

Ignorance of the Facts Is No Defense

By Joseph W. Hovermill and Matthew T. Wagman

A look at the options available to a company in meeting its Rule 30(b)(6) obligations while protecting its best interests.

When Nobody Knows What the Company “Knows”

The deposition of a corporation through its “corporate representative” can be perilous in any case. Such a deposition can go badly for many of the same reasons as any other deposition, but the obligations and conse-

quences of the corporate representative deposition process present additional risks. Although no deponent should go into a deposition unprepared, a corporate representative has an affirmative obligation to prepare thoroughly and become conversant with all information “known or reasonably known” to the corporation about preselected, designated topics. The topics covered by such a deposition can encompass information contained in perhaps thousands of documents, as well as information known to sometimes many different present, and possibly, former employees. A corporate deposition may be the only mechanism during the course of a case through which a corporation can tell its story through a single witness. When that story is not well-told, or worse, is torn apart by a talented opposing counsel, the deposition can live on in case after case.

When a corporate representative is designated to testify on matters about which he or she has personal knowledge—such as,

for example, a product’s design or a company’s personnel policies—the likelihood of the deposition going well improves, because the witness can retreat to the relative comfort of his or her personal knowledge and experience in answering many of the questions. Often, such “personal knowledge” witnesses are unavailable in toxic exposure or environmental cases involving product lines or operations of divested or discontinued businesses from earlier decades. Frequently, there simply is no living witness with personal knowledge about the most important issues concerning the relevant time period. Often, the only “knowledge” about such issues is reconstructed by outside counsel from historic documents, searched for, located, reviewed, and interpreted in defense of the case.

This article addresses the options available to a company in meeting its Rule 30(b)(6) obligations to designate a witness while protecting its best interests, specifically, when everything that is known about a case



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has been reconstructed by counsel and no current or living former company employee really “knows” anything at all.

The Rules of the Game: The Objectives and Consequences of the Rule 30(b)(6) Process

Pursuant to the Federal Rules of Civil Procedure, a party to litigation may issue a notice to a corporate entity or other organization to appear for deposition. *See, e.g.,* FED. R. CIV. P. 30(b)(6). Most states have similar corporate representative deposition laws, which were modeled after federal Rule 30(b)(6). The cases cited in this article are predominantly federal decisions.

Specifically, Rule 30(b)(6) of the Federal Rules of Civil Procedure provides that “[a] party may in the party’s notice and in a subpoena 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.” *Id.* In response, the named organization must designate one or more persons to testify on its behalf regarding the matters enumerated in the requesting party’s notice of deposition. As a result, during the deposition, the corporate designee is “speaking for the corporation,” and the corporation is bound by the designee’s testimony. *State ex rel. United Hosp. Ctr., Inc. v. Bedell*, 484 S.E.2d 199, 215 (W. Va. 1997) (holding that the testimony elicited at the deposition of a corporate representative represents the corporation’s knowledge and not that of the individual designated as the deponent).

In responding to a Rule 30(b)(6) deposition notice, a corporation has various options to ensure its testimony accurately conveys the appropriate message to the trier of fact. The rule provides that the organization “shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify.” FED. R. CIV. P. 30(b)(6) (emphasis added). Subject to its other requirements, the rule expressly provides the corporation with the sole discretion to decide who will testify on its behalf and, to the extent beneficial, the corporation may opt to designate a person outside the com-

pany to testify on its behalf, as long as that person consents. *See Ierardi v. Lorillard*, Civ. A. No. 90-7049, 1991 WL 158911 at *2 (E.D. Pa. Aug. 13, 1991).

Although the rule requires the designated individual to “testify as to the matters known or reasonably available to the organization,” a designated corporate representative is not required to have any personal knowledge of the matter identified in the discovering party’s deposition notice. *Reed v. Bennett*, 193 F.R.D. 689, 691 (D. Kan. 2000). If representatives designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they can give knowledgeable and binding answers for the corporation. *See U.S. v. Taylor*, 166 F.R.D. 356, 361–62 (M.D.N.C. 1996). A corporation is obligated to “make a conscientious, good-faith endeavor to designate the persons having knowledge of the matters sought by the deposing party and to prepare those persons in order that they can answer fully, completely, and unequivocally, the questions posed.” *Wilson*, 228 F.R.D. at 528. As one court stated, the corporation “is expected to create a witness or witnesses with responsive knowledge.” *Wilson v. Lakner*, 228 F.R.D. 524, 528 (D. Md. 2005). Creating a witness with “responsive knowledge” is achieved by educating the designated representatives using the corporation’s available information, including the corporation’s documents—even if such documents are in the hands of agents such as outside lawyers—pleadings, discovery responses, prior deposition transcripts and other related litigation materials, and by consulting with current and former employees. *Taylor* at 361–62. Such obligations have several implications.

It is well-accepted that under Rule 30(b)(6) the corporate designee must testify about facts known to the corporation or to facts reasonably available to the corporation. *See Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co.*, 1993 WL 34678 at *3 (S.D.N.Y. Feb. 4, 1993). An individual designated to testify on behalf of a corporation, however, may also be required to testify about the corporation’s subjective beliefs and opinions. *See Taylor*, 166 F.R.D. at 361–62. Such testimony may include the corporation’s interpretation of documents, its

opinion about why the facts should be construed in a particular way, and its explanation “regarding how the facts upon which it relies for its contentions supports those contentions.” *Id.*

Although there is general agreement that the use of a Rule 30(b)(6) deposition to seek factual information is appropriate, there is disagreement regarding whether

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inquiry into legal theories is appropriate. *See Arkwright*, 1993 WL 34678 at *3; *Sigmund v. Starwood Urban Retail VI, LLC*, 2006 WL 1545533 at *3–5 (D.D.C. June 6, 2006); *Canal Barge Co. v. Commonwealth Edison Co.*, 2001 WL 817853 at *2 (N.D. Ill. July 19, 2001); *Security Ins. Co. of Hartford v. Trustmark Ins. Co.*, 218 F.R.D. 29, 34 (D. Conn. 2003). Some courts have ordered corporate designees to testify about legal issues involved in the litigation, while still others have required witnesses to explain legal positions presented in pleadings. *See, e.g., Sigmund*, 2006 WL 1545533 at *3–5; *Security Ins. Co. of Hartford*, 218 F.R.D. at 34. On the other hand, some courts have held that certain matters, in particular, conceptually dense issues, are better suited to written discovery. *See McCormick-Morgan, Inc. v. Teledyne Industries, Inc.*, 134 F.R.D. 275, 286 (N.D. Cal.), *rev’d on other grounds*, 765 F. Supp. 611 (N.D. Cal. 1991). And yet other courts have recognized a distinction between factual matters and matters involving legal advice or strategy. *See Canal Barge Co.*, 2001 WL 817853 at *2 (noting distinction between “legal” issues that require attorney input and “factual issues” about which lay witnesses may testify).

Similarly, there is disagreement among jurisdictions, which has spurred substantial litigation, regarding a party’s right to



inquire about investigations conducted by a corporation or its counsel and counsel's involvement in the preparation of the designated witness. A plaintiff's counsel can and likely will explore how an individual designated to act as a corporation's witness prepared for a deposition to determine if the corporation complied with its obligations under Rule 30(b)(6). See *Calzatur-*

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ficio S.C.A.R.P. SPA v. Faviano Shoe Co., 201 F.R.D. 33, 36 (D. Mass. 2001). Indeed, a designated witness is obligated to review all corporate documentation that might have a bearing on the Rule 30(b)(6) deposition topics, and a plaintiff's counsel is entitled to ask questions regarding specifically which documents were reviewed by the deponent in preparation for the deposition. Furthermore, the witness should respond to the questions. See *Ash v. Ford Motor Co.*, 2008 WL 2312747, at *1 (N.D. Miss., May 30, 2008).

Preparing a Rule 30(b)(6) deponent for deposition becomes complex when certain facts are only known because (1) counsel became aware of them as part of a work-product protected, privileged investigation, (2) the facts are contained only in work-product privileged materials, or (3) the only basis for knowledge is an otherwise attorney-client privileged communication. Some courts have held that because the corporation is obligated to "thoroughly educate" and produce one or more witnesses to testify about all the facts known to it or its counsel regarding the deposition notice topics, even facts residing in work-product or the mind of counsel must be revealed. See *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 172 (D.D.C. 2003).

Courts employing an analysis based on Federal Rule of Evidence 612 have found

that different standards apply depending on which privilege is involved—work product or attorney-client. Some courts have compelled disclosure of both types of privileged materials under certain circumstances, while others have required a waiver at least of the attorney-client privilege before compelling disclosure. See *Suss v. MSX Intern. Engineering Services, Inc.*, 212 F.R.D. 159, 163 (S.D.N.Y. 2002). At issue in many of these decisions is the extent to which the information in the privileged material impacted the witnesses' testimony and how much an adversary's ability to cross-examine the witness is prejudiced. See *id.*; see also *In re Rivastigmine Patent Litigation*, 486 F. Supp. 2d 241, 244 (S.D.N.Y. 2007)

Perhaps No Other Litigation Decision Is More Important than Choosing the Best 30(b)(6) Witness(es)

Commonly, in a toxic tort or environmental case a summons and complaint seeking damages first informs an astonished company that it was once in a certain business, may be responsible for a certain product line, or owned a business with operations in a certain location. After a brief "has-anyone-heard-of-such-and-such" internal meeting, outside counsel is usually engaged to defend the case by reconstructing events based on whatever information is available. Counsel searches and reviews the client's document repositories, or perhaps those of other businesses in the corporate history chain. If pension records or other record types identify persons employed by the business at the time, investigators are hired to find potential witnesses, and they are interviewed for facts that might be of use in understanding what happened at the earlier point in time. Patent records, Internet searches, local, state and federal archives might be searched to piece together a picture of the business, its operations and its products. This process is often exclusively managed by counsel. Counsel uses the information unearthed through investigation to formulate discovery responses in the case that are later verified by a current employee on based on information and belief.

Then it happens. The plaintiff's counsel issues a deposition notice to the company demanding that a witness testify on

behalf of the corporation about a number of topics involving facts from the past—for example, the nature of the company's operations, the use of certain components in the company's products, the company's safety, sales, and marketing practices, or the company's use or disposal of certain materials as part of its operations. In addition, the notice might demand that a witness testify regarding the basis for certain responses in written discovery or affirmative defenses in the company's answer. Deposition notice topics might also cover the thoroughness of the company's search for information obtained through investigation. Often, when the deposition notice is received, only defense counsel really knows what the answers are to any questions about the above-mentioned topics. A decision must be made: who should become the company's designated witness?

"But, I Already Have a Day Job!" A Company Employee Is Not Your Only Option for a 30(b)(6) Witness—and Sometimes an Employee Is Not the Best Choice

Former employees are often used as designated witnesses when they have personal knowledge relating to historical topics. The following discussion assumes, as is just as often the case, that no such person is available.

The preparation obligations imposed on a corporation and the individual designated to testify on its behalf are burdensome in most cases, even when many of the specific topics are within the witness's personal knowledge. If a current company employee in a toxic tort case really knows practically nothing about the specific topics, the time commitment alone can be prohibitively burdensome. Unless a corporation allows the employee to make learning the facts a full-time job for a period of time, it could be a real challenge for an employee with regular job duties to make the time required to digest the case facts and voluminous documents reconstructed by counsel over hundreds of hours. Under such circumstances, it is fairly common to assist such a witness by providing a document developed specifically for disclosure at or before the deposition, or by working with the witness to develop such a document, so the witness has a "road map" during the deposition of the information that

needs to be conveyed and a way to identify the information sources. But even with such a “cheat sheet,” it is highly likely that the witness will become entangled in an unanticipated question or statement in a document, or will lack nimbleness with the facts, calling for a strategy focused on damage control rather than on using the deposition to affirmatively make defense-supporting points.

Other challenges are posed when designating a current company employee as a 30(b)(6) witness. Many such witnesses lack legal training. When the questions, as allowed in some of the jurisdictions, venture into quasi-legal subject areas, such as questions on the basis for statements in a discovery response or in an affirmative defense, many lay witnesses, answer badly or are manipulated into uttering the mantra, “the lawyers really did everything.” The result can look like a lack of preparation, indifference or a secret conspiracy.

Additionally, many jurisdictions allow a designee to answer questions beyond the scope of the topics in the notice, if the information would be otherwise discoverable. See *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995). One should give careful thought, therefore, to what the designated, currently company employed witness does “know” to make sure nothing can be used to impeach or attack actions that occurred thirty years ago about which the witness will testify. For example, today’s environmental compliance employee is trained in all of the modern ways in which industrial wastes cannot be safely disposed and the problems caused by improper disposal. If a witness has up to date knowledge of improper waste disposal practices, it could be used to impeach the very actions about which the witness has been designated to testify—actions that occurred decades earlier when practices were perhaps less sophisticated. Although some arguments can minimize impeachment tactics based on the discrepancy between current and historic practices, the reality is that if up-to-date knowledge is used to impeach historic practices, a corporation’s witness still ends up criticizing historic practices for which the corporation is responsible.

On the other hand, a lay witness current company employee has certain advantages as a corporate designee. Compared

with other options, in some respects, designating a currently company-employed lay individual as a Rule 30(b)(6) witness offers the greatest likelihood of preserving privileged information. See *Suss. v. MSX Intern. Engineering Services, Inc.*, 212 F.R.D. 159, 163 (S.D.N.Y. 2002). Although many jurisdictions might require disclosure of work-product, or even attorney-client protected materials that convey factual information, under some circumstances, jurisdictions that apply a waiver test are less likely to find a waiver is applicable when a lay company employee is involved. *Id.* During witness preparation, at least attorney-client advice about how to testify, how to phrase things, points of emphasis, or case strategy should remain privileged, even if certain privileged information about factual matters may not. There is also an “optics” issue. It just “looks better” or more honest when a company employee speaks for the company, as opposed to someone perceived as a hired “mouthpiece,” such as a third-party lawyer retained by the company.

A Tempting Risk Not Worth Taking: The Risk of Subject Matter Waiver of the Attorney-Client Privilege Always Outweighs the Benefits of Using Outside Counsel Defending the Case As a 30(b)(6) Witness

It might be tempting, because of the burden involved, counsel’s command of the facts, and a trained lawyer’s ability (at least hopefully) to handle and respond to deposition questions more persuasively, to simply designate one of the corporate counsel’s team as the 30(b)(6) representative. The advantage presented by this scenario is twofold: (1) the preparation obligations imposed on the individual designated to testify on the corporation’s behalf have already been satisfied because counsel has reviewed all of the existing documents and compiled the information known or reasonably available to the corporation; and (2) counsel will be well-versed in the corporation’s legal positions and should be the best candidate to present such positions accurately, persuasively, and succinctly.

Setting aside the obvious disadvantage of the “optics” issue (one of the “lawyers” involved in the case or issues actually testifying about facts of their client’s case), another significant disadvantage of designating counsel involved in the case is that

there is a great potential for unintentional privilege waiver and the possible significant ramifications of such waiver. See *Avery v. Dennison Corp. v. UCB Films PLC*, 1998 WL 703647 at *6 (N.D. Ill. Sept. 30, 1980). Generally, courts have held that designating counsel as a corporation’s Rule 30(b)(6) designee does not automatically waive the attorney-client privilege or work-product

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doctrine where he or she was designated to testify as to non-privileged factual matters. See *Offering In-House Counsel as 30(b)(6) Deponent*, 7 ANNOTATED PATENT DIGEST §42:77. Some jurisdictions have held that as long as the questions posed and responses given involve purely factual information and do not reveal the substance of communication between counsel and client, then there is no waiver of the attorney-client privilege. See *Sony Electronics, Inc. v. Soundview Technologies, Inc.*, 217 F.R.D. 104, 109–110 (D. Conn. 2002); *In re Pioneer Hi-Bred Intern., Inc.*, 238 F.3d 1370, 1376 (Fed. Cir. 2001); *U.S. v. Nobles*, 422 U.S. 225, 239–40 (1975). Legal advice and counseling would remain, therefore, privileged. If a testifying counsel inadvertently strays into privileged areas, however, the witness may be found to have waived the corporation’s privileges with respect to the matters testified to because the witness would be serving in a dual capacity, counsel for the corporation and corporate representative. See *Avery Dennison Corp. v. UCB Films PLC*, No. 95 C 6351, 1998 WL 703647 at *6 (holding that a party’s attorney voluntarily waived the attorney-client privilege by “straying into testimony regarding the reasons for withdrawing a reissue application for a patent.”)

Some courts, however, have taken a more extreme position on the designation of counsel as a corporation’s Rule 30(b)(6) designee and have held that “if the corpo-



ration calls counsel to testify to matters that the attorney could *only* have learned through the attorney-client relationship the privilege is waived.” See *People v. Dubrin*, 232 Cal. App. 2d 674, 680 (2d Dist. 1965) (emphasis added); *State ex rel. United Hosp. Ctr., Inc. v. Bedell*, 484 S.E.2d 199 (W. Va. 1997). The dangers here are not necessarily the waiver of certain facts that might, in

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any event, need to be discovered even by designating a lay witness. The real danger is an inadvertent subject matter waiver where all communications and advice about a subject are deemed waived. See *Chinnici v. Cent. DuPage Hosp. Ass’n*, 136 F.R.D. 464, 465 (N.D. Ill. 1991) (holding “[t]he privilege exists in the first instance to encourage communications from a client to his attorney, and for that reason the confidence of such communications must be protected. . . [A] party abandons this confidence by submitting a privileged material in a discovery proceeding, insofar as the subject matter of the privilege is concerned”). Although there are many benefits to counsel who developed the facts being designated, the risks associated with subject matter waiver, and the uncertainty, in at least some jurisdictions, about the dual role of counsel in such a situation may make this a last resort rather than a preferred option.

“You’re Hired!” Using Third-Party Sources As Your Rule 30(b)(6) Witness May Ensure You Get the Best and Most Consistent Testimony Possible

Designating a third party as a Rule 30(b)(6) witness might offer the best of both worlds. If handled properly, it can minimize the risk of privilege waiver, at least with respect to strategic matters and legal advice. Designating a third party can also present an opportunity to select a witness with testifying skills and time to prepare, ensuring

the corporation’s story is well-told. If the potential exposure from the case or future cases is significant, a company may want to consider retaining a completely independent third party to testify. The background and experience of that third party will depend on the topics listed in the deposition notice. A separate lawyer or law firm with case-appropriate toxic tort experience should be able to digest and persuasively testify about historic documents and facts. Under the right circumstances, a likable, silver-haired “dean of the bar,” a retired judge, or even a retired political figure, could actually give the corporation’s investigation and positions a unique perception of independence and respectability.

In other situations, consider traditional experts. If the issue is a company’s knowledge of the dangers of certain substances based on documents or studies in its possession, a trained epidemiologist may make an appropriate witness. If a company’s disposal practices are at issue, an individual familiar with the industrial processes and practices of the time in question might be appropriate. Many such individuals are familiar with the deposition process because they have testified before as experts, hopefully improving the chances for a favorable deposition overall. Such individuals advantageously minimize the risks associated with tripping over highly technical questions that might be beyond lay knowledge. It’s also unlikely experts will have discoverable personal knowledge about matters other than those for which they investigated or prepared to testify. Although prior “opinions” of such experts should be thoroughly vetted, because such witnesses are not offering opinions in this circumstance, but rather stating facts known to the company and the basis for the company’s position, the expert’s opinion in prior legal matters should be irrelevant.

If the investigation’s adequacy seems to be the focus of a deposition or an important issue in the case, a historian, private investigator or former law enforcement investigator with relevant forensic experience, might be an appropriate witness. The only risk with these types of witnesses is that they could, by the nature of their training and experience, be put in a position to impeach the company’s investigation if the

investigatory or research practices they have utilized in other contexts have not been followed.

Most importantly, in all likelihood, pretty much any communications with such independent, third-party designated witnesses are discoverable. Courts that have considered the issue have analogized such witnesses to testifying experts finding that communications with them and documents provided to the witness are discoverable. See *Magnivision, Inc. v. The Bonneau Company*, 2003 WL 23320550 (C.D. Cal., Dec. 18, 2003); see also *Pioneer Hi-Bred Int’l, Inc.*, 238 F.3d 1370 (Mo. 2001); *U.S. v. Ackert*, 169 F.3d 136, 140 (2d Cir. 1999). The reason is that communication between the corporation’s counsel and the independent designated witness are not intended to improve a client’s comprehension of the legal advice, so the witness is not considered a privileged agent or consultant. See *U.S. v. Kovel*, 296 F.2d 918, 921–22 (2d Cir. 1961). Thus, corporation counsel should be sensitive to the discoverability issue from the beginning, providing only information and documents to a witness that he or she is prepared to disclose.

Conclusion

The corporate representative deposition is too often approached narrowly. Often, counsel or the client may just assume that a former or current employee is the best Rule 30(b)(6) option. In cases where no potential previously or currently company-employed witness has personal knowledge of the deposition topics, or if the potential witness also has personal knowledge about other matters that the company chooses not to volunteer, the designation of a third party witness makes real sense. Although counsel for the company might be an option, very serious privilege waiver risks make it a dangerous choice at least in some jurisdictions. An independent witness can give the company a real opportunity to tell a story favorable to itself. While not every case justifies a retired senator or judge, or even a highly paid scientist, given the risks associated with a “bad” corporate representative deposition in not just one, but perhaps in many, many future high stakes cases, the substantial expense could be an investment that pay for itself and pays the client dividends well into the future.

