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Corporate Representative Depositions: Selection and Preparation

By Carter E. Strang and Arun J. Kottha

The selection and preparation of a corporate representative in response to a Rule 30 (b)(6) notice is of critical importance to the success or failure of the deposition. In this article—the second in a series on 30 (b)(6) depositions—important considerations in selection and preparation of a corporate representative will be discussed.1

Rule's Applicable Language

Rule 30 (b)(6) states, in applicable part, it is the noticed corporation's obligation to:

> [D]esignate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each such person designated, the matters on which the person will testify.
>
> . . .

Pursuant to the Rule, the noticed corporation is obliged to provide "one or more" officers, directors, agents, employees or "other persons" (which may include former employees, experts, etc.) who "consent to testify" on its behalf in response to "matters known" or "reasonably available" to it. Once selected, such corporate representative(s) shall be "designated" (identified) as to each area of inquiry via a written response to the 30 (b)(6) notice.2

Counsel for the noticed corporation should take advantage of the opportunity to select and prepare the representative, who can then provide a compelling case as the "face" of the corporation. On the other hand, disaster can result for the noticed corporation where the selection or preparation is inadequate, leading to inaccurate testimony binding on the corporation, disclosure of work product/attorney client information, and/or sanctions.3

Duty to Provide a Knowledgeable Representative

The responding party has an obligation to: 1) "designate a deponent who is knowledgeable on the subject matter identified as the area of inquiry," 2) select "more than one deponent if multiple deponents are necessary to respond to all of the relevant areas of inquiry," 3) "prepare the deponent so that he or she can testify on matters not only within his or her personal knowledge, but also on matters reasonably known by [it]," and 4) "if it becomes apparent during the deposition that the designated deponent is unable to respond to the relevant areas of inquiry, [it] has the duty to substitute the designated deponent with a knowledgeable deponent."4

It is counsel for the noticed party, not counsel for the noticing party, that selects the representative(s) who will testify to the items in the notice. Thus, where counsel for the noticing party names—in its 30 (b)(6) notice—a specific corporate representative, requests a representative with "personal knowledge," or requests the person(s) "most knowledgeable," such notice is improper.5 The Rule simply does not require such representatives be provided.6

Because the noticing party has a right under the Rule to know the noticed corporation's position on the items in the notice, the noticed corporation has "a duty to gather reasonable available information" to educate a representative—and thereby "create a spokesperson" if necessary—to be able to testify on behalf of the corporation.7 The duty to educate means the noticed corporation must engage in "due inquiry," including searching its files and conducting interviews of its employees and officers, so that the representative is prepared to and can answer the questions "fully, completely, and unevasively."8

Corporate representative deposition responses of "I don't know" or "I don't remember/recall" equate to a failure to appear, creating a duty to substitute someone who does know or to the imposition of other sanctions.9 Courts frown on corporations that try to play "hide the ball" with their representative by designation of someone with no knowledge where it is clear that others with knowledge could have been provided and were not.10 However, for sanctions to be warranted "the inadequacies in a deponent's testimony must be egregious and not merely lacking in desired specificity in discrete areas."11

In a Southern District of Ohio case, the noticed party's representative knew "little or nothing" about many of the subjects described in the notice, which resulted in the noticing party filing a motion to compel.12 The court held the noticed corporation failed to meet its obligation to provide "an informed spokesperson" in response to the items in the notice so that the goal of "effective discovery" would not be thwarted.13 It barred any later testimony by the corporation as to those responses that constituted a complete failure to respond, and ordered a replacement witness for those that were insufficiently answered.

In the best of circumstances, finding and preparing a corporate representative for deposition presents a challenge, but for certain types of cases (mass tort, environmental, etc.) with a long latency period and/or as a result of economic downturn, it may not be possible to find representatives with actual knowledge of some or all of the items in the notice.14

Commenting on this problem, one author noted after adoption of the Rule, "[o]rganizations began to discover that they simply did not employ persons with knowledge of the facts, as contemplated by the Rule" made worse by "the economic upheavals which began in the 1970s and resulted in lay-offs, downsizing, mergers and bankruptcies," which caused many corporations to "come up empty" when faced with the need to respond to a Rule 30 (b)(6) notice.15

In such situations, counsel for the noticed corporation may need to look to sources of information outside the corporation (former employees and officers, etc.) for use in educating the corporate representative and/or consider using such persons as their representative(s).16

It is generally held that a company cannot be "required to designate a retired employee to serve as a 30(b)(6) designee, because 'it cannot be supposed that ... former employees would identify their interests with those of their former employers to such an extent that admissions by them should be held to bind the employer.'"17 Therefore, the noticed corporation is not obliged "to produce a non-party, such as a former employee, as a witness at a 30(b)(6) deposition," however it may at its option.18 Such optional use of a former employee or any other person as a designee is fully permissible under the Rule.19 As a last

resort, where information is simply unavailable, the noticed corporation may assert its lack of corporate “memory”; however, in such cases, if the corporation intends to rely on third party testimony or documentation, the corporate deponent “must present an opinion as to why the corporation believes the facts so construed.”20

Sometimes the person best able to provide information to the corporate representative is counsel for the noticed corporation.21 That counsel’s involvement, while central to proper preparation, needs to be considered in light of work product and attorney-client issues that are attendant to such preparation. These issues are the subject of the next article in this series.

Approaching a Rule 30 (b)(6) deposition like any other is a mistake. It will require more preparation time than a “typical” deposition because of its special nature, some of which has been addressed above (for example, a representative needs to be provided for every issue in the notice, even if lacking any personal knowledge). Information, including company records, prior depositions, and interviews with current and perhaps former employees/officers, will have to be located, reviewed, and analyzed so that the “corporate knowledge” regarding the noticed items is sufficiently clear to enable the representative to adequately prepare.22 The potential representatives will then need to be screened, selected and prepared.

This process is likely to be very time consuming, so preparation for a 30 (b)(6) deposition should begin when the litigation is first filed, not upon receipt of the notice. Waiting until receipt of the notice will place counsel in a “catch up” mode that makes successful preparation less likely. Counsel is advised—even in the absence of a notice—to identify the likely issues that will be listed and engage in preparatory steps with the corporate client to anticipate such notice.23 Such requested testimony for which the witness should be prepared includes the corporation’s “subjective beliefs and opinions” including the corporation’s “interpretation of documents” and its opinion on why facts should be construed a certain way.24

Selection of a representative is, clearly, of critical importance. As noted, it is the corporation’s right—within limits, as discussed above—to select as its representative the person it feels “best suited” to be its spokesperson.25 Factors to consider include not only familiarity with the noticed items, but also the person’s demeanor and appearance, familiarity with the litigation process, and the ability of the representative to fully devote the time and energy necessary to become fully prepared to testify and to work cooperatively with all involved with that process.26

In considering the number of representatives to use, time limits for such depositions should be considered. Each corporate representative deposition is limited to one day of seven hours of questioning without stipulation or leave of court.27 However, where a single person is deposed in their personal and corporate representative capacities, presumptively two separate seven hour periods apply.28 Further, for the purposes of the ten-deposition limit noted in the Civil Rules, a 30(b)(6) deposition counts as one, irrespective of how many people testify to fulfill the notice.29
It is important for counsel for the noticed corporation to control the selection and preparation process, including who talks to whom, about what, when, and in whose presence. A failure to control the process can exacerbate already problematic attorney-client and work product issues with such depositions.30

Scope of Testimony
In preparing the corporate representative, it is important to be aware of the permissible scope of the 30 (b)(6) deposition.

Generally, the scope of a Rule 30 (b)(6) deposition is as broad as Federal Rule 26 (b)(1) for the areas referenced in the notice. Thus, the corporate representative can be asked about

any personal knowledge such person may have about the items referenced in the notice.31 It is therefore imperative that as part of the preparation of such witness, counsel for the noticed party inform the witness of this fact, then discuss what personal knowledge the witness may have.

There is a split of authority as to whether the corporate representative must answer questions about which the deponent has personal knowledge but which are outside the scope of the notice.32 Cases restricting questioning to the items identified in the notice state that to permit broader questioning would render the notice's "reasonable particularity" language meaningless.33 Those permitting broader questioning note that Rule 30 (b)(6) was drafted to augment Rule 26, not replace it, and does not bar such inquiry.34 Where it is permitted, the noticing party cannot allege "inadequate preparation" and request a different corporate representative be provided as to areas outside the notice.35 Counsel for the noticed corporation should also discuss with the representative—as a component of the preparation process—how such questions will be handled at the deposition.

However, where the corporate representative is an officer or managing agent, and does answer questions based on personal knowledge that are outside the notice, the responses are binding on the corporation.36

Binding Testimony

As noted, the testimony of the corporate representative is binding on the corporation. However, it does not constitute a judicial admission on that party.37 Generally, a 30 (b)(6) deposition is "evidence that, like any other deposition testimony, can be contradicted and used for impeachment."38 However, a defendant corporation could not admit evidence showing it did not manufacture the product at issue to contradict the corporate representative's testimony that it had manufactured it, "absent showing that the company did not have access to relevant facts before the 30 (b)(6) deposition, or that the representative was confused or made an honest mistake."39

Judge O'Malley of our Northern District Court similarly permitted the admission of testimony by a corporate representative that contradicted the 30 (b)(6) testimony of its corporate representative, noting that "[g]enerally testimony from a 30 (b)(6) witness can be contradicted or used for impeachment at trial, just like any other deposition testimony."40 However, Judge O'Malley drew a distinction between "more-responsive" and "non-responsive" corporate representative testimony, with the former being excludable:

[I]t is only when a party first provides a non-responsive 30 (b)(6) deponent and later tries to call a more-responsive witness at trial that courts have excluded the witness.41

Thus, under such an analysis, providing a "responsive" 30 (b)(6) witness takes on an even more importance, because the responsive—but mistaken—testimony can be addressed by a later corporate witness; whereas, a failure to provide a "responsive" witness can negate such an attempt.

Duplicative Testimony/Documents

In responding to a 30 (b)(6) notice, the noticed corporation should consider designating prior deposition testimony and/or discovery response as responsive and binding on it, possibly obviating the need for a live witness to testify on the same subjects.42 The party responding to the notice should do so by way of objection in response to the notice, asserting that the item(s) in the notice are duplicative, citing the prior testimony/documents.43 If not done prior to the deposition, the noticed corporation risks losing the potential objection.44

If the noticing party receives such an objection, it should thoroughly analyze the proffered testimony/documents and determine whether it does, in fact, provide "verbatim" responses to the noticed items.

Courts are, however, reluctant to restrict the right of a party to conduct 30 (b)(6) depositions even where prior relevant depositions and documents may be available, though the decisions appear to be case-sensitive.45

Conclusion

Rule 30(b)(6) provides the mechanism for taking the deposition of a corporate representative. Such testimony is "binding" on the corporation. It is critical that the party responding to the notice provide a knowledgeable representative. Such preparation is likely to require considerable time and effort on the part of the corporate counsel to adequately prepare the witness, who may know little or nothing about the noticed items before such preparation. Adequate preparation includes inquiry about any personal knowledge the representative may have outside the notice and advance discussion about how counsel will direct the representative to respond to such inquiry. Counsel should also determine whether the notice is duplicative of prior discovery and whether to offer any such discovery in place of the noticed deposition, in whole or part.

Endnotes

1The first article was Corporate Representative Depositions: Notice Provisions of Rule 30 (b)(6)," co-authored by Carter E. Strang and Arun J. Kottha and published in the Spring, 2009 Inter Alia. It is available on the Chapter's Web site (www.fba-ndohio.org). As was true in the first article, "notice" shall be inclusive of subpoenas issued to non-parties, and the word "corporation" shall be inclusive of all the entities that can be noticed.

2The noticed corporation may designate as many representatives as necessary to enable it to fully respond to the notice. See Phillips v. Manufacturers Hanover Trust Co., 1994 WL 116078, at *5 (S.D.N.Y.); U.S. v. Taylor, 166 F.R.D. 356, 360-361 (M.D.N.C. 1996). Time limit issues are discussed below.

3One commentator described the danger as the "modern equivalent to the Trojan horse" because the process seems innocent enough and too often is not sufficiently addressed by counsel for the corporation. See Bradley M. Elbein, How Rule 30 (b)(6) Became A Trojan Horse: A Proposal for a Change, FICC Quarterly, Vol. 46, No. 3, 365-378 (Spring 1996) (noting with particularity the work product and attorney client issues arising from preparation of such representative(s)).

4U.S. ex rel Fago v. M & T Mort.Corp., 235 F.R.D. 11, 22–23 (D. D.C. 2006).

5Jerold Solovy & Robert Byman, Discovery: Invoking Rule 30 (b)(6), NAT'L L.J., Oct. 26, 1998 at B13 (col. 1).; Gucci America Inc. v. Exclusive Imports Int'l, 2002 WL 1870293, at **8-9 (S.D.N.Y.) ("marginally adequate" witness was sufficient and did not require production of witness with actual knowledge); Cruz v. Coach Stores, Inc., 1998 WL 812045, at *6 (S.D.N.Y.), vacated on other grounds by 202 F.3d 560 (2d Cir. 2000) (a prepared, not "most knowledgeable," witness is the Rule's requirement); Reed v. Bennett, 193 F.R.D. 689, 692 (D. Kan. 2000) (noticed party "is not required to designate someone with 'personal knowledge' to appear on its behalf at the Rule 30(b)(6) deposition."); but see discussion supra regarding a failure to provide a "responsive" witness, particularly where others were available but not produced. S.I. Schenkier, Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30 (b)(6), Litigation, Vol. 29, No. 2, 23 (Winter 2003) (Magistrate Judge Schenkier of the Northern District of Illinois notes "you can search high and low in Rule 30 (b)(6) and not find a requirement that the corporation produce the 'most knowledgeable witness' "); Henry L. Hecht, Effective Depositions, 54 (1997) (need only provide deponent who can provide "complete, knowledgeable, and binding answers").

6Absent the egregious circumstances of the type seen in Bucher, infra., the noticed corporation is generally free to select who it wants as its corporate representative, as discussed more fully below.

7Elbein, supra, at 368.

8See Candance A. Blydenbough, Picking and Preparing Your Corporate Witness for Rule 30 (b)(6) Depositions, Practical Litigator, Vol. 13, No. 4 (July 2002). Mitsui v. Puerto Rico, 93 F.R.D. 62, 67 (D.P.R. 1981); see also Poole ex rel. Elliott v. Textron, Inc., 192 F.R.D. 494, 504 (D.Md. 2000)("[A] corporation served with a Rule 30(b)(6) notice of deposition has

a duty to produce such number of persons as will satisfy the request [and] more importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of the corporation")(internal citation and quotation omitted).
9Taylor, supra. at 360-61 ("do not know" responses equate to a failure to appear); Barron v. Caterpillar, 168 FRD 175, 177 (E.D. Pa. 1996) (Rule 30 (b)(6) creates a duty to substitute—even if corporation had a good faith belief that the witness could properly respond); see also Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. 121, 126 (M.D.N.C. 1989); Mark A. Cymrot, The Forgotten Rule, Litigation, Vol. 18, No. 3 (Spring 1992); but see EEOC v. American Int'l Group, Inc., Not Reported in F.Supp., 1994 WL 376052, at *3 (S.D.N.Y.) (deponent's inability to answer questions about the contents of an investigative file was not in violation of duty to adequately prepare because Rule 30 (b)(6) "is not designed to be a memory contest …[and it is unreasonable] to expect any individual to remember every fact in an EEOC investigative file.").
10FDIC v. Bucher, 116 FRD 196, 199 (ED Tenn. 1986) aff'd, 116 FRD 203 (1987) (corporation engaged in "intransigent behavior," where it withheld a key "six-part memorandum" from the designated representative who was completely unprepared to discuss it where the employees who prepared the memorandum were available to testify about it); Resolution Trust v. Southern, 985 F. 2d 196, 196-198 (5th Cir. 1993) (sanctions were appropriate where the corporation possessed documents clearly identifying an employee as having personal knowledge of the subject of the deposition, but where it did not furnish those documents or designate the employee until after it had designated two other employees "who possessed no knowledge relevant to the subject matters identified in the Rule 30(b)(6) notice").
11Kent Sinclair and Roger P. Fendrich, Discovering Corporate Knowledge and Contentions: Rethinking Rule 30 (b)(6) and Alternative Mechanisms, 50 Ala. L. Rev. 651, 674 (1999) (internal quotation and citation omitted).
12Prosonic Corporation v. Stafford, 2008 WL 2323528, at *1-2 (S.D. Ohio).
13Id.
14The notice may, as an example, request a representative to identify all company practices or procedures that go back some half-century or more ago.
15Elbein, supra, at 367-368.
16See Kiryas Joel Local Dev. Corp. v. Insurance Co. of North America, 1991 WL 41667, at *2 (S.D.N.Y. 1991) (use of former employee who consents to testify).
17Sinclair and Fendrich, supra, at 665 (internal quotation and citation omitted); Lapenna v. Upjohn Co. 110 F.R.D. 15, 23 (E.D. Pa. 1986); but see Sierra Rutile Ltd. v. Katz, 1995 WL 9312 (S.D.N.Y.) (court ordered use of former employee as corporate representative).
18Sinclair, supra.
19Id.
20Taylor, supra, at 361.
21The same can be said for in-house counsel for the noticed corporation.
22Dravo Corp. v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 75 (D. Neb. 1995); see also Buycks-Roberson v. Citibank Federal Sav. Bank, 162 F.R.D. 338, 343 (N.D. Ill. 1995).
23Such efforts can nicely dovetail with other discovery preparation (responses to interrogatories, requests for production, etc.).
24Joseph W. Hovermill and Matthew T. Wagman, When Nobody Knows What the Company "Knows": A Look at the Options Available to a Company in Meeting its Rule 30 (b)(6) Obligations While Protecting its Best Interests, For the Defense, Toxic Torts and Environmental Law, DRI, 52-56 (Nov 2008).
25See n. 8, supra (duty to provide person who can provide "meaningful" information about the noticed issues, not the "most knowledgeable"). American Bar Association Civil Discovery Standards, §V(19).
2630 (b)(6) depositions are usually videotaped by the noticing party and as a result, have a "long shelf life," which makes the representative's appearance and demeanor even more important. Blydenburgh, supra, provides a nice practical overview of the selection and preparation process, including how to work with in-house counsel, including a "check list" for the process.
27Siegrun D. Kane, Trademark law: a practitioner's guide §14.17.3 (4th Ed. 2002) (citing

Fed. Civ. R. 30(d), advisory committee note).
28Id. (citing Sabre v. First Dominion Capital, LLC, 2001 WL 1590544 (S.D.N.Y.)).
29Id. (citing Fed. Civ. R. 30(a), advisory committee note).
30Again, work product and attorney client issues will be addressed in the next article in this series; however, see Blydenburgh, supra, and Elbein, supra for their discussion of the issue.
31Counsel for the noticing party should, of course, be sure to inquire about any personal knowledge at the deposition, just as he/she should inquire about all with, or formerly, with the corporation that may have any knowledge about the items in the notice.
32See Paporelli v. Prudential Ins., 308 FRD 727 (D. Mass. 1985) (held such questioning is not permitted); and King v. Pratt & Whitney, 161 FRD 475 (S.D. Fla. 1995), aff'd without opinion, 213 F. 3d 247 (11 Cir. 2000) (permitting such questioning).
33See Paporelli, supra.
34See King, supra.
35Id. at 476.
36GTE Products v. Gee, 115 FRD 67, 69 (D. Mass 1987).
37Ruth v. A.O. Smith Corp., 2006 WL 53388, at *10 (N.D. Ohio).
38Industrial Hard Chrome, LTD v. Hetran, 92 F. Supp. 2d 786, 790; see also Hyde v. Stanley Tools, 107 F.Supp.2d 992, 992-993 (E.D. La. 2000) ("[W]here the non-movant in a motion for summary judgment submits an affidavit which directly contradicts an earlier [30(b)(6)] deposition and the movant has relied upon…the prior deposition, courts may disregard the later affidavit" however, "[c]ourts have allowed a contradictory or inconsistent affidavit to nonetheless be admitted if it is accompanied by a reasonable explanation.").
39Hyde v. Stanley, supra at 992.
40Ruth, supra (court permitted the opposing party to: 1) introduce the corporate representative's testimony in its case-in-chief, 2) tell the jury the second witness for the corporation was not designated until after the 30 (b)(6) deponent had been deposed, and 3) use the 30 (b)(6) testimony for "any other relevant purpose" including impeachment of the 30 (b)(6) witness).
41Id.(emphasis in original).
42E.E.O.C. v. Boeing Co., 2007 WL 1146446, at *2 (D.Ariz.); but see where the topics listed in the 30 (b)(6) notice are duplicative of information sought via other discovery mechanisms, the Court allowed the repetitive testimony subject to Rule 26(c) ("undue burden or expense"); however, the Court noted "the clock is ticking against the seven-hour limit in Rule 30(d)(2), and every moment wasted on a useless question is lost and cannot be used to ask a meaningful question."
43Prosonic Corp. v. Stafforn, supra, at *4.
44Id.
45Fresenius Medical Care Holdings, Inc. v. Roxane Laboratories, Inc., 2007 WL 1026439, at *1 (S.D. Ohio) (court permitted 30 (b)(6) depositions after prior individual depositions of same corporate officers that covered same issues (or could have) to be addressed in Rule 30 (b)(6) notice, noting "unfortunately" there is nothing in the rules "which requires the parties to conduct their discovery in the most efficient way possible," absent "countervailing circumstances," such circumstances require a showing that the questioning would be "unduly or unreasonably"—not just "somewhat"—burdensome or duplicative or that the burden of the discovery outweighs its benefit).

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