Strategic Insights into Corporate Representative Depositions: Rules, Roles, and Realities

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Introduction/The Role of Corporate Representatives in Litigation

- Federal and state rules allow parties to depose organizations
- Importance of producing a knowledgeable corporate representative witness cannot be overstated
- Corporate representatives can also tell the organization's side of the story
- It's never too early to begin thinking about corporate representatives
- We'll discuss:
  - Relevant federal and state rule
  - Preparing corporate representatives for depositions
  - Taking and defending the corporate representative deposition
  - Document retention and litigation holds

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Federal Rule of Civil Procedure 30(b)(6)

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 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.

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Federal Rule of Civil Procedure 30(b)(6)

- Subdivision (b)(6) was added in 1970
- Drafters state the new rule would curb "bandying," wherein "officers or managing agents of a corporation are deposed in turn, but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it." *See* Fed. R. Civ. P. 30(b)(6), 1970 advisory comm. note.
  - Also protects organizations from having "an unnecessarily large number of their officers and agents [from] being deposed by a party uncertain of who in the organization has knowledge." *Id.*
- A Rule 30(b)(6) deposition counts as one deposition for purposes of the ten-deposition limit under Fed. R. Civ. P. 30(a)(2)(A)(i)
  - However, for purposes of the seven-hour durational limit, "the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition." Fed. R. Civ. P. 30(d)(2), 2000 advisory comm. note. "The presumptive duration may be extended, or otherwise altered, by agreement." *Id.*
  - Throughout, we'll refer to "corporations" but note that rule extends to various public and private entities

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Rule 30(b)(6): Determining the Matters for Examination

- **Rule 30(b)(6)**: “Before promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination.”
  - Matters for examination define the scope of the deposition and ensures that witnesses will be prepared
  - Rule imposes a requirement that the parties meet and confer about deposition topics
  - Written objections to the noticed deposition topics may still be served (vagueness, overbreadth, etc.) to frame discussion
  - Documents may also be requested in the deposition notice, but usually only when the documents are few or closely related to the noticed topics

“Reasonable Particularity”

- Rule 30(b)(6) requires that the noticed matters must be described with “reasonable particularity”
- Some judicial districts have referred to “painstaking specificity”
- The Northern District of Illinois has not adopted this view
- Note, however, that the specificity required may vary depending on the nature of the topics

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Procedural Considerations

- Rule 30(b)(6) conference also serves to address "process issues"
  - "It may be productive also to discuss 'process' issues, such as the timing and location of the deposition, the number of witnesses and the matters on which each witness will testify, and any other issue that might facilitate the efficiency and productivity of the deposition." Fed. R. Civ. P. 30(b)(6), 2020 Advisory Comm. Note.
- Location
  - Usually the judicial district where the defendant's principal place of business is located absent an agreement of parties or interests of justice requiring otherwise
    - Location of counsel
    - Number of corporate representatives
    - Burden and travel expenses
    - Whether designees otherwise travel frequently
- In-person or remote?
  - Rule 30(b)(6) authorizes remote depositions, which have become commonplace

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Rule 30(b)(6): When Parties Cannot Agree on Deposition Topics

- Rule 30(b)(6) requires that parties meet and confer, but no requirement that parties actually reach an agreement on deposition topics
- If parties cannot agree, appropriate step is for objecting party o move for a protective order under Rule 26(c), and for noticing party to move to compel
  - Failure to seek a protective order may result in waiver of objections to deposition topics
  - Discovery may not automatically be stayed as a result of motion for protective order

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Rule 30(b)(6): "Information Known or Reasonably Available to the Organization"

- Even if no one within the organization has knowledge of the noticed topics, the organization must take reasonable steps to educate a witness on a topic
- Key Principles from *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 689 (S.D. Fla. 2012):
  - Not a memory "contest" but requires good faith effort to prepare appropriate person to testify fully and non-evasively
  - Duty to prepare witness goes beyond the witnesses personal knowledge or matters in which they were personally involved
- Witness must be able to testify competently and in detail – but failure to answer every question does not mean the corporation failed to adequately prepare

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Illinois Supreme Court Rule 206(a)(1)

- *Representative Deponent.* A party may in the notice and in a subpoena, if required, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested.
- Substantially similar to the federal rule
  - "Paragraph (a) was amended in 1987 to add paragraph (a)(1) on representative deponents. The procedure is substantially similar to the procedure set forth in Federal Rule of Civil Procedure 30(b)." Ill. S. Ct. R. 206(a)(1), 1999 committee comments.
- Federal case law is instructive for interpreting Illinois rule

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New York State Court Rule, NYCRR 202.20-d

(b) Notices and subpoenas directed to an entity may enumerate the matters upon which the person is to be examined, and if so enumerated, the matters must be described with reasonable particularity.
(c) If the notice or subpoena to an entity does not identify a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in section (b) of this Rule, then no later than ten days prior to the scheduled deposition:
(1) the named entity must designate one or more officers, directors, members or employees, or other individual(s) who consent to testify on its behalf;
(2) such designation must include the identity, description or title of such individual(s); and
(3) if the named entity designates more than one individual, it must set out the matters on which each individual will testify.
(d) If the notice or subpoena to an entity does identify a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in section (b) of this Rule, then:
(1) pursuant to CPLR 3106(d), the named entity shall produce the individual so designated . . .

- Key differences
  - Noticing party is not required to enumerate matters for examination
  - The noticing party may designate a particular representative

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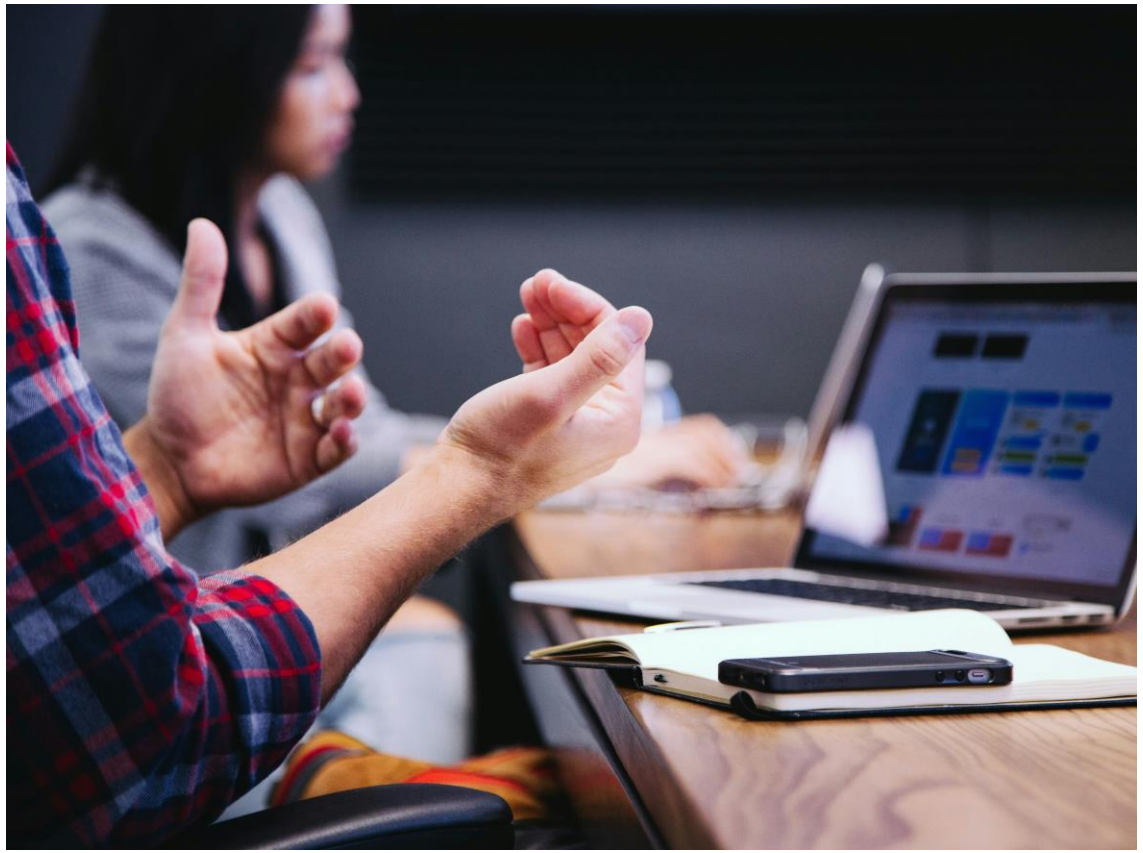
Preparing to Produce a Corporate Representative



- Gather documents pertaining to each noticed topic
  - Documents produced in discovery that relate to the noticed topics
  - Other documents that have not yet been requested or produced, but are related to the noticed topics
- Identify individuals with knowledge about each of the noticed topics
- Begin interviewing individuals with knowledge about the noticed topics

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Gathering Documents: Document Retention Policies

- Ensuring documents are properly preserved is key to successful corporate representative deposition and litigation strategy
- Before litigation begins, review your document retention policy (DRP)
- DRP is a set of policies and procedures that, among other things:
  - Outlines the company's commitment to comply with document retention laws, rules, and regulations
  - Identifies documents, records, and other information to preserve
  - Establishes a "retention period" for different record types
  - Provides guidelines for the deletion of records post-retention to reduce storage costs and liability
  - Describes employee compliance with litigation holds to protect relevant records

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Gathering Documents: Litigation Holds

- Litigation hold
  - Written instruction directing employees to preserve records and information that may be relevant to the subject matter of a lawsuit, government investigation, or internal investigation
- When to issue
  - Litigation hold should be issued when a company:
    - Reasonably anticipates litigation
    - Is served with a complaint or becomes aware of litigation against it
    - Other scenarios
      - Internal investigations
      - Government investigations
      - Cease and desist letter
      - Subpoena for documents or deposition

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Gathering Documents: Litigation Holds

- What the litigation hold should convey
  - Description of subject matter of the dispute
  - Instructions not to destroy or modify relevant records
  - Warnings on the importance of preserving potentially relevant materials and the possible consequences of non-compliance
  - Guidelines specifying date ranges for and types of materials to preserve
  - Explanation that the duty to preserve is ongoing until further notice
  - Contact information for outside or in-house counsel
- Who should receive the litigation hold
  - Current employees, including employees on leave
  - Employees departing the company
  - Records department and IT department
  - Cloud-storage providers and third parties that may hold relevant information
  - Vendors handling the collection of relevant information

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Gathering Documents: Ephemeral Messaging and Collaboration Tools

- Preservation obligations extend to ephemeral messaging and collaboration tools
- In January 2024, the FTC and DOJ issued additional guidance regarding these technologies
- Google Antitrust opinion (August 2024)
- In a case handled by Taft, the Court imposed the sanction of dismissal with prejudice where plaintiff was found to have spoliated evidence by using Signal's "disappearing messages"

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Identifying Representatives: Key Considerations

- Once preservation holds are issued and written discovery is underway, process begins to identify corporate representatives
- Rule 30(b)(6) gives corporations control over who they want to present as their witness
- One witness or more?
  - Corporation can designate multiple witnesses to testify as particular topics
- The person with the most knowledge is not necessarily the best
- Consider personal traits and communication skills

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Witness Prep

"Preparing a Rule 30(b)(6) designee may be an onerous and burdensome task, but this consequence is merely an obligation that flows from the privilege of using the corporate form to do business." QBE Ins. Corp. v. Jorda Enterprises, Inc., 277 F.R.D. 676, 689 (S.D. Fla. 2012)

- Challenges may arise where:
  - Deposition notice includes topics related to the distant past
  - Key employees have retired, been terminated, or now work for a competitor
  - Relevant business lines have been sold or abandoned
- Witness prep should ensure familiarity with noticed topics, knowledge of facts, and understanding of key documents
- Ensure sufficient time for preparation
- Conduct due diligence of the witness's online and social media presence, and any public statements

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Defending the Deposition: Practice Tips

- Common objections:
  - Outside the scope of noticed topics
  - Not reasonably known to the company
  - Seeks privileged or otherwise protected information
  - Seeks party's legal contentions in the lawsuit
- Exercise caution when an individual is being deposed as a fact witness under Rule 30(b)(1) and as a corporate representative under Rule 30(b)(6)

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Taking the Depositions: Practice Tips

- Organizing documents:
  - May need to pivot to previously deemed irrelevant documents as depositions progress
  - Documents may be organized by topic and importance for quick access to related materials
- If a witness is unprepared to testify about a designated topic, may request that the company produce another witness or if necessary, move to compel

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Binding Testimony

- Testimony binds the corporation, but is not an admission
  - "A corporation is bound by this testimony in the same way that an individual deponent would be, but this does not mean that a witness has made a judicial admission that formally and finally decides an issue. So a business entity may produce evidence that supplements or is contrary to its Rule 30(b)(6) deposition testimony. However, its witnesses are of course subject to cross-examination and impeachment if they contradict statements given by the company's Rule 30(b)(6) deponent." *Cuff v. Trans States Holdings, Inc*., 816 F. Supp. 2d 556, 559 (N.D. Ill. 2011) (quotation marks and citations omitted).
  - "A Rule 30(b)(6) deponent's testimony does not represent the knowledge or opinions of the deponent, but that of the business entity. In effect, the deponent is speaking for the corporation, presenting the corporation's position on the topic. The deponent must testify to both the facts within the knowledge of the business entity and the entity's opinions and subjective beliefs, including the entity's interpretation of events and documents. Id. A corporation is "bound" by its Rule 30(b)(6) testimony, in the same sense that any individual deposed under Rule 30(b)(1) would be "bound" by his or her testimony, however, this does not mean that the witness has made a judicial admission that formally and finally decides an issue." *Canal Barge Co. v. Commonwealth Edison Co.,* No. 98 C 0509, 2001 WL 817853, at *1 (N.D. Ill. July 19, 2001) (quotation marks and citations omitted).

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Using the Testimony at Trial

- Rule 32(a)(3): “Deposition of Party, Agent, or Designee. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party’s officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).”
- Does Rule 30(b)(6) permit live trial testimony?
  - Rule is limited to depositions and cannot be used to compel a corporate representative to testify at trial
  - Rule does not preclude a corporate representative from testifying at trial if subpoenaed under Rule 45
  - Personal knowledge is required

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Consequences and Pitfalls

- Rule 37(b)(2): If a person designated to testify under Rule 30(b)(6) “fails to obey an order to provide or permit discovery…the court in which the action is pending may make such orders in regard to the failure as are just.”
- Failure to produce a knowledgeable witness
- Obstructionist conduct
  - The Consumer Financial Protection Bureau recently sanctioned for misconduct during Rule 30(b)(6) depositions: “All in all, in each 30(b)(6) deposition, whether the CFPB's tactic was to object at every turn, instruct its witness not to answer, refuse to acknowledge any exculpatory facts, or have its witness read extended and nonresponsive answers, the CFPB tried to game the system so that nothing was accomplished.” *Consumer Fin. Prot. Bureau v. Brown*, 69 F.4th 1321, 1327-28 (11th Cir. 2023).
    - More than 70 work product objections, even to fact-based questions the district court had instructed it to answer
    - Use of “memory aids,” which the court described as “lawyer-prepared scripts that were hundreds of pages in length
    - Refusal to acknowledge the existence of any exculpatory facts

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