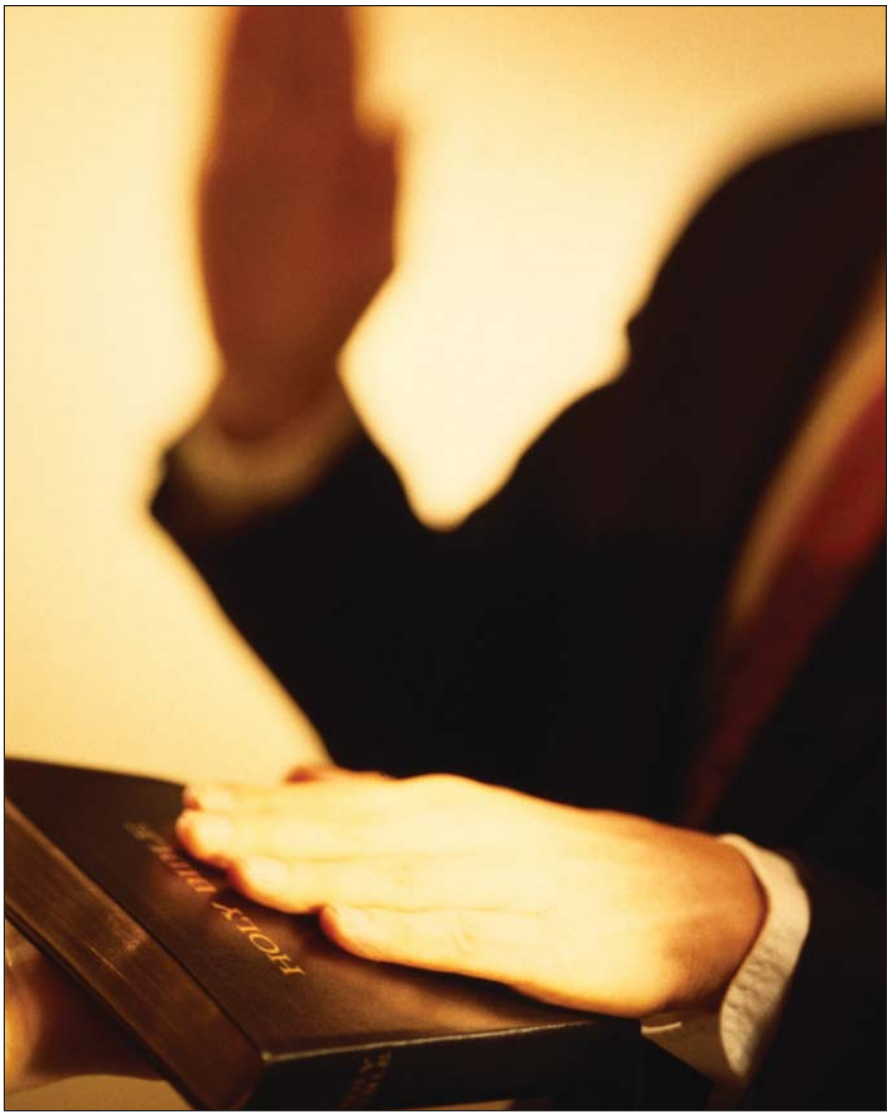
TAKING NOTICE: DEFENDING CORPORATE REPRESENTATIVE DEPOSITIONS



By Stephanie Wurdock
Sturgill, Turner, Barker & Moloney, PLLC

Introduction

We all know what to do when a client is asked to give his or her deposition. Once the plaintiff issues the notice, you set to work preparing your client to testify about his or her involvement in the case. You lay out the ground rules: "Don't talk about anything we've discussed; only testify to those things of which you have personal knowledge; and absolutely no speculating!" These are basic deposition rules. We all know them.

Not so fast. If your client is a corporation and you have been issued a notice pursuant to Kentucky Civil Rule of Procedure 30.02(6) or Federal Rule of Civil Procedure 30(b)(6), the above advice is absolutely incorrect. Not only is it bad advice, but it could result in sanctions against your client.

Wait … what?!?

That's right. CR 30.02(6) and Fed. R. Civ. P. 30(b)(6) – which allow a deposition notice and subpoena to be served upon a corporation – require significantly different deposition preparation than your everyday fact or party deposition. CR 30.02(6) – Kentucky's "corporate representative deposition" rule – provides that:

> A party may in his 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. In that event, the organization so named 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 he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization…

CR 30.02(6) parrots Fed. R. Civ. P. 30(b)(6) with no substantive differences. Therefore, this article will refer interchangeably to the state and federal versions of the corporate deposition rule as simply "the Rule." Although the Rule can be used to subpoena representatives from organizations and government agencies as well, this article will discuss the Rule within the corporate context.

Designed to streamline the discovery process, the Rule was intended by its drafters to benefit both the noticing and responding parties. Specifically, it was designed to (1) reduce difficulty in determining the managerial role (if any) of the person to be deposed; (2) curb the practice of "bandying," whereby various officers of a corporation are deposed, each of them claiming not to have knowledge of the pertinent facts; and

(3) protect corporations from duplicative, unproductive, and unnecessary depositions. *Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623 (5th Cir. 1973).

The Rule has existed peacefully for several decades, typically being invoked in business and products liability litigation to prevent parties from "hiding the ball" via corporate finger-pointing. However, the plaintiffs' bar has recently begun exploiting the Rule in personal injury cases to gain unfair advantages in discovery and at trial. This article will provide an introduction to the parties' duties and obligations under the Rule, available sanctions for failing to meet those duties, the ways the Rule may be wielded as a weapon against corporate defendants, and practice tips for defeating abusive discovery strategies.

The Parties' Duties

The Rule sets forth the noticing and responding parties' duties. The noticing party has only one duty under the Rule. He or she must "describe with reasonable particularity the matters on which examination is requested." CR 30.02(6). In other words, the notice must briefly state the topics or documents upon which the noticing party wants to depose the corporation. There is no rule setting forth how specifically the matters must be described. Indeed, the notice may be so broad as "any and all facts leading up to, concerning, or surrounding" the alleged negligence, and as vague as "[t]he functionality of all workforce, HR, management and/or analytics components of the 'punch-in/punch-out' time clock system used at the facility." Wilson v. Lackner, 228 F.R.D. 524 (D. Md. 2005). There is no limit to the number of topics that may be listed in the notice. Finally, the notice need not – and in fact cannot – designate who will be deposed on those topics.

In contrast to the noticing party's singular duty, the responding party must identify, prepare, and present one or more corporate representatives to testify regarding the entire corporation's "knowledge" of the stated topics. The U.S. District Court for the Eastern District of Kentucky sets forth the clearly-established law that "[a] party which intends to assert claims and defenses in litigation must adequately prepare an individual to testify as to those claims and defenses…" I*n re Classicstar Mare Lease Litigation*, 2009 WL 1313311, *2 (E.D. Ky., May 12, 2009).

The Rule does not require the corporation to produce the person most knowledgeable of the noticed topics. Rather, the corporation must produce one or more persons who have been prepared to testify to all matters "known or reasonably available to the organization." *See, e.g., Alexander v. F.B.I.*, 186 F.R.D. 148, 152 (D. D.C. 1999); *Mitsui & Co. v. P.R. Water Res. Auth.*, 93 F.R.D. 62, 67 (D.P.R. 1981); *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000). In most instances, the requested information is not known by one person and, therefore, several individuals must be produced.

Next, the corporate representative's requisite knowledge is not limited to facts. Rather, the corporate representative must also be prepared to testify regarding the corporation's subjective beliefs, opinions, positions, and interpretation of documents and events. S*ee, e.g., Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 20 (E.D. Pa. 1986); *U.S. v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996); *Ierardi v. Lorillard, Inc.*, 1991 WL 158911, at *2 (E.D. Pa., Aug. 13, 1991). Finally, the representative's answers are binding upon the corporation. *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb. 1995). While corporate testimony is binding upon the corporation, it does *not* constitute a judicial admission. Therefore, it is not the final word on legal issues, and it can still be contradicted by other evidence tendered by the corporation. *Industrial Hard Chrome, Ltd. V. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000). That being said, a corporation cannot defeat summary judgment merely by tendering an affidavit that contradicts the corporate testimony. *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 992-93 (E.D. La. 2003). Also, the corporate representative's testimony constitutes an "admission by a party opponent" and, therefore, is not inadmissible hearsay. It can also be used in trial the same way that a normal deposition would be used.

> *...the organization so named 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 he will testify.*

Unfortunately, the responding party's duties under the Rule are grossly disproportionate to the noticing party's, with the responding party bearing the brunt of the work. While the noticing party need only craft a list of topics, the responding party is tasked with preparation that, depending upon the extent of the matters described, can take hundreds of hours.

Sanctions

Depending on the jurisdiction, sanctions may be assessed against the responding corporation for failing to produce an adequately prepared corporate representative. There is no Kentucky case stating when sanctions may be ordered for failure to prepare a corporate representative, and the federal circuits are divided. However, Kentucky's Rules of Civil Procedure do offer some support for sanctions. CR 37.04(1) allows that sanctions may be ordered:

> [i]f a party or an office, director, or managing agent of a party or a person designated under Rule 30.02(6) or 31.01(2) to testify on behalf of a party fails (a) to appear before the officer who is to take his deposition, after being served with proper notice.

Sanctions for failing to appear at a corporate deposition may be severe. *In Martin County Coal Corp. v. Universal Underwriters*, 2011 WL 836859, *6 (E.D. Ky., Mar. 4, 2011), the court stated that, "[i]f a corporate party takes the position during its [corporate representative] deposition that it has no knowledge concerning an area of inquiry, it cannot thereafter argue a contrary position at trial." *Id.* (citing *Taylor*, 166 F.R.D. at 362). Thus, if the corporation refuses to produce a corporate representative, the court may prohibit the corporation from taking any position on the facts or asserting any claims and defenses at trial.

Sanctions are generally ordered only where the deponent-party wholly neglects to respond to the deposition notice. *See Charter House Ins. Brokers, Ltd.*, 667 F.2d 600, 604 (7th Cir. 1981). Some courts have ruled that where a party appears physically for the taking of the deposition, but refuses to cooperate by being sworn or by testifying, CR 37.04 does not apply. *Estrada v. Rowland*, 69 F.3d 405, 406 (9th Cir. 1995) (no failure to appear where a deponent attended but refused to testify); *Aziz v. Wright*, 34 F.3d 587, 589 (8th Cir. 1994) (holding that "a refusal to answer questions or participate does not constitute a 'failure to appear'"). However, some courts have held that failure to present a prepared witness is tantamount to no appearance at all. *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416 (5th Cir. 2006). Unfortunately, no Kentucky law is instructive on this particular issue. Therefore, the prudent attorney should make every effort possible to produce a properly prepared witness.

Scope of the Deposition

The appropriate scope of a corporate deposition is a widely debated topic and there is case law supporting both broad and narrow views. While some courts restrict the deposition to the matters set forth in the notice, others have held that the examiner may exceed that scope so long as his questions are relevant to the case. There is no Kentucky case law on this issue. However, the current trend among federal courts is that the corporate deposition is not limited to the matters set forth in the deposition notice.

Under the leading case and its progeny, a corporate defendant has an affirmative duty to produce a representative who can answer questions that are both within the scope of the notice as well as those matters that are "known or reasonably available" to the corporation even if not described in the deposition notice. *King v. Pratt & Whitney, a Div. of United Techs. Corp.*, 161 F.R.D. 475 (S.D. Fla 1995). If the examining party asks questions outside the scope of the matters described in the notice, the general deposition rules govern, and relevant questions may be asked. These answers will not become binding upon the corporation and, if the deponent does not know the answer to questions that are outside the scope of the matters described in the notice, the corporate defendant will not be sanctioned.

Favoring a policy of broad discovery, courts have shown little sympathy to the corporate defendant for the exorbitant amount of time and expense associated with presenting corporate representatives under the Rule. "[P]reparing for a [corporate] deposition can be burdensome. However, this is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business." *Taylor*, 166 F.R.D. at 362. Unfortunately, the courts' broad interpretation of the Rule has led to abuse of the discovery process in recent years. The Rule is no longer being used to streamline discovery and benefit both parties. Now it is being wielded as a weapon with which to gain unfair advantage over corporate defendants.

Potential for Abuse

Due to the courts' policy of liberal discovery, some plaintiff attorneys have begun using the Rule to discover attorney work product and privileged communications, cause the corporate defendant to incur undue burden and expense, and force the corporate defendant to reveal defense strategies early in discovery.

a. Discovery of Privileged Information.

Plaintiffs may use the Rule to attempt discovery of attorney work product and other privileged communications. Examining counsel is permitted to ask the corporate representative about the documents he or she reviewed in preparation for the deposition. Examining counsel may also ask what facts were provided to the corporate representative by corporate counsel. The courts have held that the corporation is obligated to provide the facts that it relies upon to support its defense in the case, even if those facts were provided to the witness by the preparing attorney. Thus, although the communications are between the attorney and his or her client, those communications are discoverable to the extent that they include factual information. (This will be discussed in greater detail in the "Practice Tips.")

In *Wilson v. Lackner*, the court held that a hospital could not use the work product doctrine as a barrier to prevent the plaintiff from gaining access to relevant factual information

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> While counsel's own investigation into the facts of the case is substantially protected by the doctrine, and while the proceedings of any investigation conducted for purposes of risk assessment or peer review may be privileged by reason of the Maryland statute, the fact remains that a designated witness or witnesses must still be prepared to respond to the 30(b)(6) notice. If that preparation means tracking much the same investigative ground that counsel and the risk management/peer review committee have already traversed, but independently of that investigation, so be it. Defense counsel may wish to exercise caution in preparing the witness or witnesses with privileged documents – otherwise the privilege may be waived as to those documents – but it is simply no answer to a 30(b)(6) deposition notice to claim that relevant documents or investigations are privileged and that therefore no knowledgeable witness can be produced.
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> *Wilson*, 228 F.R.D. at 529.

Finally, beware that the corporation may be deemed to have waived attorney-client privilege if it designates a non-employee to testify as the corporate representative. *Magnivision, Inc. v. Bonneau Co.*, 2003 WL 23320550, at *3 (C.D. Cal., Dec. 18, 2003).

b. Undue Burden and Expense.

Generally, deposition notices under the Rule request information on topics that no single person can provide. More often than not, several corporate representatives must testify, or their collective knowledge must be gathered by counsel and imparted to a single corporate deponent. Vague and extensive notice categories further increase defense costs. There is no limit to the number of notices that can be served or on the number of topics within each notice. Preparing for these depositions can be a gargantuan task.

The Rule can also be used to shift the burden of discovery to a corporate defendant by forcing the creation of a "super witness." Jack I. Samet & Andre Y. Bates, *Rule for Streamlining Discovery Is No Panacea: Companies Find Rule 30(b)(6) Depositions Don't Always Speed Things Better than Other Means*, Nat'l L.J., Apr. 24, 2000, at B16. "[T]hrough this one witness, an examining party can then discover all of the facts supporting its opponent's contentions and pin it down with binding admissions…" *Id.* Instead of deposing numerous witnesses and requesting production of documents to discover facts germane to his or her case, the plaintiff merely notices a corporate representative to testify to the defendant's "position on all claims and defenses" or "all facts leading up to and all circumstances surrounding" the allegedly negligent event.

Used in this way, the corporate deposition forces the corporation to investigate itself and report its findings via the corporate representative. In medical cases, where the plaintiff was seen by multiple medical providers prior to entering the corporate defendant's care, this could also require the corporation to interview and investigate outside providers and their records. Not only does this impose a huge burden upon the responding party, but such communications may be prohibited by the Health Insurance Portability and Accountability Act of 1996.

c. Premature Disclosure of Defense Theories.

Early notice of corporate depositions may

force the corporate defendant to reveal defense strategies prematurely. The Rule places no restrictions on when the notice may be served, and it is not uncommon to receive CR 30.02(6) notices simultaneously with the Complaint. Because the Rule allows testimony regarding a corporation's "position" in the case, early notice under the Rule may force the corporation to state its theory of defense before any fact or expert discovery has taken place. As key witnesses are deposed and more thorough investigation of the claims and defenses is completed, the corporation's theory of defense may change. In this situation, the premature corporate representative testimony – which is binding upon the corporation – will be inconsistent with the corporation's later, but more fully-informed position.

Practice Tips

Thankfully, some simple strategies are available to help combat the above tactics. The applicability of these strategies is dependent upon the particular facts of your case.

a. Choose and Prepare the Representative Carefully.

The moment you are served with a notice under the Rule, you should immediately begin identifying potential corporate representatives. Identifying and preparing corporate representatives takes a significant amount of time, especially if the persons having the pertinent knowledge are former employees.

Choosing the corporate representative is of crucial importance. This person will be the "face" of the corporation. It is important that your representative be likeable, credible, and able to withstand rigorous cross-examination. Furthermore, the corporate representative must be able to understand and articulate the information necessary to answer all topics he or she is designated to answer.

The corporate representative can be a current employee, former employee, hired representative, or attorney. For a case where the corporation has only slight exposure, a current or former employee will likely be sufficient. If the stakes are much higher, it may be advisable to hire a professional consultant or engage corporate counsel to testify. However, beware of designating former employees, non-employees, and counsel, since communications with those persons may not be protected by the attorney-client privilege.

Once you have designated the corporate representative(s), review with them all pertinent documentation with the exception of any privileged information. Consider creating a "cheat sheet" – a document that contains certain facts about the case and the topics noticed in the deposition. A cheat sheet can be especially helpful in case with complex and technical facts. However, be cognizant that the cheat sheet is discoverable and therefore take careful steps to ensure that it does *not* contain privileged material or counsel's mental impressions.

Finally, ensure that the corporate representative knows the pertinent facts and the corporation's position on the issues in the case. Because examining counsel is permitted to ask questions beyond the scope of the notice, consider preparing your witness to discuss matters outside the scope of the notice. This is left to counsel's discretion as to how informed the corporate representative should be, especially where the representative has personal knowledge of the alleged negligence.

No expense should be spared in choosing and preparing the corporate representative(s). As explained above, his or her testimony is binding upon the corporation and can greatly increase or decrease the value of the case. Again, failure to properly prepare the witness can also result in severe sanctions.

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b. Move the Court for a Protective Order.

The court has discretion to "make any order justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." CR 26.03(1). Specifically, the court can order "(a) that the discovery not be had; … ; [or] (c) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery." CR 26.03; *see also* CR 37.01 ("If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26.03.").

Courts have generally recognized that overbroad notice "subjects the noticed party to an impossible task." *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000); *see also Smithkline Beecham Corp. v. Apotex Corp.*, 2000 WL 116082, at *9 (N.D. Ill., Jan. 24, 2000) (stating "the Rules also preclude proponents of discovery from wielding the discovery process as a club by propounding requests compelling the recipient to assume an excessive burden."); *CSX Transp., Inc. v. Vela*, 2007 WL 3334966, at *4 (S.D. Ind., Nov. 8, 2007) (holding that a protective order was merited with respect to a request for information supporting a comparative fault claim because the party seeking discovery "may not serve a Rule 30(b)(6) notice for the purpose of requiring [the defendant] to marshal all of its factual proof and prepare a witness to be able to testify on a particular defense.") Therefore, a motion for protective order may help limit the topics to a manageable range. It will not, however, succeed in prohibiting the entire deposition entirely unless it can be shown that extreme circumstances exist for doing so. For example, a court will not prohibit the deposition where it would merely be repetitious of previous testimony, or where only minor annoyance or expense will be incurred.

Alternatively, a protective order may be used to request that less burdensome methods of discovery be used in lieu of corporate depositions. Some federal courts examining this issue have ruled that a defendant need not submit to a corporate deposition if there is a less burdensome and equivalently effective method of obtaining the same information. For example, when a plaintiff served the defendant with a corporate deposition notice "requesting that [the defendant] produce a corporate witness to testify about facts supporting numerous paragraphs of [defendant's] denials and affirmative defenses in its Answer and Counterclaims," one federal court found that the plaintiff's attempt to discover facts through a corporate representative deposition was "overbroad, inefficient, and unreasonable" and "implicate[d] serious privilege concerns… Even under the present-day liberal discovery rules, [the defendant] is not required to have counsel 'marshal all of its factual proof' and prepare a witness to be able to testify on a given defense or counterclaim." *Id.; see also Apotex Corp.*, 2000 WL 116082, at *9.

A protective order may also be used to postpone early corporate representative depositions until later in discovery. This allows the corporate defendant more thoroughly to

investigate the facts, claims, and defenses so as to avoid inconsistent corporate positions.

Motions for protective order must be made *prior* to the deposition so as to avoid sanctions for having an unprepared witness:

> The failure to act described in this rule may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26.03.

CR 37.04(2). You must move for the order before the date of the deposition, and failure to do so will preclude objections later. 8 Wright and Miller, *Federal Practice & Procedure*, § 2035, at 262; *Mitsui & Co.*, 93 F.R.D. at 67.

c. State Proper Objections.

As stated above, the corporate representative deposition is not limited to the items set forth in the notice. Therefore, defense counsel must immediately object to any line of questioning that exceeds the scope of the notice. Failure to do so may result in a waiver of that objection. *U.S. ex rel Tiesinga*, 240 F.R.D. 40, 42 (D. Conn. 2006). Once defense counsel has objected, examining counsel must demonstrate that the question is within the scope of the deposition notice. If examining counsel is unable to do so, the witness must still answer the question, but the answer is not binding upon the corporation. Counsel should state for the record the answers that are not binding. However, do not terminate the deposition or instruct the deponent not to answer on grounds of improper scope, as this is a basis for sanctions.

Finally, examining counsel may not ask questions that are intended to elicit corporate counsel's advice or any matter that reveals corporate counsel's mental impressions of the case. If examining counsel attempts to elicit this type of testimony, objections to privilege should be made and the corporate representative should be instructed not to answer.

Conclusion

Plaintiffs' attorneys throughout the country are attending seminars and presentations about the benefit of using corporate depositions in discovery. Until the judiciary takes action to limit the scope of and burden imposed by corporate representative depositions, corporate defendants in personal injury cases across the Commonwealth can expect to receive an increasing number of these demanding notices. The defense bar must recognize the challenges created by the Rule and familiarize themselves with responsive strategies in order to effectively advocate for their clients and keep litigation expenses and case value to a minimum.

Jamie Wilhite Dittert, also an Associate at Sturgill, Turner, Barker & Moloney, PLLC, assisted in the research and preparation of this article.

Stephanie Wurdock is an Associate at Sturgill, Turner, Barker & Moloney, PLLC, in Lexington. As a member of the firm's health care practice group, Stephanie defends nursing homes, hospitals and other health care providers in Central Kentucky against claims of negligent care, wrongful death and violations of resident's rights. Stephanie chairs the Young Lawyers' Section of the KDC and is involved in DRI.