
## Tuesday, October 2, 2012
## 9:00 AM - 10:30 AM

# 404 – When Nobody Knows What the Company is Expected to "Know": Defending Corporate Designee Depositions in Challenging Circumstances

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# Faculty Biographies

**Joseph Hovermill**

Joseph Hovermill chairs the product liability and mass torts group at mid-Atlantic based Miles & Stockbridge P.C. His practice focuses on the defense of manufacturers in complex civil litigation involving toxic torts, product liability, environmental issues and class actions. He coordinates such litigation nationally for several of his U.S. and foreign-based manufacturer clients.

In connection with toxic tort and environmental litigation, he has personally conducted and/or supervised numerous forensic investigations relating to discontinued product lines or divested operations, accumulating and digesting available historic documents and locating and interviewing/deposing living witnesses. Mr. Hovermill has developed the available corporate knowledge relating to key issues in toxic tort and environmental matters and prepared and defended numerous corporate designee witness depositions relating to such topics and the corporation's efforts to locate available documents and information for such testimony.

Mr. Hovermill is a regular speaker and writer on issues relevant to his practice and is an active member of the Defense Research Institute and the International Association of Defense Counsel.

Mr. Hovermill received his BA from the University of Maryland Baltimore County and is a graduate of the University of Maryland School of Law.

**Mary McLemore**
*Senior Counsel, Litigation*
Georgia-Pacific LLC

**Ted Morris**

Theodore C. Morris is assistant general counsel and assistant secretary of Stanley Black & Decker. Since joining Stanley, Mr. Morris's responsibilities have included, among other things, management of the company's worldwide litigation.

Prior to joining Stanley, Mr. Morris spent over eight years as a trial lawyer with the law firms of Day, Berry & Howard (n/k/a Day Pitney) and Hebb & Gitlin (n/k/a Bingham McCutchen), in Hartford, CT. Mr. Morris left private practice to assume the position of vice president, general counsel and secretary of Farrel Corporation (a publicly traded manufacturing company in Ansonia, CT), and later, he served as counsel in the commercial lines law department of Travelers Property Casualty. At Farrel, Mr. Morris was responsible for all legal issues relating to the company, including SEC compliance,

intellectual property, employment, environmental and the company's product liability docket. At Travelers, Mr. Morris managed several hundred million dollars worth of insurance coverage and bad faith litigation, including product liability matters.

Mr. Morris graduated magna cum laude from the University Of Connecticut School Of Law.

**Diana Reed**

Diana L. Reed is senior counsel for PPG Industries, Inc. in Pittsburgh, PA. Her responsibilities include management of toxic and environmental tort litigation, counsel for product stewardship functions, and management of litigation hold and e-discovery activities.

Prior to joining PPG, Ms. Reed was a partner in the Pittsburgh law firm of Thorp, Reed & Armstrong.

Ms. Reed received an AB from Bryn Mawr College, and her law degree from Temple University School of Law where she was editor-in-chief of the *Temple Law Quarterly*. She served as law clerk to the Hon. Maurice B. Cohill, Jr. of the United States District Court for the Western District of Pennsylvania.

Ms. Reed is a trustee of Washington & Jefferson College in Washington, PA and a member of the board of visitors of Vanderbilt Divinity School.

 

# ACC's Annual Meeting 2012 - Orlando

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## What Are We Trying to Avoid?




 

## Lack of Individuals and Records

Your company is involved in environmental/toxic tort litigation arising out of a divested or defunct business from several decades ago:

- No records to speak of and no living people with any first-hand knowledge of the events at issue

-OR-

- Some or even extensive records are located and some low-level former employee witnesses are still alive, but no former management personnel and no one employed at company with any first-hand knowledge remains



## A 30(b)(6)/Corporate Designee Deposition Notice is Served on Your Company

- Multiple Topics Noticed:
  - Products and operations of the business including use and/or disposal of substances at issue in the litigation
  - Names and any information relating to former employees at the division and the identities of key personnel in management.
  - Corporate structure of the business including potential predecessor businesses and how the entity fits into the current corporate family
  - Business knowledge of the potential dangers associated with the substances at issue including knowledge available from scientific literature or other studies or trade association archives
  - Company's search for records and available information relating to business or issues in the litigation
  - Basis for the company's contentions on key points relating to product, operations or corporate successor liability defenses

## Multiple Considerations

- Scope of Company's Obligations in Responding to 30(b)(6) Notice
- Forensic Investigation
- Strategies to Oppose, Narrow or Limit Deposition
- Alternative Discovery Mechanisms
- Witness Options
- Miscellaneous Issues
- Affirmative Use of 30(b)(6) Deposition Testimony



## Company's Obligations

- Designate one or more officers, directors, managing agents or other persons who consent to testify on behalf of company
  - Witness need not be employed by company at time of deposition or at any time in the past
  - Witness need not have personal knowledge about events at issue
- Prepare designee to testify about information known or reasonably available to the company
  - Ascertain the company's "knowledge"
  - Teach the company's knowledge to designee

## Forensic Investigation

- Thorough and defensible investigation and document compilation is essential
  - Organized and documented search for historical records at the company, at other companies or in other repositories
  - Personnel at business unit(s) involved
  - Identification of former employees (personnel records, pension records, workers' compensation claims)
  - Interviews or preservation of living witness information
  - Role of outside counsel



## Strategies to Oppose, Narrow or Limit Deposition

Do not simply accept the Rule 30(b)(6) notice you receive.

- Overbroad?
  - "Reasonable Particularity"
    - "Including but not limited to" = overbroad, not reasonably particular
    - Topics not limited to products/time periods at issue = overbroad, not reasonably particular
- Limits on how much a witness is expected to testify about in detail
  - *Costa v. County of Burlington* (D.N.J. 2008) ("It is simply impractical to expect defendant's 30(b)(6) witness to know the intimate details of numerous officers' contacts with the decedent. If Plaintiffs want to know the details [of those contacts], Plaintiffs should take the officers' depositions.")
  - *State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.* (E.D.Pa. 2008) ("[C]ertain questions may seek details so minute that a witness could not reasonably be expected to answer them," such as questions as to loan numbers for sixty-three different loans)

## Requiring Alternative Discovery Mechanisms

Courts have held the Rule 30(b)(6) deposition to be inappropriate under certain circumstances:

- Too much information for designee to absorb and testify about – Not a "memory contest"
  - *Camp v. Correctional Med. Servs.* (M.D.Ala. 2008) (granting protective order where court was "doubtful a single corporate representative could provide to the plaintiffs the information they [sought]")
- Requested information or company's position is too complex for designee, and may be better suited for contention interrogatories
  - *United States v. Taylor* (M.D.N.C. 1996) (some inquiries are better answered through contention interrogatories wherein the client can have attorney's assistance in answering complicated questions involving legal issues)
  - *McCormick-Morgan, Inc. v. Teledyne Indus., Inc.* (N.D.Cal. 1991) (requiring use of contention interrogatories where information in patent case was too complex for 30(b)(6) deposition)
  - *Lance, Inc. v. Ginsburg* (E.D.Pa. 1962) (requiring contention interrogatories on question as to whether a trademark was valid)



## Alternative Discovery Mechanisms Cont'd

- Too burdensome and expensive to prepare for Rule 30(b)(6) deposition
  - Federal Rule 26 and courts applying Rule 26 recognize need to minimize costs and burdens during discovery process
    - Written discovery = less burdensome and less expensive
      - *SmithKline Beecham Corp. v. Apotex Corp.* (E.D.Pa. 2004) (concerns for costs will guide determination as to contention interrogatories v. 30(b)(6) depositions)
      - *Exxon Research & Eng'g Co. v. United States* (Fed. Cl. 1999) ("contention interrogatories should be a less expensive method and a less invasive method of letting the U.S. learn the required information")
      - *McCormick-Morgan, Inc. v. Teledyne Indus., Inc.* (N.D.Cal. 1991) (denying 30(b)(6) deposition where contention interrogatories were more cost-effective and less burdensome)

Strategic Consideration: Conversely, 30(b)(6) deposition may be best way to avoid burdensome written discovery

## Witness Options

Potential designees include:

- In-House Business / Professional Personnel
- Former "Old-Timer" Employee
- In-House Counsel
- Outside Counsel
- Retained Expert

Strategic Consideration: More than one witness can be designated. This decision may have implications in courts with deposition time limits.



## In-House Business / Professional Personnel

| PROS | CONS |
|---|---|
| Preservation of Privileged Communication (materials reviewed for deposition are not privileged) | Time commitment – designee not available to perform job duties, or too busy to prepare for deposition |
| Loyalty to Company | Lack of Legal Training |
| No Added Out-of-Pocket Cost | Subject to Business Issues / Employment / Restructuring Risks |
| Juror Perception of "Company" Testifying | |
| | |

## Former "Old-Timer" Employee

| PROS | CONS |
|---|---|
| Relevant Historical Knowledge Concerning Company | Lack of Legal Training |
| Does Not Interfere with Current Business Operations | Removed from Current Company Climate and Objectives/Goals |
| Witness Has Time to Prepare | Potential Vendettas |
| Personal Knowledge of Events at Issue (also a potential problem) | Added Cost – can/should you pay for time? |
| Juror Perception of "Company" Witness | Witness Longevity / Fatigue Factor |

Strategic Consideration: Old-timers might still be deposed because they have personal knowledge or were consulted as part of forensic investigation. 30(b)(6) deposition can be used to direct opposing counsel toward depositions of others you want to be deposed as fact witnesses.



## In-House Counsel

| PROS | CONS |
|---|---|
| Legal Training | Time commitment – designee not available to perform job duties (double loss of value) |
| No Added Cost | Significant Privilege Concerns |
| Can Make Time (Sometimes) to Adequately Prepare | |
| Active Involvement in Development of Company Information and Documents | |
| Juror Perception of "Company" Witness | |

## Outside Counsel

| PROS | CONS |
|---|---|
| Legal Training | Significant Risk of Waiver of Privilege |
| Often Most Knowledgeable About Events at Issue | Exclusion from Case / Ethical Issues |
| | Added Cost (?) |
| | "Hired Gun" Perception |
| | |



## Retained Expert

| PROS | CONS |
|---|---|
| Does Not Interfere with Current Business Operations | Significant Added Cost |
| Time to Adequately Prepare | "Hired Gun" Perception |
| | Expert Issues in Case Could be Complicated if Same Witness |
| | |
| | |

## What We've Learned

# PANEL EXPERIENCES IN DESIGNATING 30(b)(6) WITNESSES



## Miscellaneous Issues

Other issues to consider:

- Deposition questioning ventures outside notice of deposition
- Identification of documents during deposition
- Source of designee's education as to topics for examination

## Deposition Questioning Ventures Outside Noticed Topics

- Deposition questioning ventures outside topics stated within notice of deposition, but counsel allows witness to answer anyway
  - Is it individual or corporate testimony?
    - Is witness testifying from personal knowledge?
    - Can corporation be bound by testimony concerning topics outside the notice?
- Desirability of designating witness without personal knowledge in order to avoid possibility of answering questions as to topics outside 30(b)(6) notice



## Identification of Documents During Deposition

- Opportunity to ensure admissibility of corporate documents at trial
  - Authenticate
  - Provide necessary context to overcome hearsay objections, such as testimony that documents are kept in ordinary course of business
- Failure to properly identify documents becomes problematic when later seeking to introduce at trial

## Source of Designee's Education as to Topics for Examination

- Review of privileged documents
  - Documents reviewed are discoverable
    - Privilege or attorney work product arguments are waived
  - Sole source of designee's information should therefore not be facts communicated by counsel
  - What if witness is internal client who has routine attorney-client privileged communications with in-house and/or outside counsel?

Strategic Consideration: Certain work product can be disclosed in manner to induce more favorable questioning or result in favorable testimony.



## Affirmative Use of 30(b)(6) Corporate Designee Testimony

- Testimony during 30(b)(6) deposition is favorable, but witness lacks personal knowledge
  - Can witness testify at trial as to corporate knowledge?
    - *Brazos River Auth. V. GE Ionics, Inc.* (5th Cir. (TX) 2006) (concluding that adverse party could examine previously designated 30(b)(6) witness as to matters within the corporate knowledge to which he testified during deposition)
    - *Union Pump Co. v. Centrifugal Tech., Inc.* (5th Cir. (LA) 2010) (finding trial court erred in allowing corporate representative to testify at trial as to matters within corporate knowledge but outside representative's personal knowledge)
- Testimony during 30(b)(6) deposition is favorable, but witness is unavailable to testify at trial
  - Can the deposition testimony be used at trial?
    - *Sara Lee Corp. v. Kraft Foods, Inc.* (N.D.Ill. 2011) (permitting limited affirmative use of 30(b)(6) deposition of unavailable non-party corporate designee, despite lack of personal knowledge, as to matters "particularly suitable" for 30(b)(6) testimony, such as corporate policies and procedures)

## Demeanor of Designee

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## When Nobody Knows What the Company is Expected to "Know": Defending Corporate Designee Depositions in Challenging Circumstances

## Appendix of Cases

1. Scope of Designee Examination

    a. Two Views on Scope

        Examination Limited to Matters in Notice

*Paparelli v. Prudential Ins. Co.*, 108 F.R.D. 727, 730 (D. Mass. 1985) (ruling that the deponent may only be questioned regarding issues described in the notice because Rule 30(b)(6) implicitly restricts the scope of examination by requiring the deposing party to describe "with reasonable particularity the matters for examination").

        Broad Scope of Examination

*King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Ha. 1995) (ruling that the corporate defendant was not entitled to protective order barring designee examination outside scope of matters designated in deposition notice).

*Cabot Corp. v. Yamulla Enters., Inc.*, 194 F.R.D. 499, 500 (M.D. Pa. 2000) (court specifically rejected *Paparelli* and ruled that the scope of a Rule 30(b)(6) deposition is not limited to matters described in notice).

*Am. Gen. Life Ins. Co. v. Billard*, 2010 WL 4367052 at *4 (N.D. Iowa Oct. 28, 2010) (noting that "every court which has addressed this issue since *Paparelli* has taken a different view" and finding that questioning of Rule 30(b)(6) deponent is not limited to the subjects identified in the 30(b)(6) notice).

*EEOC v. Caesars Entertainment, Inc.*, 237 F.R.D. 428, 432 (D. Nev. 2006) ("reasonable particularity" requirement imposes an obligation on the corporate party to provide someone who can answer questions on topics specified in notice, but does not limit the scope of what can be asked at deposition).

*Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000) (ruling that the scope of a Rule 30(b)(6) deposition is not limited to matters described in notice, but is determined rather by the relevance standard of Fed. R. Civ. P. 26).

*Overseas Private Inv. Corp v. Mandelbaum*, 185 F.R.D. 67, 68 (D.D.C. 1999) (concluding that, contrary to *Paparelli*, that the scope of inquiry is guided only by the general discovery standard of relevance).

 

2. Duties in Responding to a 30(b)(6) Request

a. Duties of Entity

Generally

*Alexander v. FBI*, 186 F.R.D. 137, 141 (D.D.C. 1998) (entity must comply with the following four duties to meet its burden under Rule 30(b)(6): (1) the deponent must be knowledgeable on the subject matter identified as the area of inquiry; (2) the designating party must designate more than one deponent if necessary in order to respond to the relevant areas of inquiry, specified by the party requesting the deposition; (3) the designating party must prepare the witness to testify on matters not only known by the deponent, but those that should be known by the designating party; and (4) the designating party must substitute an appropriate deponent when it becomes apparent that the previous deponent is unable to respond to certain relevant areas of inquiry).

*Reilly v. NatWest Mkts. Group, Inc.*, 181 F.3d 253, 268 (2d Cir. 1999) (noting that a corporate deponent has an affirmative duty to produce as many persons as will be necessary to give complete, knowledgeable, and binding answers on its behalf).

*King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Ha. 1995) (if the corporate designee cannot answer questions regarding subject matter in notice, the organization has failed to comply with its obligations under Rule 30(b)(6)).

*Myrdal v. District of Columbia*, 248 F.R.D. 315, 317 (D.D.C. 2008) (ruling that the government entity failed to comply with its Rule 30(b)(6) duties when it produced a witness who stated "I don't think I can speak on behalf of the City," and who was unable to answer questions for more than half of 20 topics listed in deposition notice).

*Philbrick v. Encom, Inc.*, 593 F. Supp. 2d 352, 363 (D.N.H. 2009) (limiting the 30(b)(6) obligation to educate witness insofar as the party issuing deposition notice has described with reasonable particularity the matters for examination).

Preparation of Designated Deponent

*Mitsui & Co. v. Puerto Rico Water Resources Auth.*, 93 F.R.D. 62, 67 (D.P.R. 1981) (granting a motion to compel the designation of witnesses under Rule 30(b)(6) after corporation failed to designate and prepare a witness to respond to questions on behalf of the corporation).

*Bank of New York v. Meridien Biao Bank Tanzania, Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997) (stating that a corporate deponent must prepare its designee to the extent that matters are reasonably available from documents, past employees, or other sources).

*Wilson v. Lakner*, 228 F.R.D. 524, 528 (D. Md. 2005) (a organization in response to a 30(b)(6) deposition notice is expected to "create" a witness or witnesses with responsive knowledge).

 

*Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C.1989) (a corporation must produce persons to satisfy a 30(b)(6) request, "but more importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of corporation").

*Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006) (holding that the corporate defendant violated Rule 30(b)(6) by failing to prepare deponent with respect to issues that, while not in his personal knowledge, were within corporate knowledge of organization).

*Federal Deposit Ins. Corp. v. Butcher*, 116 F.R.D. 196, 202 (E.D. Tenn. 1986) (finding that designated deponents were not prepared, court ordered organization to redesignate witnesses under Fed. R. Civ. P. 30(b)(6) and prepare them to testify on matters designated in notice of deposition).

*Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb. 1995) (ordering corporation to either prepare designated witness to answer matters referred to in notice or designate and prepare another witness).

*Quantachrome Corp. v. Micromeritics Instrument Corp.*, 189 F.R.D. 697, 699 (S.D. Fla. 1999) (ordering defendant to produce additional representatives with knowledge of subject matter in deposition notice after defendant failed to fulfill its duty to prepare witnesses so they would be able to give complete and knowledgeable answers).

Substituted/Multiple Designees

*Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989) (defendant failed to make complete designation and produce knowledgeable witness and could be subject to sanctions when it refused to produce any person other than its claims director, who did not know information sought).

*Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb. 1995) (corporation had duty to produce an additional knowledgeable designee if its first designee lacked corporate knowledge and could not be prepared to answer questions on subject matter listed in notice).

*Alexander v. FBI*, 186 F.R.D. 137, 141 (D.D.C. 1998) (An organization must substitute an appropriate deponent when it becomes apparent that previous deponent is unable to respond to the relevant areas of inquiry).

b. Duties of Designee

Testify as to Matters Known or Reasonably Available to the Organization

*PPM Finance, Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894-95 (7th Cir. 2004) (Rule 30(b)(6) deponent may testify to both matters within his or her personal knowledge and matters known or reasonably available to organization).

 

*State Farm Mut. Auto. Ins. Co. v. New Horizon, Inc.*, 250 F.R.D. 203, 216 (E.D. Pa. 2008) (Rule 30(b)(6) designee is not simply testifying about matters within his or her knowledge, but rather is speaking for corporation about matters to which corporation has reasonable access).

*Sigmund v. Starwood Urban Retail VI, LLC*, 236 F.R.D. 43, 45 (D.D.C. 2006) ("Because Rule 30(b)(6) allows a corporation to speak through its designated agents, the agents' testimony is generally admissible as a statement of the corporation.").

Firsthand Knowledge Not Required

*S.E.C. v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y. 1992) (rejecting the contention that Rule 30(b)(6) is only intended to apply to actions in which an organization or someone in its employ has participated in transactions or events in controversy or has actual knowledge of facts or information relevant to action).

*PPM Finance, Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894 (7th Cir. 2004) (Rule 30(b)(6) deponent may testify both to matters within his or her personal knowledge and matters known or reasonably available to organization).

*Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) (a noticing party may not require organization to designate someone with "personal knowledge" appear on behalf of entity because personal knowledge by designee is not required by Rule 30(b)(6)).

Testify as to the Entity's Subjective Beliefs and Opinions

*United States v. Taylor*, 166 F.R.D. 356, 361 *aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996) ("[T]he designee must not only testify about facts within the corporation's knowledge, but also its subjective beliefs and opinions.").

*Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006) (Rule 30(b)(6) designee does not give his or her personal opinions, but rather presents corporation's position on topics in deposition notice).

Rule 30(b)(6) deponent may not invoke Fifth Amendment

*Nutramax Lab., Inc. v. Twin Lab., Inc.*, 32 F. Supp. 2d 331, 337-38 (D. Md. 1999) (designated deponent acted in bad faith in waiving privilege against self-incrimination in prior affidavits and then making self-serving speech at end of his Rule 30(b)(6) deposition while claiming privilege during deposition to certain questions on same matters).

Designee Not Required to Know Intimate Details

*Costa v. County of Burlington*, 254 F.R.D. 187, 190-91 (D.N.J. 2008) ("It is simply impractical to expect defendant's 30(b)(6) designee to know the intimate details of numerous officers' contacts with the decedent. If Plaintiffs want to know the details [of those contacts], Plaintiffs should take the officers' depositions.").

 

*State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.*, 250 F.R.D. 203, 216-17 (E.D.Pa. 2008) ("[C]ertain questions may seek details so minute that a witness could not reasonably be expected to answer them," such as questions as to loan numbers for sixty-three different loans).

3. Methods to Oppose, Narrow, or Limit

Overbroad Notice

*Unzicker v. A.W. Chesterton Co.*, No. MDL-875, 2012 WL 1966028, at *5 (E.D.Pa. May 31, 2012) (finding 30(b)(6) deposition notice overbroad and not reasonably particular where it sought testimony regarding products and time periods not relevant to the plaintiff's allegations of exposure).

*Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) (although plaintiff specifically listed areas of inquiry, court found notice to be overbroad because the matters specified were qualified by the phrase "including but not limited to").

*Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 125 (D.D.C. 2005) (Rule 30(b)(6) notice that listed 19 categories of inquiry each qualified by the phrase "including but not limited to" was overbroad because witnesses could not be properly prepared to respond).

Protective Order

*S.E.C. v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (court granted SEC's motion for a protective order barring 30(b)(6) deposition because deposition constituted impermissible attempt to inquire into mental processes and strategies of SEC counsel).

No Designation Required When Organization Lacks Knowledge; Protective Order Necessary

*Barron v. Caterpillar, Inc.*, 168 F.R.D. 175, 177-78 (ED. Pa. 1996) (because "inescapable and unstoppable forces of time" had erased items from designee's memory, and because designee did not act willfully or in bad faith, plaintiffs were granted leave only to file additional interrogatories and requests for production of documents instead of deposing additional designee as requested).

*Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 76 (D. Neb. 1995) (if entity does not possess knowledge of matters listed in subpoena so as to prepare witness to give knowledgeable answers, its obligations under Rule 30(b)(6) cease, because the rule requires only "testimony as to matters known or reasonably available to the organization").

*Commodity Futures Trading Comm'n v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 771 (9th Cir. 1995) (trial court properly sanctioned corporation when it failed to seek a protective order after being unable to designate a 30(b)(6) deponent).

 

4. Witness Options

a. Current Employees/Managers

Candace A. Blydenburgh, *Picking and Preparing Your Corporate Witnesses for Rule 30(b)(6) Depositions*, 13 No. 4 Prac. Litigator 7, 10-11 (July 2002) ("If the subjects contained in the notice relate to complex issues and opposing counsel is a novice to the type of litigation, you may want a high-level officer, director, or managing agent who has testified on the subject matter previously to representative the corporation. If the topics of the notice are straightforward and the opposing counsel is well-versed in the subject matter, you may want a low-level officer or even a high-ranking non-management employee with little testimonial experience to represent the company. Similarly, you may want to designate an individual who only has knowledge about the topic listed on the notice in view of the fact that an examining party is able to ask questions outside the scope of the matters described in the notice, so long as the questions are relevant to the pending litigation.").

b. Former Employees/Agents

*Ierardi v. Lorillard, Inc.*, CIV. A. 90-7049, 1991 WL 158911 (E.D. Pa. Aug. 13, 1991) (quoting *Proseus v. Anchor Line, Ltd.*, 26 F.R.D. 165, 167 (S.D.N.Y.1960)) (defendant corporation had the option, but was not required to designate a former employee "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.'").

*Hilburn v. Deere & Co.*, CIV. A. 88-3692, 1990 WL 119690 (E.D. Pa. Aug. 7, 1990) *aff'd sub nom. Hilburn v. John Deere Co.*, 928 F.2d 1131 (3d Cir. 1991) (former employee was proper 30(b)(6) designee for defendant corporation and his testimony could be received into evidence as statements of the corporation).

J. Walter Sinclair & Samia E. McCall, *Lessons Learned from the 30(b)(6) Deposition*, 49-SEP ADVOCATE (Idaho) 23, 24 (2006) ("The 30(b)(6) deposition notice served on a defunct or severely downsized entity presents a very challenging issue. In this case, the organization most likely has no knowledgeable employee and limited, if any, documents may remain with which to prepare a witness. In many instances, the former employees could be working for a prior competitor and access may be difficult, if not impossible. Even if former employees are not working for the competition, a knowledgeable former employee is not necessarily a prudent choice for a 30(b)(6) deponent. The 30(b)(6) deponent's testimony will bind the organization and the former employee's interest may not necessarily be aligned with those of the organization. The former employee, however, may be used as a 30(b)(6) witness if he or she agrees to do so, or may be used to help prepare a current employee as a 30(b)(6) witness, if the organization has any current employees.").

Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 St. John's L. Rev. 191, 230 (1989) ("[T]he corporation's knowledge may be unobtainable for the additional reason that it lies in the memory of a former employee who cannot be located or one who is deceased or otherwise unavailable. If the forgetful, evasive, silent or unavailable

 

employee had previously communicated the relevant information to the corporation's counsel, however, a basis would be available for testing credibility and filling the gaps of missing proof.").

c. Attorneys

Outside Counsel as Rule 30(b)(6) deponent

*Cartier, Div. of Richemont N. Am., Inc. v. Bertone Group, Inc.*, 404 F. Supp. 2d 573, 574 (S.D.N.Y. 2005) (court permitted plaintiff to appoint one of its two litigation counsel as its designated Rule 30(b)(6) deponent in trademark infringement action, although court warned plaintiff that it was risking later disqualification of counsel).

*New Jersey v. Sprint Corp.*, 03-2071-JWL, 2010 WL 610671 (D. Kan. Feb. 19, 2010) ("Sprint is strongly cautioned to think very long and hard about designating outside trial counsel as the 30(b)(6) witness, as that will definitely expose the attorney—indeed, perhaps his entire law firm—to disqualification later.").

In-house Counsel as Rule 30(b)(6) deponent

*In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1376 (Fed. Cir. 2001) ("[Corporate] [c]ounsel is often a fact witness with respect to various events, and may testify on deposition by the opposing party as to such matters without waiver [of attorney-client privilege]. A different result would obtain, of course, if counsel were offered to testify as to privileged or protected matters and might obtain if counsel were offered as a fact witness at trial by his client.").

*Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1552 (10th Cir.1995) (stating that mere designation of counsel as corporate representative for deposition pursuant to Fed. R. Civ. P. 30(b)(6) does not waive attorney-client privilege).

d. Retained Experts

*Hilburn v. Deere & Co.*, CIV. A. 88-3692, 1990 WL 119690 (E.D. Pa. Aug. 7, 1990) *aff'd sub nom. Hilburn v. John Deere Co.*, 928 F.2d 1131 (3d Cir. 1991) (former employee who testified as a paid expert on behalf of defendant corporation was proper 30(b)(6) designee and his testimony could be received into evidence as statements of the corporation).

e. Information Unavailable

*Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 24 (E.D. Pa. 1986) ("[A] certain level of retirement, death, or memory loss must be expected when specific information, or general information as old as 25 years is sought from a corporation.").

*Barron v. Caterpillar, Inc.*, 168 F.R.D. 175, 177 (E.D. Pa. 1996) (holding that requiring defendant to appoint an additional corporate designee would be inappropriate when "both parties

 

should expect that the inescapable and unstoppable forces of time have erased items from [the original designee's] memory which neither party can retrieve.").

5. Place of Deposition

Deposition at Principal Place of Business

*Buzze v. Board of Ed. of Hempstead*, 178 F.R.D. 390, 392 (E.D.N.Y. 1998) (stating that there is a general presumption in favor of conducting the corporate deposition at its principal place of business).

*Morin v. Nationwide Fed. Credit Union*, 229 F.R.D. 362, 363 (D. Conn. 2005) (when plaintiff seeks to depose defendant at location other than defendant's place of business, plaintiff must demonstrate "peculiar" circumstances that compel deposition to be held in alternative location).

*Zuckert v. Berkliff Corp.*, 96 F.R.D. 161, 162 (N.D. Ill. 1982) ("[A]s a general rule, the deposition of a corporation by its agents and officers should be taken at its principal place of business.").

*Stone v. Morton International, Inc.*, 170 F.R.D. 498, 504 (D. Utah 1997) (deposition of corporate officer should ordinarily be taken at its principal place of business or at deponent's residence or place of business as matter of convenience).

*McDougal-Wilson v. Goodyear Tire & Rubber Co.*, 232 F.R.D. 246, 249 (E.D.N.C. 2005) (plaintiff failed to overcome presumption that deposition should take place at corporate headquarters rather than in the state where action was pending).

6. Multiple Depositions of Organization

Leave of Court Required for Second Deposition

*Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d 189, 192 (1st Cir. 2001) (without leave of court, defendant was not entitled to take additional Rule 30(b)(6) depositions of nonparty corporation after plaintiff had earlier deposed representatives of that same corporation under Rule 30(b)(6)).

*State Farm Mut. Auto. Ins. Co. v. New Horizon, Inc.*, 254 F.R.D. 227, 234 (E.D. Pa. 2008) (neither text of Rule 30(a)(2)(A)(ii) nor committee's note exempts Rule 30(b)(6) depositions from leave of court requirement).

Leave of Court Not Required for Second Deposition on Different Topics

*Quality Aero Tech., Inc. v. Telemetrie Elektronik, GmbH*, 212 F.R.D. 313, 319 (E.D.N.C. 2002) (ordering corporate defendant to submit to a second Rule 30(b)(6) deposition when noticing party sought information regarding different subject areas).

 

7. Alternatives to Oral Deposition

30(b)(6) May Not Be the Best Discovery Option in Certain Circumstances

*McCormick-Morgan, Inc. v. Teledyne Indus., Inc.*, 134 F.R.D. 275, 286-87 (N.D.Cal. 1991), *rev'd on other grounds*, 765 F. Supp. 611 (N.D.Cal. 1991) (stating that "no one human being can be expected to set forth, especially orally in a deposition, a fully reliable and sufficiently complete account of all the bases for the contentions made and positions taken by a party" in circumstances involving complex facts and numerous legal issues).

*Camp v. Correctional Med. Servs.*, Civil Act. No. 2:08cv227, 2008 WL 5157910, at *5 (M.D.Ala. 2008) ("The court is doubtful a single corporate representative could provide to the plaintiffs the information they seek. Accordingly, …plaintiffs' motion to compel will be denied and the defendants' motion for a protective order will be granted.").

Using Contention Interrogatories Instead of 30(b)(6) Depositions

*McCormick-Morgan, Inc. v. Teledyne Indus., Inc.*, 134 F.R.D. 275, 286 (N.D.Cal. 1991), *rev'd on other grounds*, 765 F. Supp. 611 (N.D.Cal. 1991) (assessing whether contention interrogatories or a Rule 30(b)(6) deposition "would yield most reliably and in the most cost-effective, least burdensome manner information that is sufficiently complete to meet the needs of the parties and the court in a case like this").

*Exxon Research & Eng'g Co. v. United States*, 44 Fed. Cl. 597, 601–602 (Fed. Cl. 1999) (holding that under the circumstances contention interrogatories were more appropriate than Rule 30(b)(6) depositions because (a) contention interrogatories should be a less expensive method and are a less invasive method of letting the United States learn the required information, (b) claim construction is a difficult issue to summarize for one deponent, and (c) a deposition of an attorney should be avoided until other possible methods for discovery are attempted and found unsuccessful).

*United States v. Taylor*, 166 F.R.D. 356, 362 n.7 (M.D.N.C. 1996) (recognizing that "[s]ome inquiries are better answered through contention interrogatories wherein the client can have the assistance of the attorney in answering complicated questions involving legal issues").

*Lance, Inc. v. Ginsburg*, 32 F.R.D. 51, 53 (E.D.Pa. 1962) (denying plaintiff's motion to compel a deposition and instead requiring contention interrogatories on the question of whether a trademark was valid).

Cost-Benefit Analysis to a 30(b)(6) Deposition

*Exxon Research & Eng'g Co.*, 44 Fed. Cl. 597, 601 (Fed. Cl. 1999) (stating that "contention interrogatories should be a less expensive method and are a less invasive method of letting the United States learn the required information").

 

*SmithKline Beecham Corp. v. Apotex Corp., et al.*, No. 99-CV-4304, 2004 WL 739959, at *3 (E.D.Pa. 2004) (concluding that determination as to whether contention interrogatories are more appropriate than Rule 30(b)(6) depositions will be determined on a case-by-case basis, and will be guided by concerns for minimizing costs and burdens).

*McCormick-Morgan, Inc. v. Teledyne Indus., Inc.*, 134 F.R.D. 275, 286 (N.D.Cal. 1991), *rev'd on other grounds*, 765 F. Supp. 611 (N.D.Cal. 1991) (denying a Rule 30(b)(6) deposition where contention interrogatories were more cost-effective and less burdensome)

*Jennifer A. v. United Healthcare Ins. Co.*, No. CV 11-1813, 2012 WL 762071, at *1 (C.D.Cal. 2012) (allowing Rule 30(b)(6) deposition where "[t]here is no evidence in the record that a Rule 30(b)(6) deposition would be unduly burdensome").

8. Affirmative Use of 30(b)(6) Testimony

*Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416 (5th Cir. 2006) (concluding that adverse party could examine previously designated 30(b)(6) witness as to matters within the corporate knowledge to which he testified during deposition).

*Union Pump Co. v. Centrifugal Tech., Inc.*, 404 Fed. Appx. 899 (5th Cir. 2010) (finding trial court erred in allowing corporate representative to testify at trial as to matters within corporate knowledge but outside representative's personal knowledge).

*Sara Lee Corp. v. Kraft Foods, Inc.*, 276 F.R.D. 500, 502-04 (N.D.Ill. 2011) (permitting limited affirmative use of 30(b)(6) deposition of unavailable non-party corporate designee, despite lack of personal knowledge, as to matters "particularly suitable" for 30(b)(6) testimony, such as corporate policies and procedures).

 