HAYNES BOONE

The Corporate Representative Deposition:

Preparation, Privilege, and Practice Tips

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I. Introduction

The corporate representative deposition is ubiquitous, but that is not true of papers discussing its uses and abuses—both its benefits and its limitations. This paper explores the tool in general, including the many similarities (and few differences) in the federal and state rules of civil procedure that govern them.

II. What a Corporate Representative Deposition Can Accomplish, and What It Cannot

The main purpose of a corporate representative[1] deposition, whether in federal or state court, is to (i) learn what the corporation knows and (ii) obtain testimony that the corporation cannot later disclaim (unless they provide a compelling explanation). These depositions clearly have much to offer to the interrogating party.[2] But if handled properly, the corporate representative deposition is also an opportunity for the corporation to tell its story through an intelligent and prepared witness.

As this paper will discuss, the corporate representative deposition has limits. For example, the party requesting the deposition must make do with the corporation's chosen representative—the requesting party may not select the witness.[3] And because the requesting party must specifically identify topics to be covered in the deposition, the chances of gaining an off-the-cuff answer to a surprise question are greatly diminished. Still, many practitioners find the corporate representative deposition to be efficient and useful.

III. Objecting to the Deposition Notice

Under Federal Rule 30(b)(6) and many analogous state rules of civil procedure, the party seeking discovery from a corporation must issue a Notice of Deposition in which the corporation is named as the deponent and the deposition topics and subject matters are described.[4] The requesting party "must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute."[5] Once counsel for the corporation receives this notice, it should review it carefully and consider objections.

In Texas, objecting to a Corporate Representative Deposition Notice is similar to objecting to any other deposition. You may file a Motion to Quash or Motion for Protective Order objecting on the basis that the notice is overbroad, unlikely to produce relevant information, beyond the scope of discovery permitted by Rule 192.3, presents an undue burden to the corporation, or is unreasonably cumulative or duplicative of other evidence.[6] A party seeking to

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[1] Federal Rule of Civil Procedure 30(b)(6), and most or all equivalent state rules of civil procedure, allow for depositions of a variety of organizations, not just corporations. For ease of reference, and in keeping with the parlance often used by practitioners, we will simply refer to these depositions as "corporate representative depositions."

[2] Including, among other things, streamlining the discovery process. *See Great Am. Ins. Co. of N.Y. v. Vegas Const. Co., Inc.*, 251 F.R.D. 534, 538 (D. Nev. 2008) (citing *Resolution Tr. Corp. v. S. Union Co., Inc.*, 985 F.2d 196, 197 (5th Cir. 1993) ("Rule 30(b)(6) streamlines the discovery process.")).

[3] The Federal Rules of Civil Procedure do offer a method by which the requesting party may designate a corporate officer, director, or managing agent to provide testimony that will bind the corporation. FED. R. CIV. P. 30(b)(1). Under this type of deposition, however, the witness is not required to testify as to information "known or knowable" to the corporation; the witness must testify as to what he or she personally knows. *See* JAMES WINTON & FARRELL HOCHMUTH, *Corporate Representative Depositions in Texas* 34, The Advocate, Fall 2004. This paper will deal with true corporate representative depositions under Rule 30(b)(6) of the Federal Rules of Civil Procedure and related state rules.

[4] FED. R. CIV. P. 30(b)(6) ("A party may in the party's notice and in a subpoena name as the deponent a public or private corporation . . . and describe with reasonable particularity the matters on which examination is requested."); *see, e.g.*, TEX. R. CIV. P. 199.2(b)(1) ("If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested."); MO. R. CIV. P. 57.03(b)(4) (also requiring "reasonable particularity" in the notice and in a subpoena).

[5] *SGII, Inc. v. Suon*, No. 8:21-CV-01168, 2021 WL 6752324, at *5 (C.D. Cal. Dec. 29, 2021) (quoting *Prokosch v. Catalina Lighting*, 193 F.R.D. 633, 638 (D. Minn. 2000)).

[6] *See, e.g., In re Univar USA, Inc.*, 311 S.W.3d 186, 189 (Tex. App.—Beaumont 2010, orig. proceeding) (finding corporate representative topic regarding benzene sales was not relevant because there was no showing that plaintiff was exposed to benzene sold by the corporation); *In re Swift Transp. Co.*, No. 14-11-00535-CV, 2011 WL 4031029 at *2 (Tex. App.—Houston [14th Dist.] Sept. 13, 2011). The civil procedure rules of the federal courts, and many other state courts, offer similar objections as the Texas Rules. For an example of a federal court finding that the discovery request was overbroad, see *Recycled Paper Greetings, Inc. v. Davis*, No. 1:08-MC-13, 2008 WL 440458, at *4 (N.D. Ohio Feb. 13, 2008). For a discussion of the appropriate

avoid discovery must identify a particular, specific, and demonstrable injury by facts sufficient to justify a protective order.[7] Under Texas law, if the discovery sought relates to a claim or defense of the party seeking discovery and is not privileged, a trial court may not grant a protective order limiting discovery "unless the party seeking such protection has met this burden."[8] In other words, a party resisting discovery must produce some evidence supporting its request for a protective order; it cannot simply make bare and conclusory allegations that the requested discovery is unduly burdensome or duplicative.[9]

For instance, in *Recycled Paper Greetings, Inc. v. Davis*, the court found that the corporate representative notice was overbroad and unduly burdensome because it: (1) sought information relating to a vast array of strategic, financial, and contractual information from a non-party corporation; (2) provided a short time for response; (3) included notice topics beyond the issues in the underlying litigation; (4) would require a costly review and analysis of thousands of documents and witness preparation in order to respond; (5) requested information already available from other sources; and (6) sought potentially privileged information.[10]

Texas courts have reached similar results in *In re Swift Transp. Co.*[11] and *In re Ace Credit Servs.*,[12] where both protective orders were granted, on the basis that the notice topics were overbroad and not relevant to the subject matter of the pending action. In *In re Swift Transp. Co.*, the court concluded that plaintiff's deposition notice on the topic of "all injury and death claims during ten years before plaintiff's accident" was overbroad for a national insurance company with thousands of auto accidents. It found that plaintiff's assertion that the information sought "might well show" that the defendant had engaged in a pattern of negligent hiring and supervision of its truck drivers amounted to an "impermissible fishing expedition."[13] The notice in *In re Ace Credit Servs.* was found to be similarly overbroad.[14] In it, plaintiffs noticed a corporate representative deposition on 73 topics of class-wide discovery before class certification.[15] The court concluded that the notice topics related to services provided in connection with obtaining a loan were not relevant and were overbroad when plaintiff never applied for

use of objections to a 30(b)(6) deposition notice in federal court, see *Tri-State Hosp. Supply Corp. v. U.S.*, 226 F.R.D. 118, 126 (D.D.C. 2005).

[7] *Garcia v. Peeples*, 734 S.W.2d 343, 345 (Tex. 1987); *Brewer & Pritchard, P.C. v. Johnson*, 167 S.W.3d 460, 466 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

[8] *Brewer & Pritchard, P.C.*, 167 S.W.3d at 466 (citing *Masinga v. Whittington*, 792 S.W.2d 940, 940-41 (Tex. 1990)).

[9] *Garcia*, 734 S.W.2d at 345.

[10] *Recycled Paper*, 2008 WL 440458, at *4.

[11] *In re Swift Transp. Co.*, 2011 WL 4031029 at *2 (Tex. App.—Houston [14th Dist.] Sept. 13, 2011) (mem. op.)

[12] *In re Ace Credit Servs.*, No. 04-10-00049, 2010 WL 1491780 (Tex. App.—San Antonio Apr. 14, 2010).

[13] *Swift Transp. Co.*, 2011 WL 4031029, at *2.

[14] *In re Ace Credit Servs.*, 2010 WL 1491780.

[15] *Id.*

a loan and the collection call to plaintiff was a wrong number.[16]

When you receive a corporate representative notice, review it carefully and make timely objections in a motion for protective order when appropriate. Under no circumstances should you wait until the deposition to make objections on the topics listed because this may result in sanctions against the noticed party or an opportunity for the opposition to redo a deposition at the noticed party's expense.[17]

IV. Identity of the Witness—Who May (and Should) Testify

A deposition under Rule 30(b)(6) is designed to present the knowledge and positions of the corporation, not of the individual(s) who are testifying.[18] Therefore, under the Federal Rules, the organization alone—not the party sending the notice—gets to designate the representative who will testify.[19] This is because the corporate representative is not required to testify from personal knowledge; the representative must be well prepared (as described below), but may testify entirely from information gained from others in preparation for the deposition.[20] As long as the corporation is satisfied with their capability to articulate the corporation's stance and is equipped with adequate corporate knowledge, it has the freedom to select almost any individual(s) to serve as its corporate representative.

A corporation should exercise caution if a deposition notice invokes Rule 30(b)(6) but also purports to require the witness to be "the most knowledgeable person" on the designated topics or requires a witness with some "personal knowledge." Even worse, a deposition notice may command a corporation to present "John Smith," or "the company's Chief Financial Officer," or some other identified person, as the corporate representative. These examples exemplify inappropriate 30(b)(6) deposition notices, and in general, federal courts concur that such notices do not impose an obligation on the corporation to produce an individual with personal knowledge or a specifically named individual.[21] A corporation that receives such a notice should object in writing, at a minimum. Some parties have gone further, by moving to quash the deposition notice and stay the deposition until a proper notice is issued.[22]

So, whom should the corporation designate? Because the witness's testimony will likely bind the corporation, it should go without saying that "selecting your representative who will testify is of the utmost importance."[23] The organization *may* designate almost anyone—Rule 30(b)(6) allows the corporation to designate "one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf."[24] The key is to select one or more persons (i) whom the corporation is comfortable appointing as its official mouthpiece, and (ii) who can adequately prepare by gaining the knowledge needed to testify. Organizations could designate, among others, one (or more)[25] of the following persons:

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[16] *Id.*

[17] *See e.g., Prairie River Home Care, Inc. v. Procura, LLC*, No. 17-CV-5121 (JRT/HB), 2019 WL 13248862, at *25 (D. Minn. Aug. 5, 2019) (court concluded appropriate remedy was to allow option to retake Rule 30(b)(6) deposition of noticed party at noticed party's expense); *Artic Cat, Inc. v. Injection Research Specialist, Inc.* 210 F.R.D. 680, 681, 686 (D. Minn. 2002) (costs imposed for failing to respond to a claimed vague notice and for enduring a 30(b)(6) deposition "predestined for failure" because "the Rule 30(b)(6) deponent is not expected to be clairvoyant, so as to divine the specific questions that could [be presented].").

[18] *See Klosin v. E.I. Du Pont De Nemours & Co.*, No. 119CV00109EAWMJR, 2023 WL 1097859, at *4 (W.D.N.Y. Jan. 30, 2023) (citing *U.S. v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996)).

[19] FED. R. CIV. P. 30(b)(6).

[20] *See Tarokh v. Wal-Mart Stores E., LP*, 342 F.R.D. 383, 386 n.3 (D.S.C. 2022) (citing *Taylor*, 166 F.R.D. at 361-62).

[21] *See, e.g., Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) ("Here, the plaintiff's imposition of a requirement of personal knowledge is at odds with the language and purpose of [Rule 30(b)(6)].").

[22] *See id.*

[23] WRIGHT AND MILLER, Fed. Pract. & Proc., Vol. 8, § 2103, n.27.2 (2d ed. 1994); WINTON & HOCHMUTH, *Corporate Representative Depositions in Texas* at 37.

[24] FED. R. CIV. P. 30(b)(6).

[25] "A deposition under Rule 30(b)(6) should, for purposes of [the limit on number of depositions parties may take], be treated as a single deposition even though *more than one person* may be designated to testify." FED. R. CIV. P. 30(b)(6) advisory committee's note, 1992 (emphasis added).

- current or former employee;
- current or former outside director;
- current or former independent contractor;
- shareholder or owner; or an
- employee or contractor of a subsidiary or other related company.

The available combinations of witnesses are almost endless. For example, in a former lawsuit in which one of the authors represented a plaintiff, two defendant companies proposed to jointly offer a single corporate representative to testify on behalf of both companies during the same deposition. An agreement was reached on the proposal in the interest of saving time and money, but subject to the condition that any answer given by the witness bound both companies.

For the most part, state procedural rules permit the corporation to elect its own representative and do not mandate that the witness provide testimony based on personal knowledge. For example, a Rhode Island court has stated that a corporate representative under its rules of civil procedure "is not testifying as to his own personal knowledge but rather as to what was known to the organization."[26] Other state courts look directly to cases applying Federal Rule 30(b)(6) to interpret their own rules.[27] For a full discussion of requests for a "knowledgeable" witness, see section VI(A) below.

V. Preparing a Corporate Representative

Under Federal there must be a "conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by the party noticing the deposition and to prepare those persons *so that they can answer fully, completely, unevasively the questions posted*" on matters the witness may not personally know, but that which the corporation should *reasonably* know.[28] The corporate designee must be prepared to provide "knowledgeable and binding answers for the corporation, including the organization's subjective

beliefs and opinions . . . [and] its interpretation of documents and events."[29]

A common struggle among corporate counsel is "how fully prepared and educated should my corporate representative deponent be?" The answer, in short, is *very* prepared. Though perhaps an oversimplification, *Alexander v. F.B.I.* outlined corporate representatives' duties into four main categories:[30]

(1) The deponent has the duty of being knowledgeable on the subject matter identified as the area of inquiry. Clearly, deponents that cannot speak to the subject matter are useless.
(2) The designating party is under the duty to designate more than one deponent if necessary to respond to the specified relevant areas of inquiry with reasonable particularity.
(3) The designating party has a duty to prepare the witness to testify on matters not only known by the deponent, but those that should be reasonably known by the designating party. Obviously, the purpose of a Rule 30(b)(6) deposition is to get answers on the subject matter described with reasonable particularity by the noticing party, not to simply get answers limited to what the deponent happens to know.

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[26] *Brokaw v. Davol, Inc.*, No. 07-5058, 2008 R.I. Super. LEXIS 154, at *12 (R.I. Super. Ct. Dec. 8, 2008) (citing Robert B. Kent et al., *Rhode Island Civil and Appellate Procedure*, § 30:6 (2006)); *accord State ex rel. United Hosp. Ctr., Inc. v. Bedell*, 199 W. Va. 316, 333 (W. Va. 1997) (West Virginia's "Rule 30(b)(6) does *not* require that the corporation's designee have personal knowledge of or have been personally involved in the examination topics.") (emphasis original).
[27] *See Am. Safety Cas. Ins. Co. v. C.G. Mitchell Constr., Inc.*, 268 Va. 340, 352 (Va. 2004) (citing to federal case law because "F.R.C.P. 30(b)(6) . . . is in all pertinent respects identical to [Virginia's] Rule 4:5(b)(6)").
[28] *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006).
[29] *Taylor*, 166 F.R.D. at 360-61 ; *see also id.* at 433.
[30] *Alexander v. F.B.I.*, 186 F.R.D. 137, 141 (D.D.C. 1998) (citations omitted).

(4) The designating party has a duty to substitute an appropriate deponent when it becomes apparent that the previous deponent is unable to respond to certain relevant areas of inquiry.

The corporate representative is obligated to "review all corporate documentation that might have had a bearing on the 30(b)(6) deposition topics."[31] This includes having the witnesses read prior deposition testimony of fact witnesses and review documents and deposition exhibits—even when documents are voluminous and review is burdensome.[32] The deponent must prepare the designee "to the extent matters are *reasonably* available, whether from documents, *past employees*, or other sources."[33] See *QBE Ins. Corp. v. Jorda Enters., Inc.* for a rich discussion of "litigation commandments and fundamental passages about pre-trial discovery."[34]

A. Prepare As Fully As Possible Even On Broad Topics

To avoid the possibility of sanctions, corporate counsel should prepare their representative as fully as possible, even when the noticed topics are broad (after objections are unsuccessful). Courts have found 30(b)(6) violations when the deponent fails to properly educate its designee on the noticed topics, even when the notice topics are broad and/or general.[35] For example, in *Function Media, L.L.C. v. Google, Inc.*, the notice topics at issue sought testimony "concerning license agreements and royalty agreements" from Google's corporate representative.[36] Google argued that it was obligated only to identify a witness who could read the written terms of the agreements into the record and explain any terms that were unclear, not testify to the circumstances surrounding the execution of the license agreements.[37] The court noted that 30(b)(6) only requires a 'reasonably particular' description of the topics, and Google must have understood that the circumstances surrounding the agreements would be material.[38] Accordingly, because its corporate representative could not testify as to the parties to the license and the terms of the license, the court found Google failed to comply with its obligation to educate a witness on the noticed 30(b)(6) topic concerning license agreements.[39]

B. "Reasonably Available" Includes Third-Party Documents "Within the Control" of the Organization

To the surprise of many, "reasonably available" information includes documents no longer held by the corporation but still "within its control." Therefore, corporate representatives should also be prepared on any documents relative to the notice topics, even documents held by third parties but "within the control" of the organization. In *Calzaturficio S.C.A.R.P.A., s.p.a. v. Fabiano Shoe Co.*, the court found that a corporate deponent failed to comply with Rule 30(b)(6) when the designee failed to review all documents "in their control" in advance of the deposition, including records held by third parties, and thus could not respond to questions on designated topics.[40]

C. "Reasonably Available" Likely Includes Information Held Only by Former Employees

The view most courts have adopted is that information is "reasonably available" to an organization even if it is only available through former employees. Not uncommonly, "a corporation indicates that it no longer employs

[31] *Calzaturficio S.C.A.R.P.A., s.p.a. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 37 (D. Mass. 2001).
[32] *City of Baton Rouge/Par. of E. Baton Rouge Dep't of Fin. v. Centroplex Ctr. Convention Hotel, LLC*, No. CV 22-94-SDD-SDJ, 2022 WL 17682645, at *2 (M.D. La. Dec. 14, 2022) (citing *Calzaturficio*, 201 F.R.D. at 37).
[33] *Brazos River Auth.*, 469 F.3d at 433.
[34] *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 687-88 (S.D. Fla. 2012).
[35] *See Mike Hooks Dredging Co. v. Eckstein Marine Serv.*, 2011 U.S. Dist. LEXIS 68989, at *5-6 (E.D. La. June 28, 2011) (finding the corporation violated Rule 30(b)(6) when it presented a corporate representative who was unable to testify to issues within the corporate knowledge of the company—the designee referenced relevant unreviewed corporate documents, and frequently stated that she did not have personal knowledge of various facts, suggesting that other individuals were better suited to testify.)
[36] *Function Media, L.L.C. v. Google, Inc.*, 2010 U.S. Dist. LEXIS 3275, at *9-10 (E.D. Tex. Jan. 15, 2010).
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Calzaturficio*, 201 F.R.D. at 37.

individuals who have memory of a distant event or that such individuals are deceased."[41] In such a situation, the organization must still prepare its designee "to the extent matters are reasonably available, whether from documents, past employees or other sources."[42] This includes reviewing materials in former employees' files and interviewing former employees or others with knowledge.[43] "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."[44] However, at least one court has held that "reasonably available" does not include knowledge held solely by former employees.[45]

In a lengthy memorandum opinion outlining the "commandments" for corporate representative depositions, *QBE* set out the obligations of a corporation in getting information from third parties, and the consequences for failing to obtain that information.[46] In *QBE*, the insurer argued it had no obligation under 30(b)(6) to obtain knowledge from non-parties to the litigation, namely its insured who refused to cooperate.[47] The court rejected the insurer's position, noting that a party's duty is not limited by the corporation's lack of control over a potential 30(b)(6) deponent, because a 30(b)(6) deponent could be anyone—even a third-party—who was "educated by the responsive party."[48] The court found that the insurer was obligated to seek out information and documents available from third-party sources, including its insured, but if the insured refused to cooperate, it would not be sanctioned, but could not offer any conflicting testimony since the corporation necessarily had no information on that topic.[49]

VI. Limits on the Corporation's Obligation to Educate a Representative

Despite the broad base of knowledge that corporate representatives are tasked with knowing, there are limits to what a deponent is required to know and share during the deposition. Generally, when the deposition goes beyond discovering the underlying facts, but attempts to gain insight into the legal theories of the case (or more often, tie the corporation down on a legal theory), corporate counsel may find some protection, both under federal and state authority.

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[41] *Taylor*, 166 F.R.D. at 361.
[42] *Id.*
[43] *QBE*, 77 F.R.D. at 687-88.
[44] *Id.*; *see also Fowler v. State Farm Mut. Auto. Ins. Co.*, No. 07–00071 SPK–KSC, 2008 WL 4907865, at *4 (D. Haw. 2008); *Great Am. Ins. Co. of N.Y. v. Vegas Const. Co., Inc.*, 251 F.R.D. 534, 538 (D. Nev. 2008); *Taylor*, 166 F.R.D. at 362.
[45] *See Abramson v. Fla. Gas Transmission Co.*, 908 F. Supp. 1376, 1382 (E.D. La. 1995). This, however, appears to be the great minority, if not an outlier opinion.
[46] *QBE*, 77 F.R.D. at 687-88.
[47] *Id.* at 696.
[48] *Id.*; *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1147 n.13 (10th Cir. 2007) (noting that the corporation was required to produce a knowledgeable deponent, whether it was a corporate officer or "a third party educated by [Plaintiff] on relevant matters").
[49] *Id.*

A. The Deponent Need Not Have Personal Knowledge or be the "Most Knowledgeable"

When a party notices a corporate representative deposition, it leaves to the corporation's discretion who it chooses to be its representative.[50] The noticed corporation is not required to select the "most knowledgeable" employee, despite some notices which specifically request such a deponent.[51]

For example in *Fraser Yachts Florida, Inc. v. Milne*, the opponent argued that one of the corporation's officers should have been selected as the representative, because he was an officer of the corporation and also because he might have specific knowledge as a supervisor.[52] The court recognized that the opposing party had never noticed this officer with a deposition, and that under Rule 30(b)(6), the corporation had the right to select who it would educate on these topics.[53] "[The] [p]laintiff is not obligated to designate Mr. Agliardi [the corporate officer] as the corporate representative if it wants Mr. Brand to fill that role, so long as Mr. Brand can testify as to the knowledge the corporation possesses through Mr. Agliardi, Mr. Roscow, and any other agent or employee known to the corporation."[54]

Similarly in *Sanders v. Circle K. Corp.*, the opponent attempted unsuccessfully to force the corporation to designate a particular fact witness using a 30(b)(6) deposition.[55] Here, the plaintiff, an assistant store manager, accused his Circle K store manager of sexual harassment. In the plaintiff's 30(b)(6) notice, he asked Circle K to produce a designee to testify to "the events the occurred on June 15, 1990, at the Circle K located at Thirty-sixth St. and Indian School Rd. in Phoenix between the hours of 10 p.m. and 12 a.m., June 16, 1990, involving Clayton Sanders and Richard Edmonds."[56] Instead of producing Edmonds, Circle K produced a human resource manager who had been educated on the event.[57] Sanders moved to compel Edmonds' deposition, claiming Circle K inappropriately designated someone who had no personal knowledge of the events in question.[58] The court denied the motion and sanctioned Sanders's attorney, holding that Circle K could not be required to designate someone who lacked authority to speak for the corporation and was not required to choose a designee with interests directly adverse to its own.[59]

The court in *QBE* clarified that a corporation noticed under Rule 30(b)(6) was *not* obligated to produce a person "most knowledgeable" for the corporate deposition, and offered many practical reasons why it may chose not to use such a person.

> 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. . . . 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.[60]

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[50] FED. R. CIV. P. 30(b)(6) states " . . . the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf."
[51] For a comprehensive article addressing this requirement and why such "hybrid" deposition notices should not be used, see James C. Winton, *Corporate Representative Depositions In Texas-Often Used But Rarely Appreciated*, 55 BAYLOR L. R. 561, 690-93 (2003).
[52] *Fraser Yachts Fla., Inc. v. Milne*, 05-21168-CIV-JORDAN, 2007 WL 1113251 at *1 (S.D. Fla. Apr. 13, 2007).
[53] *Id.*
[54] *Id.*
[55] *Sanders v. Circle K. Corp.*, 137 F.R.D. 292, 293 (D. Ariz. 1991).
[56] *Id.* at 293.
[57] *Id.*
[58] *Id.* at 294.
[59] *Id.*
[60] *QBE*, 277 F.R.D. at 687-88.

Unfortunately, Texas jurisprudence has muddied the otherwise clear federal waters on this point. Several Texas cases illustrate that practitioners are improperly noticing the corporate representative "with the most knowledge" concerning a particular topic.[61] For example, in *Para-Chem Southern, Inc. v. Sandstone Products, Inc.*, the noticing defendant argued to the trial court below that Para-Chem should be have identified a particular director as "the corporate representative with the most knowledge of formulation and testing" of a particular product for deposition purposes, given the importance of his role in the production of the product and his role as the "main lead" on the project.[62] The trial court granted sanctions against Para-Chem, for "failing to produce as a corporate representative a witness with knowledge as requested."[63] While this particular finding of fact was not challenged on appeal, it is an indication of Texas court's acceptance of these "hybrid" notices. In fact, in one Texas trial court case, the corporation was ordered "to designate the most knowledgeable witness as to each topic requested" as a discovery-abuse sanction.[64] Similarly, in *McMillin v. State Farm Lloyds*, the district court ordered the insurer to produce for a deposition a "corporate representative most knowledgeable about the guidelines."[65] The insurer subsequently disputed whether the trial court's order compelled it to produce a representative *most knowledgeable* regarding the guidelines, contending that it was merely required to produce a representative with some knowledge of the guidelines.[66] The district court rejected State Farm's interpretation of the order.[67]

Thus, while federal authority makes clear that personal knowledge is not a requirement in a

corporate representative deponent, Texas authority remains unclear on this point. Regardless, if the deposition notice requests someone with the "most knowledge" or "personal knowledge" as to a particular topic, you should object immediately.

B. The Corporation is Not Required to Explain its Legal Theories

The corporate representative deponent *is* required to know the factual basis of the allegations it is making.[68] But it is *not* required to explain its legal theories during the deposition, because this type of inquiry is more appropriately done through other

[61] *See, e.g., In re Union Pacific R. Co.*, 294 S.W.3d 589, 591 (Tex. 2009); *In re Daisy Mfg. Co., Inc.*, 17 S.W.3d 654, 659 (Tex. 2000) (quoting *AMR Corp. v. Enlow*, 926 S.W.2d 640, 644 (Tex. App.—Fort Worth 1996)); *In re Mallinckrodt, Inc.*, 262 S.W.3d 469, 470 (Tex. App.—Beaumont 2008, no pet.).

[62] *Para-Chem S., Inc. v. Sandstone Prods., Inc.*, 01-06-01073-CV, 2009 WL 276507 at *2-3 (Tex. App.—Hous. [1st Dist.] Feb. 5, 2009, pet. denied).

[63] *Id.* at *4.

[64] The appellate court concluded that, because the trial court had not considered whether lesser sanctions would promote compliance, the trial court abused its discretion, but specifically noted it was not considering the merits of the sanctions at issue. *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 385 (Tex. App.—Dallas 2009, pet. denied).

[65] *McMillin v. State Farm Lloyds*, 180 S.W.3d 183, 198 (Tex. App.—Austin 2005, pet. denied).

[66] *Id.* at 198 n.15.

[67] *Id.*

[68] *See, e.g.*, *United States ex rel. Fry v. Health Alliance of Greater Cincinnati*, No. 1:03-CV-00167, 2010 U.S. Dist. LEXIS 1558, at *10 (S.D. Ohio Jan. 6, 2010).

discovery methods, particularly interrogatories.[69] "In a nutshell, depositions, including 30(b)(6) depositions, are designed to discover facts, not contentions or legal theories, which, to the extent discoverable at all prior to trial, must be discovered by other means," such as interrogatories.[70] "To the extent that any [30(b)(6)] witness cannot answer a question that strays into legal territory, such witness only need indicate that they do not know the answer."[71]

In *First Internet Bank of Ind. v. Lawyers Title Ins. Co.*, defendants attempted to gain information on the company's legal theories and facts supporting the allegations in the complaint during a 30(b)(6) deposition.[72] The defendants noticed the deposition early in the litigation, before the corporation had an opportunity to complete its own discovery and fully develop its legal theory as a way to bind the company to its first incomplete answers.[73] The court noted "[i]n this case it appears that First Internet's Rule 30(b)(6) deposition was a perfectly good mechanism for finding out factual matters known to the company, but for learning legal theories and contentions, it is not a fair substitute for asking interrogatories or using other mechanisms that give counsel an opportunity to ensure that the answers fairly lay out the legal and factual support for the claims or defenses."[74]

Similarly in *King Pharms., Inc. v. Eon Labs, Inc.*, Eon moved to order King to produce a 30(b)(6) witness to testify on topics related to "the factual bases for King's [legal] contentions."[75] The court quashed the motion, find that "[n]otwithstanding Eon's assertion to the contrary, . . . Eon's Rule 30(b)(6) requests, in contrast, do not seek to elicit underlying facts, but rather seek King's elaborations on its legal theories of the case. That is an improper use of Rule 30(b)(6) depositions, which 'are designed to discover facts, not contentions or legal theories. . ."

Thus, corporate counsel should review the deposition notice carefully and object to any topics that request the corporation to explain its legal theories, as opposed to factual basis. Counsel should be on guard to object at the deposition if any line of questioning strays into inquiring after the corporation's legal theories.

C. Deponent is Not Required to Divulge Privilege or Work Product

The deponent is not required to reveal items that constitute privileged legal theories or communications or attorney work product.[76] *In re Boxer Prop. Mgmt. Corp.* is an example of how corporate counsel may effectively quash a corporate representative deposition aimed at discovering work product in Texas.[77] In this premises liability case, plaintiffs served discovery, including requests for production, directed at construction issues with other facilities owned by the realty company. The realtors responded to the requests after a motion to compel, asserting that no documents were responsive to the requests. Unsatisfied with this response, plaintiffs noticed the realtors' corporate representative with knowledge of who searched for the requested documents and the manner in which the document search was conducted.[78] The realty company argued that the deposition served no purpose other than to investigate in-house counsel's search for documents in response to requests for production and that the information at issue—"the who, what, when, why and how" of the search—constituted core attorney work product.[79] The court found that, though the notice was for a corporate representative and not an attorney, the notice necessarily concerned the attorney's mental

[69] *See, e.g.*, *Nycomed US, Inc. v. Glenmark Generics, Ltd.*, No. 08-CV-5023 (CBA), 2009 U.S. Dist. LEXIS 97410, at *4 (E.D.N.Y. Oct. 21, 2009) ("[T]hinly disguised efforts to have representatives of Nycomed elaborate on its legal theories of the case" in a 30(b)(6) deposition is an improper use of such a deposition.)
[70] *JPMorgan Chase Bank v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 362-63 (S.D.N.Y. 2002).
[71] *Fry*, 2010 U.S. Dist. LEXIS 1558, at *10.
[72] *First Internet Bank of Ind. v. Lawyers Title Ins. Co.*, No. 1:07-CV-0869-DFH-DML, 2009 WL 2092782 (S.D. Ind. July 13, 2009).
[73] *Id.* at *4.
[74] *Id.* at *4 n.5.
[75] *King Pharms., Inc. v. Eon Labs, Inc.*, No. 04-CV-5540 (DGT), 2008 U.S. Dist. LEXIS 98299, at *2-3 (E.D.N.Y. Dec. 4, 2008)
[76] *See State Farm Mut. Auto. Ins. Co. v. New Horizon, Inc.*, 250 F.R.D. 203, 214-15 (E.D. Pa. 2008).
[77] *In re Boxer Prop. Mgmt. Corp.*, 14-09-00579-CV, 2009 WL 425012, *1 (Tex. App.—Hous. [14th Dist.] Sept. 3, 2009, no pet.).
[78] *Id.* at *1.
[79] *Id.* at *3.

impressions, opinions, conclusions or legal theories because the sole purpose of the deposition was to explore the methods used in search for documents requested in discovery and was thus protected.[80]

Counsel should be wary of any topics that stray into work product or privileged information and should instruct the witness not to answer, if necessary. Both the Federal and Texas rules authorize an attorney to instruct a witness not to answer a question if necessary to preserve a privilege.[81] Texas Rule of Evidence 405(c) specifically provides that the attorney-client privilege may be asserted by a corporate representative.

However, a corporation may not designate a witness as a corporate representative and then claim the sources of the designee's information are privileged. Remember that facts are never privileged—even if stated by an attorney. This was made clear under the Texas Rules of Civil Procedure in *Allstate Tex. Lloyds v. Johnson*.[82] Here, Allstate designated its adjuster who investigated the plaintiff's fire as the corporate representative. When questioned about Allstate's knowledge of facts and identity of witnesses with personal knowledge, both matters within the scope of the notice, counsel instructed the witness not to answer based on attorney-client and investigative privileges. In addition, Allstate failed to designate an alternative witness who could testify without allegedly intruding on those protected areas. The court held that Allstate had, in effect, failed to produce a witness able to testify on matters described with reasonable particularity in the notice.[83]

Counsel should also recognize that a corporate representative deponent has a practically limited claim of privilege only if he is not a high-ranking executive. For instance, in *Johnson v. Samsung Elecs. Am.*, where a corporate representative was asked several questions regarding his preparation for the deposition, the court found that such questions were not privileged because the deponent did not have the authority to obtain legal services or act on legal advice.[84] This issue can be especially dangerous if selecting a third-party or low-level employee as the corporate representative.

D. Deponent is Not Required to be an Expert (but May be Designated as Such)

If your corporate representative deponent is not listed as an expert witness, then they should not be tasked with answering questions that would require expert knowledge. In *Brazos River Auth. v. GE Ionics, Inc.* this was acknowledged by the Fifth Circuit. In this Texas action for breach of warranty of fitness for a particular purpose, the corporate representative was noticed on a variety of topics, including whether the corporation's work deviated from the requirements of the contract.[85] Although the court found that the representative should be prepared to answer this line of questioning, it acknowledged that the deponent could not "make comments that would otherwise require expert qualifications."[86]

However, as noted in *Riley v. Ford Motor Co.*, it may also be useful to co-designate your corporate representative as an expert witness, especially if they will be providing technical or other scientific evidence.[87] In this wrongful death suit, plaintiffs argued that many of Ford's corporate representatives, who were only summarily designated as experts, attempted to offer opinions on subjects which are commonly reserved for expert testimony during their 30(b)(6) deposition, including the adequacy of the seat belt system, the

[80] *Id.* at *4-7.
[81] *See* TEX. R. CIV. P. 199.5(f); FED. R. CIV. P. 30(c)(2); *see also In re Senior Living Props., LLC*, 63 S.W.3d 594, 598 (Tex. App.—Tyler 2002) (recognizing that, if questions posed during a 1992.(b)(1) deposition would violate the privilege, counsel could instruct the corporation not to answer and request a hearing).
[82] *Allstate Tex. Lloyds v. Johnson*, 784 S.W.2d 100, 103-04 (Tex. App.—Waco 1989, no writ).
[83] *Id.*
[84] *Johnson v. Samsung Elect. Am.*, 10-1146C/W10-1549 SECTION: "K" (4), 2011 U.S. Dist. LEXIS 77016 at *21-22 (E.D. La. Jul. 15, 2011) (interpreting attorney-client privilege under Louisiana law).
[85] *Brazos River Auth.*, 469 F.3d at 434-35.
[86] *Id.* at 435.
[87] *Riley v. Ford Motor Co.*, No. 2:09-CV-148-KS-MTP, 2011 U.S. Dist. LEXIS 82394, *4-5 (S.D. Miss. July 27, 2011).

manner in which the seat belts should have been worn, and the manner in which the plaintiffs' injuries occurred.[88] The court noted that, regardless of whether the corporate representatives may offer expert testimony, they may offer testimony as lay witnesses, as long as they have "personalized knowledge of the facts underlying the opinion" and the opinion has a "rational connection to those facts," even if the subject is more appropriate for expert testimony.[89]

VII. Producing Documents Used to Educate Corporate Representative

Corporate counsel preparing a witness for deposition should be very careful what documents they use to educate the deponent, because, to the surprise of many, they could be subject to discovery under Texas or Federal Rule of Evidence 612, upon a finding that it is "in the interest of justice," even if counsel considered these documents work product.[90] At the outset of the deposition, the deposing attorney may (and should) ask the witness whether they reviewed documents in preparation for the deposition and, if so, ask that the witness identify those documents. Corporate counsel should be prepared to argue that the documents are protected work product.

There are two rules in conflict on this issue: the need to protect an attorney's thoughts and analysis under work-product while affording the opposing party the opportunity to conduct discovery of materials that a witness uses to refresh his memory for the purpose of testifying.[91] Courts have taken different approaches to resolving this conflict between work product and Federal Rule of Evidence 612, but Nutramax Lab., Inc. v. Twin Lab., Inc., a widely-cited district court opinion, concluded that work product protection should be balanced against the interests of disclosure.92 Nutramax laid out nine factors to be considered in balancing the interests between disclosure of documents used to refresh a corporate deponent's memory and the work product rule:

(1) status of the witness;
(2) nature of the issue in dispute;
(3) when the events took place;
(4) when the documents were reviewed;
(5) number of documents reviewed;
(6) whether the witness prepared the documents;
(7) whether the documents contain, in whole or part, "pure" attorney work product;
(8) whether the documents previously have been disclosed to the party taking the deposition; and

[88] *Id.*
[89] *Id.* Since the deponents were testifying as the corporate representatives, when the court required "personalized knowledge," presumably it was referring to the personalized knowledge of the corporation, as opposed to individual knowledge.
[90] *See* TEX. R. EVID. 612 ("If a witness uses a writing to refresh memory for the purpose of testifying either (1) while testifying; [or] (2) *before testifying* in civil cases, if the court in its discretion determines it is necessary in the interests of justice . . . "); FED. R. EVID. 612 (a)-(b) (an adverse party is entitled to have a writing used to refresh memory before testifying, if the court decides that justice requires it).
[91] *See* TEX. R. EVID. 612; FED. R. EVID. 612.
[92] *Nutramax Lab., Inc. v. Twin Lab., Inc.*, 183 F.R.D. 458 (D. Md. 1998).

(9) whether there are credible concerns regarding manipulation, concealment or destruction of evidence.[93]

The *Nutramax* court expressly noted that Rule 612 only applies to documents used to refresh recollection. Thus, review of documents for purposes other than deposition or trial testimony is exempt from the rule. Accordingly, if a witness reviews documents months before a deposition, for a purpose other than to prepare to testify, such as to prepare pleadings or motions or review the strategy or progress of litigation, disclosure of these documents should not be required in response to a Rule 612 demand.[94] Despite *Nutramax*, many courts have concluded that documents used to prepare a corporate witness are discoverable. For example, see:

- *Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 240-45 (D. Md. 2010) (granting in part a motion to compel the release of preparation documents for a corporate witness where they likely informed at least some of the testimony, contained information that was largely revealed in depositions, and consisted of simple lists/charts that only questionably protected as attorney work product);
- *Seven Seas Cruises S. DE R.L. v. V. Ships Leisure Sam*, No. 09-23411-CIV, 2010 WL 5187680 (S.D. Fla. Dec. 10, 2010), at *3-4 (holding that corporate representative designated to be deposed pursuant to Fed. R. Civ. P. 30(b)(6) was required to disclose documents reviewed in preparing for deposition);
- *Mattel, Inc. v. MGA Entm't, Inc.*, No. CV 04-9049 DOC (RNBx), 2010 WL 3705782 (C.D. Cal. Aug. 3, 2010), at *6 (ordering disclosure of all documents reviewed by deponent to refresh her recollection prior to deposition).

There are two key points to remember when using documents to educate a corporate representative:

(1) Under Rule 612, documents reviewed even weeks prior to a deposition in order to "refresh corporate recollection" may be required to be produced if "in the interest of justice."[95] Refreshing recollection is not limited to reviewing items at the deposition, but anything used in preparation of the deposition.
(2) It is the corporation's memory that is being refreshed, so the fact that the individual deponent had no prior knowledge has no relevance to this inquiry.[96]

However, counsel's *selection and compilation of specific documents* for pre-deposition review is likely protected opinion work product, particularly where the documents have already been produced in discovery. Federal courts have recognized that an attorney's selection and ordering of documents in anticipation of litigation is protected work product, even where the individual documents are not privileged.97 Notably, in Sporck v. Peil, all the documents reviewed had already been turned over to plaintiffs in discovery; it was conceded that none in their original form contained work product.98 The Third Circuit held that the selection and compilation of documents was opinion work product. It found the attorney's conduct was appropriate and even required: "in selecting the documents that he thought relevant to Sporck's deposition, defense counsel engaged in proper and necessary preparation of his client's case."99 The court noted that if disclosure were required, the witness would not have been well-prepared for the deposition, which would have been to the detriment of both parties.100 Federal courts in Texas have similarly found that documents, including business records, that were chosen and compiled by a party or its representative in preparation for litigation are

[93] *Id.* at 469-70.
[94] *Id.* at 469.
[95] TEX. R. EVID. 612.
[96] *See O.C. Seacrets*, 265 F.R.D. at 242 ("[D]ocuments are not protected by the fact that Mr. Wojciechowski, the corporation's designee, lacked independent knowledge of their contents. As the corporate entity indisputably had prior knowledge of the facts contained in the documents, but its designee needed to review these documents in order to testify as to that corporate knowledge, this element is met.").
[97] *See Sporck v. Peil*, 759 F.2d 312, 315 (3rd Cir. 1985).
[98] *Id.*
[99] *Id.*
[100] *Id.*

non-discoverable opinion work product "because the mere acknowledgement of their selection would reveal mental impressions concerning the potential litigation."[101]

Although there is little Texas authority discussing this issue, *Sporck*, the seminal case on this issue, was cited with approval by the Texas Supreme Court in *Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Valdez*.[102] Accordingly, the best practice, although time consuming, is to prepare a personal summary or memorandum highlighting key information from documents, rather than sharing the originals. This way, the original documents, especially those that will not be produced, are properly protected because they have not been reviewed, and even the most aggressive courts will consider your prepared summary as non-discoverable opinion work product.

VIII. Scope of the Examination—Are Questions Outside Notice Fair Game?

Corporate counsel often ask whether there are any protections during the deposition for questions outside the scope of the deposition notice. The unfortunate answer, even under the federal rules, is that there seems to be a lack of consistency among courts on this issue.

Some courts have found that the notice only constitutes "the minimum, not the maximum, about which a deponent must be prepared to speak."[103] These courts limit the scope of questioning only to the general relevance rules outlined in Federal Rule of Civil Procedure 26(b)(1).[104] Once the witness satisfies the minimum standard of knowledge on topics set out in the notice, the scope of the deposition is limited only to Rule 26(b)(1), and instructions not to answer questions outside the scope are improper.[105]

Other courts have found that examination is limited to the matters identified in the notice.[106] These courts look to the purpose of the rule, as outlined in the notes by the Advisory Committee, and find that "[i]t makes no sense for a party to state in a notice that it wishes to examine a representative of a corporation on certain matters, have the corporation designate the person most knowledgeable with respect to those matters, and then to ask the representative about matters totally different from the ones listed in the notice."[107] Further, the courts argue, the requirement that matters be listed "with reasonable particularity" would make no sense, if the party were free to ask any "relevant" questions beyond the scope of the notice.[108]

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[101] *S.E.C. v. Brady*, 238 F.R.D. 429, 442 (N.D. Tex. 2006).
[102] *Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993).
[103] *Crawford v. Franklin Credit Mgmt. Corp.*, 261 F.R.D. 34, 38 (S.D.N.Y. 2009). *See also Emp'rs. Ins. Co. of Wausau v. Nationwide Mut. Fire Ins. Co.*, No. CV 2005-620(JFB) (MDD), 2006 WL 1120632, at *1 (E.D.N.Y. Apr. 26, 2006); *Detoy v. City and Cty. of S.F.*, 196 F.R.D. 362, 366 (N.D. Ca. 2000).
[104] *Id.*; *see also F.C.C. v. Mizuho Medy Co. Ltd.*, 257 F.R.D. 679, 682 (S.D. Cal. 2009) (cross examination limited only by Rule 26); *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (if the examining party asks questions outside the scope of the 30(b)(6) notice, the general deposition rules under 26(b)(1) govern).
[105] *Detoy*, 196 F.R.D. at 367.
[106] *See Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 729-30 (D. Mass. 1985).
[107] *Id.*
[108] *Id.*

Regardless whether examination questions outside the scope of the notice are allowed, there are still things that you can do to protect your witness:[109]

1. Object;
2. State on the record that the question is outside the scope of the notice and that the deponent is not authorized to speak on the corporation's behalf on such matters and that such answers are not binding on the corporation;
3. Prior to trial, consider requesting instruction from court that answers do not constitute an admission of the corporation;
4. Under Rule 30(d)(3), if "being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party," the party may move to terminate or limit a deposition;[110] and
5. Under Texas Rule of Civil Procedure 199.5(f), if the question is abusive, "*or one for which any answers would be misleading*," you may instruct a witness not to answer.[111] Comment 4 to Rule 199 notes that "[a]busive questions include questions that inquire into matters clearly beyond the scope of discovery."[112]

However, caution should be used when instructing a witness not to answer, especially if the court allows questions outside the scope of deposition notice.[113]

IX. Supplementing Rule 30(b)(6) Responses

An organization cannot act except through individual persons. Thus, when a law firm signs a lease on new office space, a human being signs the lease on behalf of the firm. By the same token, a corporation can only provide deposition testimony through persons; when a person testifies on the corporation's behalf, the testimony is considered that of the corporation.

> *The testimony provided by a corporate representative at a 30(b)(6) deposition binds the corporation. This is quite unlike a deposition of an employee of the corporation, which is little more than that individual employee's view of the case and is not binding on the corporation. . . . plaintiff [] is entitled to tie down the definitive positions of [the corporation] itself, rather than that of the individuals who work for [the corporation]. . . .*[114]

If the purpose of a corporate representative deposition is to give "binding answers for the corporation,"[115] the question naturally arises: can the corporation ever unbind itself from answers? This is of particular importance if the corporate representative misidentifies some key fact or if testimony from a representative selected for trial conflicts with the corporation's earlier deposition testimony.

While there are no hard and fast guidelines in Texas or the Fifth Circuit, the general rule by multiple courts has been that "Rule 30(b)(6) testimony does not bind a corporation as a matter of law in the sense that matters admitted cannot be controverted. Instead, a corporation is 'bound' in the same sense as any other witness: the witness has committed to a position at a particular point in time; it does not mean that the witness has made a judicial admission that formally and finally decides an issue. . . . [Such] evidence may be *explained or contradicted*."[116] In such a case, the deponent's

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[109] Joseph F. Brophy, *The Entity Representative Deposition*, State Bar of Texas Advanced Evidence & Discovery Course, available at www.texasbarcle.com/Materials/Events/6644/3445.htm.
[110] FED. R. CIV. P. 30(d)(3).
[111] TEX. R. CIV. P. 199.5(f).
[112] *Id.* cmt 4.
[113] *See Mass Engineered Design, Inc. v. Ergotron, Inc.*, 206 CV 272, 2008 WL 8667511 (E.D. Tex. Jan. 8, 2008) (awarding sanctions of attorneys' fees and expenses incurred at the deposition for repeatedly instructing a witness not to answer and suggesting that the proper response for questions aimed at broadening the scope of the deposition would have been to file a motion to terminate or limit the deposition); *Detoy*, 196 F.R.D. at 367 (holding that instructing a witness not to answer a question outside the scope of a 30(b)(6) notice is improper and the proper remedy is to object but let the deponent answer).
[114] *New Jersey v. Sprint Corp.*, No. 03-2071-JWL, 2010 WL 610671, at *2 (D. Kan. Feb. 19, 2010).
[115] *Taylor*, 166 F.R.D. at 360-63.
[116] *W.R. Grace & Co. v. Viskase Corp.*, No. 90C5383, 1991 WL 211647, at *2 (N.D. Ill. Oct. 15, 1991) (allowing corporate party to offer at trial evidence contrary to its corporate representative's earlier testimony in a Rule 30(b)(6) deposition); *See also A & E Prods. Group., L.P. v. Mainetti USA, Inc.*, No. 01 Civ 10820(RPP), 2004 WL 345841, at *6–*7 (S.D.N.Y. Feb. 25, 2004) (allowing

testimony may be used for impeachment if it differs from his or her trial testimony, but it is not an irrefutable judicial admission.[117]

Johnson v. Big Lots Stores, Inc. is particularly instructive. In *Johnson*, Big Lots listed its EVP to testify at trial, but designated two others as corporate representatives in its depositions.[118] Plaintiffs argued the EVP should not be allowed as a witness because, by calling the EVP at trial, Big Lots was in-effect "de-designating" the corporate representatives and seeking to avoid the adverse statements they made in their depositions.[119] Plaintiffs argued that Big Lots was attempting to ambush the plaintiffs with the EVP's testimony.[120] The court found that Big Lots was not foreclosed from calling the EVP, even if his testimony contradicted or explained statements made by either corporate representative.[121] The court explained:

> Big Lots is still bound by the deposition statements of [its reps] as its Rule 30(b)(6) designees. It cannot shed those statements by calling [the EVP]. Plaintiffs can call [the reps], and they can impeach [the EVP] with the testimony of Big Lots' 30(b)(6) designees. . . . [O]bviously, Big Lots faces credibility hurdles to the extent that it seeks to use [the EVP] to recast statements of its designated representatives. But Big Lots is not foreclosed from calling [the EVP], even if his testimony is different from the 30(b)(6) designees.[122]

This rule is not uniformly applied. Other courts have precluded the company from introducing such documents or testimony at trial unless it can prove that the information was unknown or inaccessible at the time of the deposition.[123] In the oft-cited case *U.S. v. Taylor*, the court found that a statement by a Rule 30(b)(6) designee was not a judicial admission, but could bind the corporation as an admission against interest under Federal Rule of Evidence 804(b)(3).[124]

Accordingly, though supplementing a corporate representatives may be possible, the best practice is to fully prepare your corporate representative so that amendment and supplementation is not necessary.

X. Costs of Failing to Educate a Representative

The consequences for failing to properly educate a corporate representative can vary, from minor sanctions essentially authorizing a "do over" to severe sanctions, including striking all the corporation's pleadings or even entry of default.[125] The Texas rules similarly authorize sanctions for failing to properly educate a witness on noticed

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corporate party to introduce declaration of one of its employees that was inconsistent with deposition testimony corporation's Rule 30(b)(6) representative); *Indus. Hard Chrome Ltd. v. Hetran, Inc.*, 92 F.Supp.2d 786, 791 (N.D. Ill. 2000) (explaining that [R]ule 30(b)(6) deposition "testimony is not a judicial admission that ultimately decides an issue. The testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes"); *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 992–93 (E.D. La. 2000) (acknowledging that while a "court may disregard an affidavit which directly contradicts an earlier 30(b)(6) deposition … [c]ourts have allowed a contradictory or inconsistent affidavit to nonetheless be admitted if it is accompanied by a reasonable explanation."). *Cf. Brown & Root, Inc. v. Am. Home Assur. Co.*, 353 F.2d 113, 116 (5th Cir.1965) (explaining in the context of an expert witness who contradicted his earlier deposition testimony at trial that "except for those specialized, rare assertions characterized as judicial admissions, a party is entitled to explain an admission and even to retract it. When that is done, the factual evaluation of the admission vis-à-vis explanation, retraction, or repudiation is for the trier of fact.").

[117] *A.I. Credit Corp.*, 265 F.3d at 637.

[118] *Johnson v. Big Lots Stores, Inc.*, No. 04-3201, 2008 WL 6928161, *4 (E.D. La. May 2, 2008).

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *See Rainey v. Am. Forest & Paper Ass'n*, 26 F. Supp. 2d 82, 94 (D. D.C. 1998); *Ierardi v. Lorillard, Inc.*, Civ. A. No. 90-7049, 1991 WL 158911 at *2 (E.D. Pa. Aug. 13, 1991) (holding that party cannot introduce evidence during trial contradicting previous statements by Rule 30(b)(6) designee).

[124] *Taylor*, 166 F.R.D. at 362.

[125] *See 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").

deposition topics or improperly claiming privilege.[126]

Corporate counsel should never put forth an unknowledgeable representative and assume that any deficiencies may be cleared up in later depositions or at trial. As illustrated below, the consequences for this line of thinking can be drastic. If the witness's knowledge is limited for some reason, the best practice is to notify the opponent of that fact before the deposition begins to avoid sanctions altogether.[127]

A. A Range of Sanctions May Be Ordered

In *Mike Hooks Dredging Co. v. Eckstein Marine Serv.*, the court found the corporation had violated Rule 30(b)(6) when it presented a corporate representative who was unable to testify to issues that were within the corporate knowledge of the company.[128] The designee referenced relevant corporate documents that she had not reviewed and frequently stated that she did not have personal knowledge of various facts, suggesting that other individuals were better suited to testify on those issues.[129] As sanctions, the court awarded attorneys' fees and costs associated with the corporation's failure to comply with its obligation to provide a knowledgeable witness on the noticed topics.[130]

In a Texas case, a plaintiff sought a spoliation instruction, arguing that the insurer's failure to produce a corporate representative left them without meaningful discovery regarding the carrier's interpretation of its mold operational guidelines.[131] Although the trial court ultimately denied the request for spoliation instruction and the denial was upheld by the appellate court,[132] this case indicates the possibility of creative sanctions that may be sought or awarded in Texas for failing to comply fully with a deposition notice.

The sanctions awarded can be drastic, especially under the Texas rules. Rule 215.2(b) provides that sanctions awarded may include: (1) disallowing any further discovery of any kind or of a particular kind by the disobedient party; (2) charging all or any portion of the expense of discovery against the disobedient party or the attorney advising him; or (3) striking out pleadings or dismissing with or without prejudice the action or any part thereof.[133] In *Allstate Texas Lloyds v. Johnson*, the trial court imposed sanctions of attorneys' fees and costs, prohibiting Allstate from engaging in any further discovery, and striking all of Allstate's pleadings when Allstate's corporate designee improperly claimed privilege in response to questions on designated topics and Allstate failed to produce a replacement designee who could testify.[134] The appellate court did note that striking the pleadings is an extreme sanction which should be avoided "unless the failure to answer discovery requests is willful, in bad faith, or due to some fault of the disobedient party."[135]

B. The Corporation May Be Barred From Presenting Contradictory Testimony

Corporate counsel should be very weary of having their corporate representative state an "I don't know response," and should discourage the deponent from stating such, unless absolutely no corporate knowledge exists. If you are taking a

[126] *See* Tex. R. Civ. P. 215.2(b).
[127] *Calzaturficio*, 201 F.R.D. at 38; *QBE*, 276 F.R.D. at 691.
[128] *Mike Hooks*, 2011 U.S. Dis. LEXIS 68989, *5-6.
[129] *Id.*
[130] *Id.*
[131] *McMillin*, 180 S.W.3d at 199.
[132] *Id.*
[133] See the complete list of discovery sanctions at Tex. R. Civ. Pro. 215.2(b).
[134] *Allstate Texas Lloyds*, 784 S.W.2d at 105.
[135] *Id.* The appellate court reserved a determination on striking the pleadings until Allstate appealed the final case.

representative deposition, be sure to note these responses and object to any later testimony that offers knowledge on this topic. Any "I don't know" responses will likely limit the corporation's ability to later introduce any evidence on this point. As noted in *Taylor*, "if a party states it has no knowledge or position as to a set of alleged facts or area of inquiry at a Rule 30(b)(6) deposition, it cannot argue for a contrary position at trial without introducing evidence explaining the reasons for the change."[136] Other courts have followed suit.[137] This rule is designed to prevent a corporation from making a "half-hearted inquiry before the deposition but a thorough and vigorous one before the trial."[138]

An example of this is found in *QBE*, where the court held that when a corporate representative was unable to speak on the unobjected-to topics noticed, the corporation was prohibited from presenting contradictory testimony on that topic.[139] In *QBE*, the insurer was noticed on several topics in which only the insured, which refused to cooperate, had knowledge.[140] The court found that, regardless of whether the corporation's "I don't know" responses concerned a "genuine lack of knowledge", meaning the matter was not reasonably available to the insurer, or it involved a failure to adequately prepare its representative, the end result was the same—the corporation would not be allowed to take a position at trial on those issues for which the corporate representative did not provide testimony.[141] The court noted:

> This relief is triggered either as a sanction (for failing to comply with the 30(b)(6) obligations) or as a natural consequence of not having a pre-trial position on certain topics. It would be fundamentally unfair if QBE did not provide 30(b)(6) testimony on certain matters, proclaimed a lack of its own knowledge, advocated that the association's refusal to cooperate should not impact it and then at trial take affirmative positions on these topics and seek to introduce evidence against Jorda.[142]

Thus, corporate counsel should advise deponents against an "I don't know" response unless there is no corporate knowledge on the subject. The better rule is to answer as completely as possible, and supplement immediately if necessary. Opponents taking a corporate representative deposition should note where a designee identifies an "I don't know" response and move to exclude or impeach any conflicting testimony.

C. The Corporation May Be Barred From Objecting to Deponent's Lack of Personal Knowledge or Credibility

Finally, the corporation will likely be barred from objecting to the corporate representative's testimony at a later trial on the basis that the representative lacked personal knowledge or credibility on the topics he testified to at the deposition.[143] "[I]f the corporation makes the witness available at trial he should not be able to refuse to testify to matters as to which he testified at the deposition on grounds that he only had corporate knowledge of the issues, not personal knowledge."[144] Accordingly, if a certain fact is within the collective knowledge of or even subjective belief of the company, a corporate representative should be prepared to testify as to it, even if it is not within his personal knowledge, provided the testimony is otherwise permissible lay testimony.[145]

Similarly, an opponent's objections to a corporate representative's authentication of documents on the basis that he lacks personal knowledge will also

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[136] *Taylor*, 166 F.R.D. at 361-62.
[137] *Fraser Yachts*, 2007 WL 1113251, at *3.
2007); *Chick-Fil-A v. Exxonmobil Corp.*, No. 08-61422-CIV, 2009 WL 3763032, at *13 (S.D. Fla. Nov. 10, 2009); *Ierardi*, 1991 WL 158911, 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").
[138] *Taylor*, 166 F.R.D. at 363.
[139] *QBE* at *20.
[140] *Id.*
[141] *Id.* at 21.
[142] *Id.*.
[143] *Brazos River Auth.*, 469 F.3d at 434-35; *Whitehouse Hotel L.P. v. Comm'r*, 615 F.3d 321, 342 (5th Cir. 2010).
[144] *Id.* at 434.
[145] *Id.*

likely be overruled.[146] The court in *Sinegaure v. Bally Total Fitness Corp.* specifically noted Texas Rule of Evidence 901(b) does not limit the ways an object can be authenticated, and since a sponsoring witness—here, the corporate representative—could vouch for its authenticity, Rule 901(b) was satisfied.[147]

XI. Conclusion

A corporate representative deposition can be an excellent discovery tool if used properly, but it can also be a dangerous trap for unwary corporate counsel, especially early in litigation. As corporate counsel, it is important to review the discovery notice as soon as practicable with an eye towards objections, particularly topics that stray into legal theories or work product. Be thorough when prepping your corporate representative, but careful in what documents you provide. The best practice will be not to share original, privileged documents, but to "educate" your corporate representative using a summary of key information. Remember that, as the corporate representative, the deponent has an obligation to be knowledgeable on everything within the noticed topics "reasonably available" to the corporation, and this likely includes former employees and documents not on-site, but still within the corporation's control.

During the deposition, listen for questions outside the noticed topics and object, noting that the questions are outside the scope of the notice and the deponent is not authorized to speak on those issues. In addition, make objections to any questions involving legal theories, work product, privileged information, or answers which would require expert knowledge. Be sure to review your state's rules on when you may instruct a witness not to answer.

Remember that, although your representative need not be perfect, she should be fully informed on all the topics. The consequences for failing to adequately prepare a witness may be severe for both the client and counsel. Finally, keep in mind that a corporate representative deposition presents an opportunity for the corporation to present its version of events through a capable witness of its choosing.

[146] *Sinegaure v. Bally Total Fitness Corp.*, 01-05-01070-CV, 2008 WL 5263235 (Tex. App.—Hous. [1st Dist.] Dec. 18, 2008, no pet.)
[147] *Id.*

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