ARTICLES

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Defending the Corporate Representative Deposition

Nothing will ruin the defense of a case more quickly than a bad Rule 30(b)(6) deposition. The corporate representative deposition can and will impact the trial outcome, settlement evaluations, and the company brand.

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Corporate representative depositions are the main area of battle before trial but often fail to garner the attention to detail required to resolve disputes successfully. This article aims to arm corporate legal practitioners, their outside counsel, and witnesses with the tools and knowledge to prepare for, manage, and conduct corporate representative depositions. More specifically, it provides information on the latest developments under Rule 30(b)(6) and how federal courts have interpreted its provisions, discuss time-tested methods for battling overbroad topics, and how to select and prepare witnesses for a successful deposition. You will be better prepared to handle the tough issues that will inevitably arise with someone speaking under oath on a company's behalf.

History and purpose of Rule 30(b)(6)

In 1970, the Advisory Committee on Rules amended Federal Rule of Civil Procedure 30(b)(6) to allow "a party" to "name a corporation, partnership, association, or governmental agency as the deponent and designate the matters on which he requests examination." This new tool was described as being "an added facility for discovery, one which may be advantageous to both sides" because it "reduce[d] the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a 'managing agent.'"[1]

Amended and altered several more times over the years since then, Rule 30(b)(6) now provides, in full:

> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

This Rule sets forth a number of specific processes and requirements for noticing, preparing for, and conducting a corporate representative deposition.[2] Each of these aspects are discussed in turn below.

Deposition notice and subpoena topics

The corporate representative deposition process begins with one party naming in a deposition notice or subpoena a "public or private corporation, a partnership, an association, a governmental agency, or other entity."[3] Importantly, this notice of subpoena "*must* describe with *reasonable particularity* the matters for examination" at the deposition.[4] This is an important requirement, as it places the 'initial burden' of a Rule 30(b)(6) deposition upon the requesting party.[5] The broad, imprecise language of this "reasonableness" standard presents both risk and opportunity. Counsel defending the deposition will need to insist on adequate definition of the topics and ideally narrow the topics covered.

The main test utilized by federal courts for the "reasonable particularity" standard is "whether the notice or subpoena places the receiving party upon reasonable notice of what is called for and what is not."[6] This is important, as the subpoena or notice must permit the entity being deposed to "determine the identity and number of persons whose presence will be necessary to provide an adequate response to any of [the] potential questions."[7] Some courts have even noted that the requesting party must enumerate the topic designations "with painstaking specificity."[8] Therefore, corporate counsel should be adamant about objecting and clarifying any confusing, overly broad, or otherwise improper topics.

It's important to realize that each of the topics or matters that are noticed are also examined by courts in the context of the particular case from which they arise.[9] As always, discovery sought—including deposition testimony—must be on matters that "are relevant to the issues that are in dispute."[10] As

a result, broad or generic topic descriptions fail to meet the reasonable particularity requirement of Rule 30(b)(6).[11]

Accordingly, practitioners should take steps up front to limit the scope of a given witness's testimony and avoid an unwarranted fishing expedition.

Finally, corporate counsel should also be cognizant that many of the common objections to other forms of discovery are equally available to utilize with the receipt of deposition topics. Objections should be made in writing. Of course, boilerplate objections are no better for being used to limit the deposition notice. However, while topics that are "unduly burdensome" are regularly disregarded by courts upon a parties' motion for a protective order, there are exceptions.[12] Similarly, deposition topics that are deemed to be "overly broad" or not "proportional to the needs of the case" have also been set aside by courts as improper.[13] Leveraging those arguments throughout discussion with opposing counsel or the court can provide additional ammunition to rid a deposition notice or subpoena of some worrisome topics.

Timing of corporate witness depositions

Traditionally, corporate witness depositions take place after written discovery is well underway and often after depositions of some individual witnesses are taken. However, nothing in the rule requires this. The taking of an early corporate deposition at the outset of discovery has become more common, particularly in business-to-business litigation. In thinking about when to conduct the deposition, counsel should consider how the timing of corporate depositions can maximize the ultimate outcome of the deposition and overall litigation strategy.

If conducted early, counsel defending the deposition may be less likely to have conducted as thorough of an investigation into the case and, therefore, the corporate witness may be ill-prepared. Of course, counsel taking the deposition must be well prepared to take advantage of such a situation. In this case, the deposition could lead to a witness that gives unfavorable testimony or in the worst case sanctions for failing to provide a competent witness as Rule 30(b)(6) necessitates.

Conversely, counsel taking the deposition could also be less prepared to box in witnesses on difficult issues and questions or miss key documents. Likewise, an early deposition could prematurely expose the theories and points that the parties will seek to utilize during the rest of the litigation. If those theories and points are not properly vetted, the early deposition could prove disadvantageous. On the other hand, a properly prepared and executed early deposition can lead to early resolution of the matter.

Corporate depositions that occur later in the life of a given matter also come with a host of pros and cons that must be weighed. At a later point in the litigation, both parties presumably understand the

key issues and documents more fully and each party's respective positions, legal theories, and themes. This may enable plaintiff's counsel to ask harder hitting questions but also allow for defense counsel to be more prepared to anticipate these questions. Likewise, a later deposition can also permit more time for witness presentation and education, especially in connection with challenging documents. In turn, this might enable the testimony given on behalf of the corporation to be better informed, more easily reiterate key defense theories and themes, and put challenging documents in context.

The meet-and-confer process

Rule 30(b)(6) expressly dictates that parties must "confer in good faith about the matters for examination." This meet-and-confer process should occur "either before or promptly after the notice or subpoena is served[.]"[14] This requirement comes as part of the most recent amendment to the Rule, which became effective on December 1, 2020. The Advisory Rules Committee noted that the goal of this change as promoting "[c]andid exchanges about the purposes of the deposition and the organization's information structure." Furthermore, it was described that the upshot of this process should result in the "clarif[ication] and focus the matters for examination" and discussion ancillary matters, such as the timing and location of the deposition, number of witnesses, and matters on which each witness will testify, to ultimately make the depositions more productive.[15]

A meet-and-confer would be a good habit even in the absence of a requirement. Certainly, it would make sense to confer in good faith to clarify and narrow the topics for the deposition, and it would normally be expected the topics would not have the same breadth as interrogatories or document requests. Having a memorandum of agreement about specific agreements reached during the meet-and-confer process would also be good practice. While in some cases, seeking input from the court if agreement cannot be reached may be appropriate, the idea of the meet-and-confer requirement is to lessen court involvement. Further, turning the dispute over to the court may result in a less favorable result.[16]

Some case law addressing the "meet and confer" process has developed as to how parties can make "good faith" efforts in the meet-and-confer process. In a recent case, where counsel refused to conduct meaningful Rule 30(b)(6) meet-and-confer sessions, the court ordered counsel to show cause why sanctions were not appropriate.[17] In this case, Magistrate Judge Scott Hardy found that the requests were overly broad and disproportionate. On top of that, the court found that counsel misrepresented the meet-and-confer conferences held. The judge stated that the conferral process is not a "bargaining chip" to be offered in exchange for a concession on a disputed discovery process or requested items.

While the case law further develops, analogous rules and requirements can be transferable. For example, many districts require litigants to conduct a meet-and-confer prior to the filing of any discovery motions.[18] In that context, a conferral has been interpreted to mean "an actual meeting or

conference" in which "a moving party must personally engage in two-way communication with the nonresponding party to meaningfully discuss each contested discovery dispute in a genuine effort to avoid judicial intervention."[19] Unilateral efforts or non-genuine attempts to actually resolve the dispute have been found to be insufficient. As always, a conferral should proceed any effort to have a court become involved in a discovery dispute.

Several additional practical points should be kept in mind for dealing with this new provision. First, the meet-and-confer requirement may enable litigants to seek an earlier conference or send a list of proposed examination topics earlier in litigation than before. Indeed, the Advisory Committee on Rules Notes even state that a meet-and-confer session may be appropriate in some instances in a Rule 26(f) plan or pretrial conference under Rule 16.[20] Thus, attorneys should plan from the outset of litigation for a corporate representative deposition, the issues that may need to be addressed early, as well as who from the corporation is best suited to address those issues.

Given the meet-and-confer process, counsel for the party taking the examination may be able to argue an organization or corporation has no excuse for putting forth an unprepared witness. That's because, presumably, the matters of examination will be more focused and clearer through the required the meet-and-confer process. Therefore, this new consultation process may indirectly place additional pressure on lawyers to prepare their corporate witnesses to be fully educated and give competent testimony. Sanctions for unprepared witnesses could become more common.

Finally, corporate counsel should be diligent and proactive in utilizing this process as a chance to set up the corporate deposition process for success. Often, skirmishes over the scope and focus of topics noticed can lead to a series of back-and-forth emails and then motion practice. Airing these potential issues out ahead of time and preventing the need for court intervention can ultimately save the corporation time and money. Likewise, specifying the topics that a witness can be produced for can prevent future headaches down the road of adequately preparing an individual to give testimony on topics that are simply outside of the witnesses and corporation's available knowledge.

Identifying, preparing, and educating corporate witnesses

Next comes the deponent party's duty to designate one or more representatives pursuant to Rule 30(b)(6). It's important to recognize at the outset the importance of this undertaking. This individual (or group of individuals) is not speaking *about* the organization but will ultimately be speaking *for* it. The witness becomes the mind, face, and voice of the company for the topics the witness covers. Indeed, this is an imperative distinction because "[a] Rule 30(b)(6) witness differs from a 'mere corporate employee' because, unlike an individual witness, the testimony of a Rule 30(b)(6) witness represents the knowledge of the corporation and testimony under the rule *binds the corporation*."[21]

This process begins with counsel's task to investigate and identify the representatives that can testify on the topics that have been noticed and negotiated. Upon receipt of a deposition notice, the corporation actually "has an obligation to investigate and identify and if necessary prepare a designee for each listed subject area and produce that designee as noticed."[22] This duty requires that witnesses are produced who "are capable of providing testimony on the noticed topics regardless of whether the information was in the witness's personal knowledge, provided that the information is reasonably available to the corporation."[23] Therefore, a guiding star for the selection process should be determining what employees are actually knowledgeable or can be educated on the matters that have been noticed. Preferably, the company and its counsel have already identified from prior matters or planning the potential candidates for the role of corporate representative. A best practice is to have corporate representatives for common litigation issues identified, vetted, and prepared as part of the company's litigation defense program.

A number of strategic and practical factors must be kept in mind when trying to identify the proper individual(s) to put up on a company's behalf. Attributes such as presentation skills, demeanor, intelligence, and savvy will all influence how the deposition plays out and how a company or corporation could ultimately be perceived at trial. Likewise, an important consideration must also be an individual's experience and past track record in testifying as a witness in any capacity. The document trail associated with each prospective designee should also be surveyed to evaluate whether the witness has produced documents that buttress case theories and themes versus documents that present challenges to those theories and themes. Perhaps most importantly, counsel should gauge how motivated or willing a prospect is to serve in this role for a company or corporation, given the significant commitment required to succeed in this role.

Indeed, once identified, counsel must spend a great deal of time and effort to adequately prepare a corporate witness ahead of the deposition. These individuals should understand that this preparation is *part of their job*—and an important part at that. The supervisors of these individuals also need to understand this and be on board. As Rule 30(b)(6) contemplates, the selected individual(s) must have knowledge of all "reasonably available" information within the topics or subjects that have been noticed. Therefore, educating the witness on the investigation, information, documents, and records that are relevant to the topics they will testify to is essential. On the other side, witnesses should also have a sound understanding of what they should *not* talk about and when they should appropriately defer during their deposition, especially if the witness is not the sole corporate representative.

Part of the preparation process should also be spent anticipating the lines of questions or items that should be expected from opposing counsel. In today's age, this goes beyond a simple review of the documents that have been produced in the matter to date. Social media and marketing materials that encompass terms like "safest product," "highest quality control," or "meets or exceeds expectations" are all low-hanging fruit that may be grasped at during a deposition by opposing counsel. Likewise, a

company or corporation's response to similar past issues or complaints should be thoroughly understood. Knowing the range of possible questions that may arise, it is then essential to instill helpful themes and identify "safe harbors" with designees so that they can provide robust and assured answers to the trickiest of questions. The witness needs to be alert to opposing counsel's efforts to elicit inappropriate soundbites by providing responsive answers that incorporate context and themes to buttress the company's case. For example, grounding answers within the importance of the company's product or service to consumers and the effort and time that goes into the same are helpful tactics. With proper preparation by counsel and the witness, unanticipated questions and documents will be minimized, and strategies and tactics for handling those rare situations will be understood.

Counsel has a duty to ensure that the preparation and the presentation of any witness comports with recognized ethical standards. The American Bar Association's Formal Opinion 508, issued August 5, 2023, provides excellent guidance on ethical preparation of a witness, as well as on avoiding misconduct during the deposition itself, particularly in remote deposition settings. It is imperative that the corporate witness generally understands these ethical boundaries. It is even more imperative that counsel not harm the client by unethical preparation and presentation of the corporate witness.

Finally, it is important to make sure the mechanics of the deposition—including being recorded and transcribed—are well understood by the witness. The proposed deponent should be comfortable with the setting, format, and environment of a deposition; the less surprise there is, the better. The best imitation for this process consists of preparation sessions that occur in-person. Repetition of questions should be given so that they can understand the pitfalls of varying answers. Techniques on how to deal with common "gotcha" type questions that can be expected from plaintiff's counsel should be addressed. Objections will also need to be explained. Ideally, the preparation will prove to be as or more challenging than the deposition itself. Preferably, a final meeting will occur with the witnesses within 48 hours of deposition to ensure all possible questions they may have are answered and that they are adequately prepared to give their testimony.

Case themes and combating reptile strategies

As deposition testimony by a corporate designee is both solicited and given, plaintiff's themes and theories will start to emerge. For example, in the realm of products liability claims, notions such as "profits over people," "every little bit contributes to injury," and a "rigged regulatory process" are commonplace tactics. Similarly, many plaintiffs will try to advance their claims under a "Reptile Strategy," which refers to efforts by attorneys to have the jury make its decision based on fear and emotion rather than fact and science.[24] This tactic should be taken seriously and can be especially forceful if the jury can be convinced that some rule—whether real or imagined—has been avoided or broken by a defendant.

Of course, preparing for these potential ideas in advance can be the best defense to limiting sound bites that a plaintiff is able to obtain during a corporate designee deposition. Just as important, the witness's testimony should also lay the groundwork for offering competing case theories and themes. Again, in the area of products liability, successful defenses have been lodged utilizing motifs like "we played by the rules," "real science versus junk science," and "alternative cause." The best themes also dovetail with the jury instructions that will eventually be given should the case go the distance. Likewise, for overcoming reptile strategies, the defense must be able to tell a compelling story and explain the facts or science in both an understandable and memorable way. This can be done through the use of repeated phrases that help jurors follow a story or the use of "anchors" and safe harbor themes that help jurors understand how various pieces of evidence fit into the overall picture of the case.

The deposition

At the end of this process comes showtime: the actual deposition itself. Corporate counsel, of course, should appear in person with the witness to give them a sense of support and that someone on their team is there. While the attention is on the designee, the defending lawyers also have an important role to play. Confer with the witness throughout the process to ensure they understand the questions being asked and that they have ample time to read any documents that have been introduced. Counsel should also be observant of signs of weariness or wandering to ensure the witness receives needed breaks or support when appropriate.

Plaintiff's approach is likely to begin by asking what preparation a corporate witness has done for each particular topic that has been noticed. In turn, this might result in plaintiff's counsel requesting documents or records that were used during the preparation process. Under Federal Rule of Evidence 612, these materials are covered by privilege but can be waived and become discoverable if a two-step foundation is laid: (1) the witness used a particular document to refresh memory on a specific topic of testimony; and (2) the witness actually relied on the document for the purpose of testifying. Thus, corporate counsel should object to any blanket requests for preparation documents or other materials unless the proper Rule 612 foundation has been laid. Otherwise, production should be withheld on work product privilege grounds.

Importantly, the witness's testimony need not be perfect. If a lack of education or knowledge is accurate in light of the company's lack of knowledge on a particular matter, this is not sanctionable.[25] However, penalties might be warranted if the deposition reflects a series of non-answers that reflect a lack of reasonable efforts to obtain the facts or circumstances around a given topic.[26] More importantly, proper preparation of a witness on key documents and issues, document retention issues, as well as training on safe harbor answers, will minimize these risks.

Plaintiff's counsel may also try to get the witness to stray from the designated topics. An objection should be lodged on every question that is asked which fails to have a direct link to the topics the witness has been put up for. Likewise, plaintiff's counsel may attempt to canvass subjective beliefs and opinions that a witness holds on a given subject or issue. Since a 30(b)(6) deposition is for the purpose of acquiring "corporate knowledge," defending counsel should place limitations on any questions that seek to examine the witness on a personal basis other than whether the company has a subjective belief or opinion grounded in a company policy.[27]

Dealing with tough issues in today's world

In today's legal arena, sophisticated plaintiffs' counsel have unleashed new approaches to litigation against corporations or companies beyond the "Reptile Strategy." Their tactics often involve attacking on multiple fronts—including the field of public perception, the internet and social media forums, regulatory agencies, legislative bodies, and in consolidated court actions. Today's corporate counsel must be ready to defend issues across all of these arenas of conflict and prepare corporate witnesses accordingly.

Increasingly, lawsuits are associated with "bad videos" or viral social media stories. For instance, on April 9, 2017, Dr. David Dao, a Vietnamese-American passenger, was severely injured while being forcibly removed from a fully boarded, sold-out United Airlines' flight. Video of the incident recorded by passengers went viral on social media, resulting in a great deal of anger over the force that was used. Politicians expressed concern and called for an official investigation. President Donald Trump even criticized United Airlines, calling its treatment of Dao "horrible." Within weeks a settlement reportedly worth $140 million was reached between Dao and United Airlines.

Scenarios such as these demonstrate the difficulty of having a witness speak on behalf of a corporation for a given issue, as these depositions do not occur in a vacuum. Indeed, not only are a plaintiff's individual claims at stake, but the corporation or company is also attempting to uphold customer confidence, brand image, and even the viability of certain products or services. To do so, the use of strong and consistent themes is key. Plaintiff's counsel and onlookers will be quick to pick up on any real or perceived inconsistencies in an entity's messaging from forum to forum. Likewise, a corporation should attempt to shift the focus of the litigation to the facts of the individual occurrence. For instance, in regard to the United Airlines incident, a focus on what took place before the video scene and an explanation as to how the law commands compliance with directions from airline personnel is a far more meritorious take on the incident as opposed to trying to defend and litigate the general practices of the airline industry. Finally, incidents that have garnered a great deal of media attention will often necessitate the need for a thorough and sound understanding of the facts, circumstances, and science. In turn, having corporate witnesses who can relay this information and give a full, complete picture of the incident in a thematic and credible manner will prove invaluable.

Defense counsel who understand and successfully master these intricacies not only set themselves up better to win the key battles of the corporate representative deposition, but also the overall litigation war.

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[1] The foregoing quotations are sourced from the 1970 Advisory Committee Notes to Fed. R. Civ. P. 30(b)(6).

[2] This article focuses on corporate depositions being conducted pursuant to the Federal Rules of Civil Procedure; however, many of the requirements and strategies discussed herein are easily transferable to practitioners in state court as well.

[3] *See* Fed. R. Civ. P. 30(b)(6).

[4] *See Id.* (emphasis added).

[5] *See Payer v. Bishop of Charleston*, Civil Action No. 2:21-613-RMG, 2021 U.S. Dist. LEXIS 154235, at *7 (D.S.C. Aug. 9, 2021).

[6] *Majestic Bldg. Maint., Inc. v. Huntington Bancshares, Inc.*, No. 2:15-cv-3023, 2018 U.S. Dist. LEXIS 114267, at *15 (S.D. Ohio July 10, 2018).

[7] *Mullenix v. Univ. of Tex.*, Case No. 1-19-CV-1203-LY, 2021 U.S. Dist. LEXIS 79965, at *19 (W.D. Tex. Apr. 26, 2021) (citation omitted).

[8] *Crocs, Inc. v. Effervescent, Inc.*, Civil Action No. 06-cv-00605-PAB-KMT, 2017 U.S. Dist. LEXIS 221098, at *7 (D. Colo. Jan. 3, 2017).

[9] James C. Winton, *Corporate Representative Depositions in Texas-Often Used But Rarely Appreciated*, 55 Baylor L. Rev. 651, 675 (2003).

[10] *Health Grades, Inc. v. MDx Med., Inc.*, 2013 U.S. Dist. LEXIS 59271, 2013 WL 1777575, at *3 (D. Colo. Apr. 25, 2013).

[11] *See Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049, 1057 n.5 (7th Cir. 2000).

[12] *See, e.g., Insignia Sys. v. News Corp.*, No. 19-1820 (MJD/BRT), 2020 U.S. Dist. LEXIS 99476, at *21 (D. Minn. June 8, 2020) (finding a deposition topic comprised of all a corporation's responses to requests for admission, interrogatories, and production of documents was "overly broad, making it unduly burdensome for a Rule 30(b)(6) witness to prepare to testify on the topics identified").

[13] *See, e.g., Smith v. Navient Sols., LLC*, No. 3:17-191, 2018 U.S. Dist. LEXIS 191183, at *8 (W.D. Pa. Nov. 8, 2018) (finding topics on a company's "internal systems and processes[,]" which were not at issue in the action, as "wholly irrelevant").

[14] *Petersen v. Masonite Corp.*, No. 8:19CV534, 2021 U.S. Dist. LEXIS 35654, at *4 (D. Neb. Feb. 25, 2021).

[15] *See* 2020 Advisory Committee Notes to Fed. R. Civ. P. 30(b)(6).

[16] *See Pflughoeft v. Kansas and Oklahoma Railroad*, Case No. 22-1177, 2023 U.S. Dist. LEXIS 155807, D. KS, 2023 (Court supervised discovery conference on scope of Rule 30(b)(6) deposition resulted in more restricted deposition scope).

[17] *Wilbert v. Pyramid Healthcare, Inc.*, 2:24-cv-00331 25 U.S. Dist. LEXIS 51057 (W.D. PA, 2025).

[18] *See, e.g.*, D. S.D. LR 37.1.

[19] *Robinson v. Napolitano*, Case No. 08-cv-40842009, U.S. Dist. LEXIS 50025, at *8 (D.S.D. June 4, 2009).

[20] *See* 2020 Advisory Committee Notes to Fed. R. Civ. P. 30(b)(6).

[21] *Edwards v. Scripps Media, Inc.*, 331 F.R.D. 116, 121 (E.D. Mich. 2019) (emphasis added).

[22] *Poole ex rel. Elliott v. Textron, Inc.*, 192 F.R.D. 494, 504 (D. Md. 2000).

[23] *Covad Communications Co. v. Revonet, Inc.*, 267 F.R.D. 14, 25 (D.D.C. 2010).

[24] See David A. Ball and Don Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution*.

[25] *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006) ("The deponent must prepare the designee to the extent matters are reasonably available" to the corporation).

[26] *See Young v. Physician Office Partners*, Case No. 18-2481-KHV, 2020 U.S. Dist. LEXIS 117503, at *1 (D. Kan. July 6, 2020) (ordering sanctions because "defendant had failed to adequately prepare its representative, and that this failure was not substantially justified").

[27] *Indus. Eng'g & Dev. v. Static Control Components, Inc.*, Case No. 8:12-cv-691-T-24-MAP, 2014 U.S. Dist. LEXIS 141823, at *8 (M.D. Fla. Oct. 6, 2014).