Ethical Minefields in Corporate Designee Depositions

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JEOPARDY: The Corporate Representative Deposition and the Ethical Pitfalls

Whether referred to as a 30(b)(6) witness (referring to the Fed. R. Civ. Pro.) or a PMK, or some other nomenclature, this article focuses on the preparation and deposition of the person who will offer binding testimony on behalf of the insurance company.

For purpose of this article, we will focus on the Federal Rules of Civil Procedure and the American Bar Association’s Model Rules of Professional Conduct. This article is intended to provide general guidance, but is no substitute for professional legal guidance provided by an attorney that practices in the jurisdiction where the litigation is pending.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 30 – Depositions by Oral Examination

(b) Notice of the Deposition; Other Formal Requirements.

(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 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

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person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. 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. (emphasis added).

ABA MODEL RULES OF PROFESSIONAL CONDUCT

Each state has its own rules of professional conduct/ethics rules that govern the practice of law. It is important to know what the rules are in the state where the litigation is pending; it is also important to know the rules in the state where in-house counsel is located. For purposes of this session, we will use the ABA Model Rules for purposes of discussion.

Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

**Rule 1.6 Confidentiality Of Information**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

   (1) to prevent reasonably certain death or substantial bodily harm;

   (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

   (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted
from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

**Rule 1.7 Conflict Of Interest: Current Clients**
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.13 Organization As Client
(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

1. despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

2. the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent
the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.
Rule 4.3 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 7.3 Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted:

(1) is a lawyer; or
(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

THE BIBLE GOVERNING CORPORATE DEPOSITIONS AS PROCLAIMED BY A FEDERAL COURT JUDGE\(^2\)

If the case law outlining the guiding principles of 30(b)(6) depositions could be summarized into a *de facto* Bible governing corporate depositions, then the litigation commandments and fundamental passages about pre-trial discovery would likely contain the following advice:

1. The rule's purpose is to streamline the discovery process. In particular, the rule serves a unique function in allowing a specialized form of deposition. *Great Am. Ins. Co. v. Vegas Constr. Co., Inc.*, 251 F.R.D. 534, 539 (D. Nev. 2008)

2. The rule gives the corporation being deposed more control by allowing it to designate and prepare a witness to testify on the corporation's behalf. *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D. N.C. 1996).

3. It is a discovery device designed to avoid the bandying by corporations where individual officers or employees disclaim knowledge of facts clearly known to the corporation. *Great Am.*, 251 F.R.D. at 539; *Taylor*, 166 F.R.D. at 361.


5. Rule 30(b)(6) imposes burdens on both the discovering party and the designating party. The party seeking discovery must describe the matters with reasonable particularity and the responding corporation or entity must produce one or more witnesses who can testify about the corporation's knowledge of the noticed topics. *Great Am.*, 251 F.R.D. at 539.

6. The testimony of a Rule 30(b)(6) witness represents the collective knowledge of the corporation, not of the specific individual deponents. A Rule 30(b)(6) designee presents
the corporation’s position on the listed topics. The corporation appears vicariously through its designees. *Taylor*, 166 F.R.D. at 361.

7. A corporation has an affirmative duty to provide a witness who is able to provide binding answers on behalf of the corporation. *Ecclesiastes 9:10–11–12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1147 (10th Cir. 2007).

8. Thus, a Rule 30(b)(6) witness need not have personal knowledge of the designated subject matter. *Ecclesiastes*, 497 F.3d at 1147; see generally Federal Civil Rules Handbook, 2012 Ed., at p. 838 (“the individual will often testify to matters outside the individual's personal knowledge”).

9. The designating party has a duty to designate more than one deponent if necessary to respond to questions on all relevant areas of inquiry listed in the notice or subpoena. *Ecclesiastes*, 497 F.3d at 1147; *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 127 (M.D. N.C. 1989) (duty to substitute another witness as a designee once the initial designee's deficiencies become apparent during the deposition); *Alexander v. F.B.I.*, 186 F.R.D. 137, 142 (D. D.C. 1998).

10. The rule does not expressly or implicitly require the corporation or entity to produce the “person most knowledgeable” for the corporate deposition. Nevertheless, many lawyers issue notices and subpoenas which purport to require the producing party to provide “the most knowledgeable” witness. Not only does the rule not provide for this type of discovery demand, but the request is also fundamentally inconsistent with the purpose and dynamics of the rule. As noted, the witness/designee need not have any personal knowledge, so the “most knowledgeable” designation is illogical. *PPM Fin., Inc.*
v. Norandal USA, Inc., 392 F.3d 889, 894–95 (7th Cir. 2004) (rejecting argument that trial
court should not have credited the testimony of a witness who lacked personal knowledge
because the witness was a 30(b)(6) witness and “was free to testify to matters outside his
personal knowledge as long as they were within the corporate rubric”). Moreover, a
corporation may have good grounds not to produce the “most knowledgeable” witness for
a 30(b)(6) deposition. For example, that witness might be comparatively inarticulate, he
might have a criminal conviction, she might be out of town for an extended trip, he might
not be photogenic (for a videotaped deposition), she might prefer to avoid the entire
process or the corporation might want to save the witness for trial. From a practical
perspective, it might be difficult to determine which witness is the “most” knowledgeable
on any given topic. And permitting a requesting party to insist on the production of the
most knowledgeable witness could lead to time-wasting disputes over the comparative
level of the witness’ knowledge. For example, if the rule authorized a demand for the
most knowledgeable witness, then the requesting party could presumably obtain
sanctions if the witness produced had the second most amount of knowledge. This result
is impractical, inefficient and problematic, but it would be required by a procedure
authorizing a demand for the “most” knowledgeable witness. But the rule says no such
thing.

11. Although the rule is not designed to be a memory contest, the corporation has a duty
to make a good faith, conscientious effort to designate appropriate persons and to
prepare them to testify fully and non-evasively about the subjects. Great Am., 251 F.R.D.
at 540.
12. The duty to prepare a Rule 30(b)(6) witness goes beyond matters personally known to the designee or to matters in which the designated witness was personally involved. *Wilson v. Lakner,* 228 F.R.D. 524 (D. Md. 2005).


14. The mere fact that an organization no longer employs a person with knowledge on the specified topics does not relieve the organization of the duty to prepare and produce an appropriate designee. *Id.; Great Am.,* 251 F.R.D. at 540; *Taylor,* 166 F.R.D. at 362; *cf. Ecclesiastes,* 497 F.3d at 1148 (in “one common scenario,” the corporation designates individuals who lack personal knowledge “but who have been educated about it”) (emphasis added).

15. Faced with such a scenario, a corporation with no current knowledgeable employees must prepare its designees by having them review available materials, such as fact witness deposition testimony, exhibits to depositions, documents produced in discovery, materials in former employees' files and, if necessary, interviews of former employees or others with knowledge. *Great Am.,* 251 F.R.D. at 540; *Federal Civil Rules Handbook,* p. 838; *see generally Wilson,* 228 F.R.D. at 529 (preparation required from myriad sources, including “documents, present or past employees, or other sources”).

16. In other words, a corporation is expected to create an appropriate witness or witnesses from information reasonably available to it if necessary. *Wilson,* 228 F.R.D. at 529.
17. As a corollary to the corporation's duty to designate and prepare a witness, it must perform a reasonable inquiry for information that is reasonably available to it. *Fowler, 2008 WL 4907865* at *5; *Marker, 125 F.R.D.* at 127.

18. A corporate designee must provide responsive answers even if the information was transmitted through the corporation's lawyers. *Great Am., 251 F.R.D.* at 542.

19. In responding to a Rule 30(b)(6) notice or subpoena, a corporation may not take the position that its documents state the company's position and that a corporate deposition is therefore unnecessary. *Great Am., 251 F.R.D.* at 540.

20. Similarly, a corporation cannot point to interrogatory answers in lieu of producing a live, in-person corporate representative designee. *Marker, 125 F.R.D.* at 127.

21. 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. *Great Am., 251 F.R.D.* at 541; *see also Calzaturificio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 38 (D. Mass. 2001) (review required even if “documents are voluminous and the review of those documents would be burdensome”).

22. Not only must the designee testify about facts within the corporation's collective knowledge, including the results of an investigation initiated for the purpose of complying with the 30(b)(6) notice, but the designee must also testify about the corporation's position, beliefs and opinions. *Great Am., 251 F.R.D.* at 539; *Taylor, 166 F.R.D.* at 362
(designee presents corporation’s “position,” its “subjective beliefs and opinions” and its “interpretation of documents and events”).

23. The rule implicitly requires the corporation to review all matters known or reasonable available to it in preparation for a Rule 30(b)(6) deposition. Wilson, 228 F.R.D. at 529 (“good faith effort” to “find out the relevant facts” and to “collect information, review documents and interview employees with personal knowledge”).

24. If a corporation genuinely cannot provide an appropriate designee because it does not have the information, cannot reasonably obtain it from other sources and still lacks sufficient knowledge after reviewing all available information, then its obligations under the Rule cease. Calzaturificio, 201 F.R.D. at 39; see also Dravo Corp. v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 76 (D. Neb. 1995).

25. If it becomes apparent during the deposition that the designee is unable to adequately respond to relevant questions on listed subjects, then the responding corporation has a duty to timely designate additional, supplemental witnesses as substitute deponents. Alexander, 186 F.R.D. at 142; Marker, 125 F.R.D. at 127.

26. The rule provides for a variety of sanctions for a party's failure to comply with its Rule 30(b)(6) obligations, ranging from the imposition of costs to preclusion of testimony and even entry of default. Reilly v. Natwest Mkts. Grp. Inc., 181 F.3d 253, 269 (2d Cir. 1999) (affirming order precluding witness five witnesses from testifying at trial); see also Taylor, 166 F.R.D. at 363 (“panoply of sanctions”); Great Am., 251 F.R.D. at 543 (“variety of sanctions”).
27. The failure to properly designate a Rule 30(b)(6) witness can be deemed a nonappearance justifying the imposition of sanctions. *Resolution Trust Corp. v. Southern Union Co., Inc.*, 985 F.2d 196, 198 (5th Cir. 1993); see also *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 305 (3d Cir. 2000) (a 30(b)(6) witness who is unable to give useful information is “no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it”).

28. When a corporation’s designee legitimately lacks the ability to answer relevant questions on listed topics and the corporation cannot better prepare that witness or obtain an adequate substitute, then the “we-don't-know” response can be binding on the corporation and prohibit it from offering evidence at trial on those points. Phrased differently, the lack of knowledge answer is itself an answer which will bind the corporation at trial. *Fraser Yachts Fla., Inc. v. Milne*, No. 05–21168–CIV–JORDAN, 2007 WL 1113251, at *3 (S.D. Fla. Apr. 13, 2007); *Chick–fil–A v. ExxonMobil Corp.*, No. 08–61422–CIV, 2009 WL 3763032, at *13 (S.D. Fla. Nov. 10, 2009); see also *Ierardi*, 1991 WL 66799 at *3 (if party’s 30(b)(6) witness, because of lack of knowledge or failing memory, provides a “don’t know” answer, then “that is itself an answer” and the corporation “will be bound by that answer”).

29. Similarly, a corporation which provides a 30(b)(6) designee who testifies that the corporation does not know the answers to the questions “will not be allowed effectively to change its answer by introducing evidence at trial.” *Ierardi v. Lorillard*, No. 90–7049, 1991 WL 158911 (Aug. 13, 1991) (E.D. Pa. 1991, at *4).
30. The conclusion that the corporation is bound at trial by a legitimate lack of knowledge response at the 30(b)(6) deposition is, for all practical purposes a variation on the rule and philosophy against trial by ambush. Calzaturificio, 201 F.R.D. at 38; Wilson, 228 F.R.D. at 531; Taylor, 166 F.R.D. at 363 (rule prevents “sandbagging” and prevents corporation from making a “half-hearted inquiry before the deposition but a thorough and vigorous one before the trial”).

31. If the corporation pleads lack of memory after diligently conducting a good faith effort to obtain information reasonably available to it, then it still must present an opinion as to why the corporation believes the facts should be construed a certain way if it wishes to assert a position on that topic at trial. Taylor, 166 F.R.D. at 362.

32. There is nothing in the rule which prohibits a corporation from adopting the testimony or position of another witness in the case, though that would still require a corporate designee to formally provide testimony that the corporation's position is that of another witness. Fraser Yachts, 2007 WL 1113251, at *3.

33. The rule does not expressly require the designee to personally review all information available to the corporation. So long as the designee is prepared to provide binding answers under oath, then the corporation may prepare the designee in whatever way it deems appropriate—as long as someone acting for the corporation reviews the available documents and information. Reichhold, Inc. v. U.S. Metals Ref. Co., No. 03–453(DRD), 2007 WL 1428559, at *9 (D. N.J. May 10, 2007) (the rule “does not require that the corporate designee personally conduct interviews,” but, instead, requires him to testify to matters known or reasonably available to the corporation).
34. Rule 30(b)(6) means what it says. Corporations must act responsibly. They are not permitted to simply declare themselves to be mere document-gatherers. They must produce live witnesses who have been prepared to provide testimony to bind the entity and to explain the corporation's position. Wilson, 228 F.R.D. at 531; Great Am., 251 F.R.D. at 542 (entitled to "corporation's position").

35. Despite the potentially difficult burdens which sometimes are generated by Rule 30(b)(6) depositions, the corporation is not without some protection, as it may timely seek a protective order or other relief. C.F.T.C. v. Noble Metals Int'l, Inc., 67 F.3d 766, 772 (9th Cir. 1995).

36. Absolute perfection is not required of a 30(b)(6) witness. The mere fact that a designee could not answer every question on a certain topic does not necessarily mean that the corporation failed to comply with its obligation. Costa v. County of Burlington, 254 F.R.D. 187, 191 (D. N.J. 2008); Chick-fil-A, 2009 WL 3763032, at *13 (explaining that the corporation need not produce witnesses who know every single fact-only those relevant and material to the incidents underlying the lawsuit).


38. There are certain cases, such as subrogation cases or those involving dated facts, where a corporation will not be able to locate an appropriate 30(b)(6) witness. In those types of scenarios, the parties “should anticipate the unavailability of certain information” and “should expect that the inescapable and unstoppable forces of time have erased items from ... memory which neither party can retrieve.” Barron v. Caterpillar, Inc., 168
F.R.D. 175, 178 (E.D. Pa. 1996) (concluding that corporation did not act in bad faith when its designee did not remember events from almost thirty years earlier).

39. A corporation which expects its designee to be unprepared to testify on any relevant, listed topic at the corporate representative deposition should advise the requesting party of the designee's limitations before the deposition begins. *Calzaturificio*, 201 F.R.D. at 39.