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# Preparing for a Federal Rules of Civil Procedure 30(b)(6) Deposition

Depositions of corporate representatives under Federal Rules of Civil Procedure (F.R.C.P.) 30(b)(6) are often the most critical event in corporate litigation. There are a myriad of procedural and substantive considerations that must be addressed prior to a F.R.C.P. 30(b)(6) deposition. This article will provide procedural and substantive considerations for outside counsel in preparing their corporate representative witnesses for a F.R.C.P. 30(b)(6) deposition.

Procedurally, there are limitations as to when the F.R.C.P. 30(b)(6) deposition may be taken, how the deposition must be noticed, what topics can be addressed, and the length of the deposition. In particular, leave of court is required to depose a corporate representative of a party or non-party when (1) the deponent is incarcerated, or (2) the parties have not stipulated to the deposition and (a) the topics to be covered would require more than 10 depositions, or (b) the deponent

has already been deposed, or (c) the parties have not held the initial discovery conference required in Rule 26. Leave of court is not required to depose a corporate representative if the deponent is not incarcerated and will be available in the United States at or after the time scheduled for the deposition.<sup>1</sup>

The F.R.C.P. 30(b)(6) deposition notice must give reasonable written notice to every party; must state the deposition time, place and location; must state



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the deponent's name and address or "a general description sufficient to identify the person or the particular class/group to which the person belongs." The notice must state the method by which the deposition will be recorded – video, court reporter or otherwise. The designated corporate representative is not required to possess first-hand knowledge of the designated topics but can rely upon "a review of corporate records and inquiries within the corporation."<sup>2</sup> If the responding corporation does not designate a party with sufficient knowledge, the court can strip the responding corporation of its right to designate and compel a specific representative to appear.<sup>3</sup>

The notice may be accompanied by a Rule 34 request for production or inspection. The notice "must describe with reasonable particularity the matters for examination."<sup>4</sup> This requirement means more than broad topics. "[T]o allow the Rule to effectively function, 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 issues in disputes."<sup>5</sup> [Italics in cited text.]

It may be necessary to object to or seek clarification regarding the areas of inquiry contained within the F.R.C.P. 30(b)(6) notice. A Motion for Protective Order may be required to limit and/or clarify the scope and nature of the areas of inquiry designated in the F.R.C.P. 30(b)(6) notice. Pre-deposition discovery motions and communications should set clear boundaries regarding the areas of inquiry to prevent in-depth questioning in areas beyond the scope of the notice.<sup>6</sup>

A potential area of concern at the very start of a corporate witness deposition is inquiries into personal information, such as home address, social security number, salary or other sensitive personal information. Anticipate these types of questions and file and/or assert the proper objections. Prepare the corporate witness in advance and advise him or her exactly how you will address these types of questions.

Anticipating areas of disagreement with opposing counsel prior to the corporate representative deposition is key to a smooth deposition. Written objections and Motions for Protective Order often preempt opposing counsel's efforts to improperly exceed F.R.C.P. 26 discovery. If necessary, a F.R.C.P. 30(d)(3) Motion to Terminate the Deposition should be considered if opposing counsel continues with objectionable behavior, tactics or inquiries.

Most corporations have experienced "go to" corporate representative witnesses. Even experienced corporate representatives need to be comfortable and aware of their verbal and non-verbal communication. If you do not already, consider videotaping witnesses during their deposition preparation sessions. Showing a deponent how they are performing is often more effective than telling them about their testimony and non-verbal cues.

Regardless of whether your corporate representative witness is experienced or not, it is imperative that the witness understands their role as the "voice" of the company and the difference between being deposed individually as opposed to as a corporate representative.<sup>7</sup> This starts with deposition preparation well in advance of the deposition. Lack of adequate preparation in advance of the deposition can lead to the imposition of sanctions.<sup>8</sup>

While F.R.C.P. 30(b)(6) does not expressly or implicitly require a corporation or entity to produce the person "most knowledgeable" regarding designated areas of inquiry, a corporation is required to make a good faith effort to designate appropriate persons and prepare them to answer fully and non-evasively questions within the designated areas of inquiry.<sup>9</sup> A company who fails to produce knowledgeable corporate witnesses for a F.R.C.P. 30(b)(6) deposition may be required to designate supplemental witnesses.<sup>10</sup> However, the mere fact that a company witness is not able to answer all questions within designated areas of inquiry does not equate to a failure to comply with its F.R.C.P. 30(b)(6) obligation.<sup>11</sup>

As part of the 30(b)(6) deposition preparation process, the corporate witness will review documents. Unless the documents reviewed are attorney-client or otherwise privileged, it is likely the documents reviewed will be discoverable.<sup>12</sup> An exception may arise in voluminous document cases under the selection and compilation theory of the work-product doctrine. Under this theory, the legal skill and analysis provided by counsel in sorting and compiling documents for review by the 30(b)(6) witness may reflect the attorney's strategy and thought process and therefore be excluded from production.<sup>13</sup> Obviously, care should be taken regarding the documents shown to a 30(b)(6) witness during the deposition preparation process.

In conclusion, it is essential that a corporate deponent receive the preparation necessary to provide responsive and effective testimony in a F.R.C.P. 30(b)(6) deposition. **P**

1 Rule 30(a)(1), Fed. R. Civ. P.

2 *McPherson v. Wells Fargo Bank, N.A.*, 292 F.R.D. 695, 698 (S.D. Fla. 2013).

3 *Wachovia Securities, LLC v. NOLA, Inc.*, 248 F.R.D. 544, 550 (N.D. Ill. 2008).

4 Rule 30(b)(6), Fed. R. Civ. P.

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*Memory Integrity, LLC v. Intel Corp.*, 308 F.R.D. 656, 661 (D. Oregon 2015), citing *Sprint Communications Co., L.P. v. TheGlobe.com, Inc.*, 236 F.R.D. 524 at 528 (D. Kansas 2006).

6 There are two lines of cases regarding whether a party can inquire into areas outside the areas designated in the F.R.C.P. 30(b)(6) notice. *Paparelli v. Prudential Ins. Co. of America*, 108 F.R.D. 727 (D. Mass. 1985) reflects a narrow construction limiting inquiries to only those areas of requiring listed in the 30(b)(6) notice. In contrast, other courts opine that the F.R.C.P. 30(b)(6) notice is limited in scope only by the general rules of Discovery in Rule 26. See, for example, *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995).

7 See, *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C.), affirmed 166 F.R.D. 367 (M.D.N.C. 1996) for a concise definition of a F.R.C.P. 30(b)(6) witness.

8 *Starlight International v. Herlihy*, 186 F.R.D. 626, 639 (D.Kan. 1999) (inadequate preparation at a F.R.C.P. 30(b)(6) designee is sanctionable based on lack of good faith, prejudice to opposing side and disruption of proceedings).

9 *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012)

10 *Alexander v. F.B.I.*, 186 F.R.D. 137, 142 (D.D.C. 1998).

11 *Costa v. County of Burlington*, 254 F.R.D. 187, 191 (D.N.J. 2008)

12 See, for example, *Calzaturificio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33 (D. Mass. 2001).

13 See, for example, *Schwarzkopf Technologies Corp. v. Ingersoll Cutting Tool Co.*, 142 F.R.D. 420, 422–23 (D. Del. 1992).