The Corporate Witness

A Defense Approach to the 30(B)(6) Deposition

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Selecting a capable representative and preparing that representative carefully will mean that your 30(b)(6) deposition will go well.

While the deposition of a corporate representative may seem mundane and tedious, a weak defense strategy from a counselor who takes a Federal Rule of Civil Procedure 30(b)(6) deposition lightly can derail the course of litigation. The defense of a 30(b)(6) witness is more intricate than that of a fact witness and carries with it the consequence of binding the corporation to unfavorable testimony. A 30(b)(6) deposition may be effectively defended through appropriately selecting and preparing a corporate representative and using effective defense strategies. The key elements to a strong defense of your witness are understanding the law, prepping your witness with your legal theories on the matter in mind, and anticipating opposing counsel's tactics. Adhering to these practices will allow you to present a knowledgeable and strong witness who represents your client's corporate interests in a beneficial manner.

Notice

The movant *must* serve a notice of deposition or subpoena (notice) that describes the topics of discussion during the deposition with reasonable particularity, so that a knowledgeable corporate representative is selected. Additionally, the notice must provide the defending party with enough information to prepare the corporate representative for the deposition properly. The movant may also serve a request for production of documents with its notice. *See* Fed. R. Civ. P. 30(b)(2). Counsel may object to the movant's notice with the standard, applicable objections if the requests are overly broad, vague, unduly burdensome, or objectionable on other grounds.

Rule 30(b)(6) specifically states:

> **Notice or Subpoena Directed to an Organization.** 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 then 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. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify

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about information known or reasonably available to the organization.

The movant's notice of deposition needs to be constructed with "*reasonable particularity*."

The notice will likely cover topics "*known or reasonably available*" to the organization. This doesn't mean that every topic or question is explicitly stated in extreme detail in the notice. It just means that the topics of discussion are described with enough detail for the deponents and their counsel to prepare for the deposition satisfactorily. On the other hand, in *Sprint Commc'ns Co., L.P. v. Theglobe.com, Inc.,* the court found that "the requesting party must take care to designate, with *painstaking specificity*, the particular subject areas that are intended to be questioned, and that are relevant to the issue in dispute." 236 F.R.D. 524, 528 (D. Kan. 2006) (emphasis added). The scope of the deposition should also be established. Courts have held that overly broad or form notices are not acceptable. *Alexander v. Federal Bureau of Investigation*, 188 F.R.D. 111, 114 (D.D.C. 1998) (finding that a notice to depose on "any matters relevant to this case" was not an example of reasonable particularity). *But see Prokosch v. Catalina Lighting, Inc.,* 193 F.R.D. 633, 638 (D. Minn. 2000) (finding that the movant needs to state "with painstaking specificity" the topics of discussion during a deposition). For example, "including, but not limited to" language is insufficient and overly broad. *Tri-State Hospital Supply Corp.,* 226 F.R.D. 118, 125 (D.D.C. 2005); *Reid v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) (holding that deposition topics must have discernible parameters to follow, and a notice is not feasible "where the defendant cannot identify the outer limits of the areas of inquiry noticed.").

Failing to follow the notice requirements of Rule 30(b)(6) are grounds for objection. While a good-faith effort should be made between parties to resolve issues related to notice, a protective order may be filed to prevent the moving party from raising the objectionable topics during deposition.

Pick Your Deponent Wisely

The deponent will need to provide "complete, knowledgeable, and binding answers on behalf of the corporation." *Marker*, 125 F.R.D. at 126; *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168 (D.D.C. 2003). *See also* Am. Bar Ass'n, Civil Discovery Standards 19(b) & 19(f). Unlike a typical deposition, which names the individual who the moving party wishes to depose, the ball is in your court when it comes to choosing the 30(b)(6) corporate representation. The role of a corporate representative differs substantially from that of other fact witnesses and requires an individual to testify on the corporation's behalf about the topics presented in a formal Rule 30(b)(6) deposition notice served by opposing counsel. While the individual chosen does not need to have the *most knowledge* of the situation, the designated individual should be thoroughly experienced in the topics of discussion and should be able to respond accurately. This will prevent common "bandying," where parties present multiple representatives who all disclaim knowledge of various practically obtainable information. You may be faced with a motion to compel if opposing counsel is aware that you have produced an unresponsive witness who lacks knowledge on the issues, and you were aware of another witness who was more knowledgeable and responsive.

The corporate representative may be an officer, director, manager, or someone else who has sufficient knowledge to answer questions in a deposition (whether the person is hired for the purposes of the deposition or the person is a former employee). If more than one deponent is required, these individuals should be identified and their areas of expertise should be explained. Be cautious when designating a witness who has extensive personal knowledge related to the case. Ideally, the witness will have enough knowledge to provide articulate responses but will not have so much personal knowledge as to lead to questions or testimony that mixes personal knowledge with corporate knowledge. The corporate representative witness is to testify on behalf of *the corporation*, not him- or herself.

Sharpen the Axe

Counselors have a duty to prepare their deponent. *Securities and Exchange Commission v. Morelli*,143 F.R.D. 42, 45 (S.D.N.Y. 1992) (finding the witnesses need to be prepared so "that they can answer fully, completely, and unevasively, the questions posed."); *Buycks-Roberson v. Citibank Federal Sav. Bank*, 162 F.R.D. 338, 343 (N.D. Ill. 1995) (reasoning the duty to prepare a corporate representative for a 30(b)(6) deposition goes beyond personal involvement or knowledge). Witness presentation is extremely important. Make sure that you set aside ample time for preparation because the corporate representative needs to be a well-prepared deponent. Applicable materials should be reviewed. Counselors may present the corporate designee with previous deposition testimony, exhibits, and a summary of the facts and issues of the case, and they should corroborate with the witness which materials need to be retrieved and reviewed. This may include pulling and examining audit trails, policies or procedures, personnel files, or other corporate documents that are necessary to review before the deposition testimony is provided. (For a comprehensive reference, *QBE Ins. Corp. v. Jordan Enterprises, Inc.,* 277 F.R.D. 676 (S.D. Fla. 2012), lays out case law governing 30(b)(6) depositions and the preparations of deponents). It is the corporate representative's duty to aide in retrieving relevant information and then interpreting the information on behalf of the

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corporation for the purposes of the representative's deposition and/or suit. This preparation will help you build your own knowledge of the suit facts and circumstances.

Further inquiry needs to be made if the witness does not know an answer to a question during witness preparation, or if the required documents, such as an audit, policy, or electronic medical record, are not readily available but are easy to get. Therefore, it is crucial that the preparation timeline have ample time to investigate, review, and prepare fully. A simple prep the morning before the deposition will obviously be insufficient in these situations and could easily be disastrous during deposition. Consider staging a mock deposition so that the deponent is comfortable answering difficult questions. A mock deposition may also shed light on additional information or documentation that needs to be located and reviewed.

Rule 30(b)(6) presents little guidance as to whether a 30(b)(6) deponent can respond to questions outside the scope of the topics identified in the notice.

Just as the corporation has an obligation to prepare its witness properly, the corporate representative needs to make a *reasonable or good-faith effort* to get the information necessary to answer anticipated questions effectively. The 30(b)(6) witness must also be apprised on the subject matter of the suit and claims raised, and the corporation's stance on these issues should be explored to determine how the information gathered can help present a strong defense behind the deponent's testimony.

Don't limit your internal investigation and witness preparation to matters strictly referenced in the notice. Opposing counsel can still ask and receive responses to inquiries outside the scope of their own notice during deposition, despite your objections.

Do limit what the 30(b)(6) witness reviews. Imagine being in a deposition and the corporate representative accidently refers to reviewing materials or documents that are privileged. Remember that the movant may attempt to obtain preparation materials in discovery. Depending on the court, this may be permitted.

The corporation also needs a witness who can comprehend opposing counsel's tricky questions, isn't susceptible to being taken off course by attempted intimidation, and can convey the corporation's persona with confidence. A well-prepared witness will help safeguard against any inadvertent statements that may be attributed to the corporation and will understand the limits of his or her testimony when objections are made to off-topic lines of questioning.

Defend the Deposition

To ensure the deponent answers on behalf of the entity, be cognizant of how the plaintiff's counsel directs his or her questions. Questions related to the issues of the suit should be carefully answered to ensure the responses are based on the entity's knowledge; this includes questions that seem to be directed at the deponent and not the entity. For example, "When did you learn…." or "How do you implement policies and procedures?" The deponent should answer questions in terms of the organization.

"I don't know" answers may be considered a failure to appear to testify. *See Black Horse Lane Assn. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000) ("In reality if a Rule 30(b)(6) witness is unable to give useful information he is no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it."). If the deponent does not know the answer, but knows who would, it is appropriate to identify the individual capable of providing a more adequate response. If your 30(b)(6) witness is confronted with a line of questioning outside the scope of the notice, but within the personal knowledge of the witness, consider offering to produce the same witness as a fact witness. The deponent can serve as a fact witness in a deposition that starts at the close of the 30(b)(6) deposition.

Allowing your witness to answer questions outside the scope of the 30(b)(6) notice runs the risk of impeachment during trial, waiving attorney–client or work-product privilege, or binding the corporation.

Counsel should object to questions that invade a privilege. This will ensure that the issue is preserved. Note that facts communicated to an attorney are not protected by the attorney–client privilege. *Great American Ins. Co. v. Vegas Const.*, 251 F.R.D. 534 (D. Nev. 2008). Make strategic objections, especially if a 30(b)(6) witness is asked a question outside the scope of the notice. Off-topic questions should be objected to as exceeding the scope of the notice, or on the grounds that the questions exceed the scope of the corporate knowledge of the witness. But keep in mind that your witness may still respond to these types of questions.

Rule 30(b)(6) presents little guidance as to whether a 30(b)(6) deponent can respond to questions outside the scope of the topics identified in the notice. Federal courts are split on whether the examination can go outside the scope of the deposition notice. The narrow view, as followed by the court in *Paparelli v. Prudential Insurance Co.*, is that the examination must be confined to matters stated "with reasonable particularity" in the deposition notice. *Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 730 (D. Mass. 1985). Or the court may follow the *King v. Pratt & Whitney* holding that is broader and more accepting of questions outside the scope or the notice, if the questions fit within the general discovery rules. *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995).

Paparelli involved a plaintiff injured by the "pre-opening" feature of an elevator. A court order was issued compelling the defendant to produce all documents involving similar accidents. The defendant produced documents concerning a single claim, prompting a 30(b)(6) notice. The notice sought a witness knowledgeable about "the details of any search conducted by Westinghouse in an endeavor to comply with the attached order." At the 30(b)(6) deposition, however, the plaintiff sought to question the witness about matters not described in the subject of the deposition. The defendant's counsel instructed the witness not to answer, and the plaintiff's counsel sought sanctions.

The *Paparelli* court held that the scope of discovery was limited to the areas of inquiry stated in the notice of deposition.

Although the court could find nothing in the text of the rule or the advisory notes, it concluded that such a limitation is implied by the procedures established in the rule and by the advisory committee's reasons for adopting the rule. If a party could ask a deponent to testify about matters that are totally unrelated to the matters listed in the notice, the court reasoned, the purpose of the rule would be effectively thwarted.

The majority of courts follow *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995). In *King*, the plaintiff served 30(b)(6) notices that outlined three issues to be covered. At the deposition, deponents were asked questions that went beyond the scope of the three issues. The defendant's counsel objected, terminated the deposition, and sought a protective order to limit the scope of questioning to those areas described in the notices. The *King* court declined to follow *Paparelli*, believing that there was a better reading to Rule 30(b)(6). In holding that the scope of discovery is not limited in a 30(b)(6) deposition to the subjects described in the notice, the court reasoned, "[the p]laintiff could simply re-notice a deponent under the regular notice provisions and ask him the same questions that were objected to." *Id.* at 476.

Consider the following example: When a hospital's designated agent was unable to provide knowledgeable answers regarding several noticed deposition topics, the court ruled it as being the same as a nonappearance warranting sanctions in the form of attorneys' fees and costs for preparing and taking the deposition. *Omega Hosp., LLC v. Community Ins. Co.*, 310 F.R.D. 319 (E.D. La. 2015).

Optimally, counselors can resolve any issues in an informal and efficient manner. If not, a party may move for a protective order, or sanctions, when appropriate.

Regardless, corporate counsel should immediately object to any line of questioning that exceeds the scope of the notice, because failing to do so, as mentioned, may result in waiving the objection. Counsel for the deponent would be wise to object to any line of questioning outside of the scope of the notice to ensure that the corporation preserves its right to contend that the deposition response is not binding.

Assume that the opposing attorney's questioning will exceed the scope outlined in the Rule 30(b)(6) notice to ensure that the designated witness is fully prepared. As soon as the deposing attorney exceeds the scope of the deposition notice, corporate counsel must object and make a record of all objections. If opposing counsel agrees to set limits for certain topics, make sure to set forth all stipulations on the record.

Protective Orders

A protective order is the proper relief when counsel instructs the 30(b)(6) witness to refrain from providing an answer in instances where opposing counsel asks questions outside the scope of the 30(b)(6) notice, or if the witness genuinely has no knowledge of, or access to, the information sought. A motion for a protective order must include "certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." Fed. R. Civ. P. 26(c)(1).

Also, consider filing a protective order under Rule 26(c) if your deponent has already testified and the plaintiff gives notice of a subsequent Rule 30(6)(b) deposition. Raise the issue that an additional deposition request is unduly burdensome or ask the plaintiff's counsel why an additional deposition is needed and if the same witness should be produced.

Sanctions

Sanctions may be sought when the designated witness lacks knowledge of the topics included in the notice of deposition. Courts have authority to impose sanctions, including reasonable attorneys' fees, due to the "failure to appear." Sanctions have been imposed when the witness did not have knowledge about the subject matter, the witness was not prepared to testify, and where the witness did not have authority to speak for all parties represented. *See, e.g.*, *Black Horse Lane Assn. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000) ("In reality if a Rule 30(b)(6) witness is unable to give useful information he is no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it."); *Res. Trust Corp.*, 985 F.2d at 197; *Paul Revere Life Ins. Co. v. Jafari*, 206 F.R.D. 126 (D. Md. 2002); *T&W Funding Co. XII, LLC v. Pennant Rent-a-Car Midwest, Inc.*, 210 F.R.D. 730 (D. Kan. 2002); *Intl. Assn. of Machinists & Aerospace Workers v. Werner-Masuda*, 390 F. Supp. 2d 479 (D. Md. 2005); *United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996) ("Producing an unprepared witness is tantamount to a failure to appear.").

Rule 30(b)(6) deposition statements are binding. However, most courts have held that the statements are not judicial admissions (binding statements that may not be refuted at trial or on appeal). Research your jurisdiction's stance on the issue. Some jurisdictions have held that 30(b)(6) testimony is an evidentiary admission, while others view it as something to be explained or refuted by subsequent testimony.

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Is Rule 30(B)(6) Testimony Binding on a Corporation?

A deponent will have the opportunity to review and sign deposition testimony once it is transcribed. Most courts have permitted substantive changes to a deposition transcript as long as an explanation is provided. Note that the original testimony may still be used for impeachment. *Indus. Hard Chrome v. Hetran, Inc.*, 92 F.Supp. 2d 786, 791 (N.D. Ill. 2000) ("testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes.").

Because a Rule 30(b)(6) designated witness is presented for the purpose of speaking for the corporation, and therefore

"must testify to both the facts within the knowledge of the business entity and the entity's opinions and subjective beliefs," testimony of a Rule 30(b)(6) witness is binding on the corporation. *United States v. Taylor*, 166 F.R.D. at 361. As discussed earlier, the 30(b)(6) designee testifies as if he or she is the organization itself. Thus, the deponent's testimony binds the corporation and may be used against it just as an individual's deposition testimony may.

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Although most courts have held that Rule 30(b)(6) statements are not judicial admissions, a small number of courts have held that Rule 30(b)(6) statements *are* judicial admissions that are conclusively binding and may not be controverted by the party at trial or on appeal of the same case. In such an instance, the court may refuse to hear trial testimony that differs from deposition testimony unless the party "can prove that the information was not known or was inaccessible at the time of the deposition." *Rainey v. American Forest and Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 95 (D.D.C. 1998). Most courts, however, as mentioned above, hold that Rule 30(b)(6) statements are evidentiary admissions, meaning that evidence presented at trial may explain or contradict a statement made at a Rule 30(b)(6) deposition. So while the testimony of a 30(b)(6) witness is not a judicial admission, "it is binding in the sense that it constitutes the official testimony of the corporation." *Monopoly Hotel Group, LLC v. Hyatt Hotels Corporation*, 2013 WL 12246988 (N.D. Ga. 2013).

As recently as May 11, 2018, in *Snapp v. Burlington Northern Santa Fe Railway Co.*, the United States Court of Appeals for the Ninth Circuit further cemented the standard for a 30(b)(6) designee's testimony, agreeing with the Second, Seventh, Eighth, and Tenth Circuits that while such testimony is an evidentiary admission, it does not have conclusive effect and can be corrected, explained, or supplemented by the corporation with additional evidence. 2018 WL 2168653 (9th Cir. May 11, 2018). In reaching this holding, the court joined its sister circuits in holding that a 30(b)(6) designee's admissions are for evidentiary purposes only, and not giving it conclusive effect on a motion for judgment.

Although a corporation is not "estopped from denying the truth of 30(b)(6) deposition testimony," counsel should carefully consider the effectiveness of such a strategy at trial. While "[a] witness is free to testify differently from the way he or she testified at deposition," the witness "risk[s]… having his or her credibility impeached by the introduction of the deposition." *R & B appliance parts, Inc. v. Amana Co., L.P.*, 258 F. 3d 783, 786-87 (8th Cir.2001).

Conduct a proper investigation so that new information is not discovered before trial to prevent the court from precluding new documents or testimony. Or be prepared to prove that the documents or information were not accessible during the discovery period.

Consider filing motions in limine to preclude the testimony of a newly named witness who represents the opposing party's entity if opposing counsel names a different trial witness who represents that entity and who also is able to testify on matters that the previous witness could not.

While there is opportunity to introduce differing testimony or new evidence, opposing counsel may still move to impeach your witness during trial with the previous deposition testimony.

Summarizing: A Quick Guide to Preparing and Defending a Rule 30(b)(6) Deposition Properly

Review the notice of deposition. Carefully read the notice to ensure that it is proper and identifies the deposition topics with reasonable particularity. If any topics are vague or excessive, assert objections and make a good faith effort to resolve the matter with the deposing party. Remember that parties are required to provide sufficient detail to enable effective preparation of the corporate representative.

Select the appropriate representative. Choose someone who is articulate and willing to take the time to prepare adequately for a thorough deposition. Remember, the witness has a duty to review whatever information is reasonably at the disposal of the organization to provide knowledgeable responses. But be mindful that whatever the representative reviews in preparation for the deposition is discoverable.

Prepare the witness to be the persuasive face of the corporation and confidently present the corporation's position. After all, the deponent's testimony will be binding as an evidentiary admission by the corporation.

Familiarize the witness with the topics described in the deposition, but go beyond that: provide the witness with a detailed overview of the case and prepare him or her for questions that potentially exceed the scope of the subjects outlined in the notice. If the information is too much to handle, have the witness make a cheat sheet. Just be prepared to produce it to the deposing party.

A prepared witness can answer any question. The only time to instruct your witness not to answer is when the question invades a privilege or the terms of a court order.

Be ready to object. Even if your witness is ready to respond to areas of inquiry not mentioned in the notice, always object when a question goes beyond the scope. This way, the issue is preserved on the record. Otherwise, you may waive your objection.

Good advice bears repeating: Be prepared! If you select a strong representative and prepare that representative thoroughly, chances are your 30(b)(6) deposition will go smoothly.