stock objections, defense counsel could then refuse to answer interrogatories by starting disputes over the simple addition of parts over subparts.

e. Rule 36(a) Creation Of Presumptive Limits On Requests For Admissions Would Increase Trial Burdens On NELA Members.

Proposed creation of limits on Rule 36(a) requests for admission would increase the burden on NELA members in their preparation for trial. Plaintiffs in employment cases use requests for admissions to simplify the process of authenticating documents that are in the possession and control of the employer. For example, under the current rules, plaintiffs could easily exceed the proposed limit on requests for admission if they seek to admit emails between and among management officers. If multiple officers are courtesy copied on a single email, the number of individual requests for admission will accumulate rapidly. Defendant-employers are often reluctant to provide this type of information absent a request to admit.

Like the problems of collateral disputes that parties already face with numerical limits on interrogatories, limits on the requests for admissions would serve as another place for tangential litigation fights. Where parties have been unable to secure admissions as to the authenticity of evidence in control of the opposing party, these disputes will spill over into the courtroom and make for lengthier, less efficient trials, providing the plaintiff-employee is able to overcome summary judgment.

V. The Advisory Committee Should Clarify That Any Changes To Rule 26(b) Do Not Alter The Preexisting Scope Of Discovery.

The proposed change to Rule 26(b) would remove well-understood language regarding the scope of discovery ("[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence"), and replace it with "[i]nformation within the scope of discovery sought need not be admissible in evidence to be discoverable" in addition to new limitations based on proportionality.

NELA draws to the Advisory Committee's attention comments submitted by NELA member Martin Levin and his firm (see above), which discussed the above changes to Rule 26(b)'s scope of discovery:

> The proposed change to Rule 26(b)(1) radically reduces the very universe of discoverable matter. It limits, by rule, the scope of discovery by introducing a

> vague concept of "proportionality" and the cost-benefit analysis now made by the court pursuant to Rule 26(b)(2)(C)(iii). Not only will these changes fall most harshly on the party in need of discovery, but they will introduce a new source of delay and expense associated with the discovery process. This delay and expense will derive from the fact that one party's view of proportionality, and the costs and benefits of any discovery request, will be a function of whether one is seeking the discovery or seeking to avoid it. Furthermore, the party seeking the discovery will be at a marked disadvantage in addressing objections based on scope, since (1) it is often difficult to gauge the relative importance of information until one possesses and can review it within the larger context of the case, and (2) the requesting party will have difficulty testing the objecting party's assertion of cost of production. (emphasis original).

Implementation of a proportionality analysis under Rule 26(b)'s scope of discovery would have a one-sided, adverse impact on workers in employment cases who lack access to information in possession of the employer. These plaintiffs would have to respond to new objections based on proportionality, while being in the dark about the costs or value of information not yet produced.

We encourage the Committee to either retain the current language of the rule or clearly state in a note that the new language of Rule 26(b) is not meant to change the meaning of the permissible scope of discovery. Moreover, we ask that the Committee emphasize that the new proportionality factors merely seek to provide guidance about what courts can weigh in their deliberative analysis of discovery objections.

VI. NELA Urges The Advisory Committee To Adopt Additional Mechanisms To Encourage The Early Exchange Of Information Similar To The *Initial Discovery Protocols*.

NELA is concerned that the new presumptive numerical limits on discovery being contemplated by the Advisory Committee run counter to the spirit of efforts to streamline the discovery process, for example, through the adoption of early discovery protocols as delineated in the *Initial Discovery Protocols for Employment Cases Alleging Adverse Actions* (Protocols). As the Committee is aware, NELA worked with members of the employment defense bar, the Institute for the Advancement of the American Legal System, and judges from the Advisory Committee to negotiate and draft pattern discovery requests in support of the creation of the Protocols. The Protocols provide for early, initial discovery specific to employment cases alleging adverse action. This early round of information exchange was intended to replace disclosures under Rule 26, but no one envisioned that they would count against any numerical limit on discovery or preclude later discovery as needed in individual cases. While the parties' subsequent right to further discovery under the Rules is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship. Given the common agreement among employee advocates, management representatives, and members of the Advisory Committee about the utility of the Protocols to achieve these goals, NELA believes the Committee would find it useful to use the

Protocols as a case study for how the new presumptive limits may play out in reality. Assuming *arguendo* that the categories of documents in the Protocols mimic the type of requests for production of documents that might be served in a case where a plaintiff alleges termination from employment based on her gender and retaliation for complaints about discrimination under Title VII of the Civil Rights Act of 1964, a plaintiff could easily exceed the proposed limit of 25 requests for production of documents. Assume further that the Protocols have not been adopted by the judge who has been assigned to hear this case. Under the Protocols, the defendant is required to produce documents to the plaintiff in the following categories:

a. All communications concerning the factual allegations or claims at issue in this lawsuit among or between:
    i. The plaintiff and the defendant;
    ii. The plaintiff's manager(s), and/or supervisor(s), and/or the defendant's human resources representative(s).

b. Responses to claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.

c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.

d. The plaintiff's personnel file, in any form, maintained by the defendant, including files concerning the plaintiff maintained by the plaintiff's supervisor(s), manager(s), or the defendant's human resources representative(s), irrespective of the relevant time period.

e. The plaintiff's performance evaluations and formal discipline.

f. Documents relied upon to make the employment decision(s) at issue in this lawsuit.

g. Workplace policies or guidelines relevant to the adverse action in effect at the time of the adverse action. Depending upon the case, those may include policies or guidelines that address:
    i. Discipline;
    ii. Termination of employment;
    iii. Promotion;
    iv. Discrimination;
    v. Performance reviews or evaluations;
    vi. Misconduct;
    vii. Retaliation; and
    viii. Nature of the employment relationship.

h. The table of contents and index of any employee handbook, code of conduct, or policies and procedures manual in effect at the time of the adverse action.

i. Job description(s) for the position(s) that the plaintiff held.

j. Documents showing the plaintiff's compensation and benefits. Those normally include retirement plan benefits, fringe benefits, employee benefit summary plan descriptions, and summaries of compensation.

k. Agreements between the plaintiff and the defendant to waive jury trial rights or to arbitrate disputes.

l. Documents concerning investigation(s) of any complaint(s) about the plaintiff or made by the plaintiff, if relevant to the plaintiff's factual allegations or claims at issue in this lawsuit and not otherwise privileged.

m. Documents in the possession of the defendant and/or the defendant's agent(s) concerning claims for unemployment benefits unless production is prohibited by applicable law.

n. Any other document(s) upon which the defendant relies to support the defenses, affirmative defenses, and counterclaims, including any other document(s) describing the reasons for the adverse action.

Counting each general category of documents (a–n) yields 14 requests. In addition to counting each general category towards the proposed Rule 34(a) limit and given NELA members' experience with defense counsels' frequent objections to interrogatories, it is likely that the subparts (a(i)–a(ii) and g(i)–g(viii)) would be counted against the numerical limits as separate requests for production. Doing so would bump the number of requests up to 24 total, leaving just 1 additional request under the proposed 25 request limit on Rule 34(a). In this scenario, what happens with plaintiff's retaliation claim for which she is entitled to the same categories of information? While some of the above categories are likely to overlap between the claims and be relevant both to her termination and retaliation claims, there are categories where separate evidence, including documents, must be sought on the two claims, such as communications about the facts related to each claim and documents the defendant relies upon to support its defenses. Thus, the plaintiff will exceed the number of document requests to be presumptively permitted by the proposal before the Committee. As we note above, it is likely that our members will need to seek relief from the presumptive limits in virtually every case of employment discrimination they bring on behalf of aggrieved employees. These categories of documents are designed to be an initial or first round of discovery and are not meant to encompass the universe of relevant and discoverable documents that a party in an employment matter might be entitled to in any given case. This initial round is meant merely to narrow the issues in dispute and provide

the parties with a greater understanding of the facts of the case in order to potentially achieve settlement of the dispute.

In sum, NELA strongly encourages the Committee to reconsider the imposition of new and additional limits on discovery for all the reasons stated herein. We believe that further study of the potential impact of these limitations on the ability of parties to prove their claims and to assist the court in its fact-finding role should be conducted.

NELA appreciates the opportunity to comment on the proposed regulations, and wishes to thank the Advisory Committee for its attention and consideration.

Sincerely yours,

Rebecca Hamburg Cappy
Program Director