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February 24, 2004 04-CV-B

Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United
States Courts
1 Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544

Re: New York State Bar Association
Commercial and Federal Litigation Section

Dear Mr. McCabe:

As you know, I am the Chair of the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. On February 12, 2004, the Section approved a report on Rule 30(b)(6). A copy is enclosed for consideration by the Advisory Committee on Civil Rules. If you need more copies or would like an electronic copy, please let me know.

Sincerely yours,

Gregory K. Arenson

GKA:sm
Enclosure

cc: Lewis M. Smoley, Esq. (w/encl.)
James A. Beha, II, Esq. (w/o encl.)

Report on Rule 30(b)(6)

Rule 30(b)(6) of the Federal Rules of Civil Procedure was introduced in 1970 to make specific changes in how information could be obtained from a corporation or other organization by deposition.[1] Where previously the examining party designated some officer or managing agent as the witness, taking the risk that the deponent might not have the desired information (and, incidentally, the risk that the person who did possess the information might not be an officer or managing agent whose testimony could "bind" the entity), Rule 30(b)(6) changed the process so that the examiner's burden was to identify by notice the topics on which testimony was sought with "reasonable particularity" (hereafter a "Notice"), at which point the burden shifted to the corporation to designate for examination one or more persons who would be prepared to convey the corporation's knowledge on the topics, speaking on behalf of the corporation (hereafter a "Corporate Witness").

This Report discusses the burdens on the examining party in terms of the specificity of the Notice and the obligation of the deponent corporation in terms of the preparation of the Corporate Witness. This Report also considers the proper scope of a Rule 30(b)(6) examination, and particularly the extent to which it may be used to elicit contentions or trial positions of a corporate party, giving particular attention to the much-cited 1996 case of United States v. Taylor, decided by Magistrate Judge Eliason of the Middle District of North Carolina.[2] The Report also addresses the evidentiary significance of Rule 30(b)(6) testimony, the extent to which such testimony should be given preclusive effect, the attorney work-product

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[1] Rule 30(b)(6) applies to a variety of entities ("a public or private corporation or a partnership or association or governmental agency"); we use "corporation" here as a shorthand. In 1971, Rule 30 was further amended to make clear that deposition discovery of third-party entities by subpoena would follow a parallel procedure.

[2] United States v. Taylor, 166 F.R.D. 356 (M.D.N.C.) (Eliason, M.J.), aff'd 166 F.R.D. 367 (M.D.N.C. 1996) ("Taylor").

issues that are often presented in the preparation and examination of a Rule 30(b)(6) witness, and current practice (as reflected in reported cases) with respect to the imposition of sanctions where the witness presented is unable to fulfill the testimonial duties imposed by the Rule.

After such discussion the Report sets forth a series of recommendations for practice under the Rule as well as a recommendation for amendment of the Rule to eliminate the use of such depositions as a device to discover legal arguments, contentions and trial positions.

A. The Rule and An Overview of Common Practice Issues

Rule 30(b)(6) currently provides:

> A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. 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 the person 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. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

The Rule was adopted as "an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process." Rule 30(b)(6) Advisory Committee's Notes (1970 Amendments). The Rule offers a streamlined procedure for extracting information that may be dispersed throughout a corporation and in practice proves especially useful early in a case when locating particular information, identifying potential witnesses on particular points or obtaining explanatory information about particular documents may be essential to mapping out a pretrial plan. The requirement that the Corporate Witness shall "testify as to matters known or reasonably available to the organization," moreover, requires

a well-prepared deponent and thereby seeks to eliminate the prior situation in which an examining party had to proceed through a series of deponents who each professed that the person who knew the answer was someone else.[3] In complex cases, very specific Notices may also prove the only practicable method for extracting information about documents, policies or decisions that have emerged as significant in the case (such as accounting treatment of a particular event or a company policy), but for which individual deponents have not been knowledgeable or helpful. The burden on the corporation to produce a witness who "shall testify as to matters known or reasonably available to the organization" can be an invaluable tool for forcing a filling-in of blanks where memories seem to have failed the witnesses so far examined.

Anecdotal reports from practitioners indicate that Notices are often framed as seeking factual support for matter in the pleadings (e.g., "all facts that plaintiff contends support the allegations of paragraph x of the Complaint" or "the factual basis for defendant's assertion of a defense of estoppel," etc.). Even where the Notice is not framed in evaluative terms, Corporate Witness responses (and witness preparation) in the context of a Rule 30(b)(6) deposition also constantly present issues about privileged communications and work product, since counsel handling the case typically have the most thorough knowledge of the facts.[4]

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[3] Id. (referring to the practice as "bandying"). See generally Jerold Solovy & Robert Byman, Discovery: Invoking Rule 30(b)(6), NAT'L L.J., Oct. 26, 1998, at B13 (arguing that if a witness is not properly prepared and lacks knowledge which others in the corporation do have (e.g., as to what happened in a negotiation), the corporation should thereafter be bound by the professed lack of knowledge -- in opposing summary judgment, for example.)

[4] See, e.g., Protective Nat'l Ins. Co. of Omaha v. Commonwealth Ins. Co., 137 F.R.D. 267, 279-80 (D.Neb. 1989) ("Protective Nat'l") (although documents may be protected work product, Rule 30(b)(6) witness must be prepared with "facts" contained in them and divulge such facts such facts at deposition; questions as to which facts "support" particular allegations did not necessarily seek counsel's mental impressions, and a deposition rather than contention interrogatories was an acceptable method insofar as it addressed allegations that were not simply legal conclusions). But see Am. Nat'l Red Cross v. Travelers Indem. Co., 896 F.Supp. 8, 13 (D.D.C. 1995) (in a complex case with extensive document discovery, requiring a description of documents that "support" affirmative defenses was barred by work-product doctrine).

Occasionally, too, parties may seek to force a corporation to take a litigation position with respect to specific issues or events through the medium of a Rule 30(b)(6) deposition. Since the Corporate Witness must "speak" for the corporation on the designated topics to the extent information is "reasonably available" to the corporation, it is argued, the witness may be asked for the corporation's "position" on factual questions, including, where testimony from other witnesses at deposition has proven to be conflicting, which version of events the corporation credits.[5] (Q: I have presented you with the depositions of Witness One and Witness Two [both, say, former employees] with respect to the circumstances surrounding the denial of plaintiff's application for promotion. Which version of such events does the company adopt?)

Use of Rule 30(b)(6) to seek "positions" that might alternatively be sought by requests to admit or contention interrogatories effectively requires the corporation, through its witness, to map out litigation positions in an oral exchange with adversary counsel with only minimal assistance from counsel -- who would have been heavily involved in framing responses to written discovery. Questions of specificity, scope and protection of work product are obviously interrelated: the more areas of inquiry and the more scope to ask about "positions," the more likely that counsel preparing a witness to answer "fully" will have to share not only factual information but counsel's assessment of the facts.

The Taylor decision and a number of others have approved the practice of seeking corporate "positions" from the Corporate Witness, often expressing a preference for compelling a corporation to speak through an individual employee rather than allowing counsel to present the

[5] See Kent Sinclair & Roger P. Fendrich, Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms, 50 ALA. L. REV. 651, 699 (1999) ("Sinclair & Fendrich").

corporation's position.[6] Other courts reject, or at least strongly disfavor, the use of a Rule 30(b)(6) deposition for this purpose, and Sinclair and Fendrich condemn the practice as a "very common misuse."[7] Although concerns about this practice may be mitigated by requiring very specific advance warning in the Rule 30(b)(6) notice, in the context of an on-going deposition (and in the context of very strong judicial disfavor of instructions to a witness not to answer), counsel for the corporation -- and the witness -- can be at a great disadvantage in a factually complex case if such questions are permitted -- a disadvantage several times compounded if the court treats the scope of Rule 30(b)(6) answers as preclusive of other evidence.[8]

Disputes about the use of Rule 30(b)(6) will surface in reported cases only in the context of motions to compel (or for sanctions), motions to preclude, or motions for protective orders.[9] Such cases will necessarily present a distorted view of practice under the Rule. Moreover, as some commentators have pointed out, analysis of decisions in such cases must sort out the court's general pronouncements about the Rule and the parties' obligations thereunder from the actual relief (including any sanctions) directed.

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[6] See, e.g., Canal Barge Co. v. Commonwealth Edison Co., 2001 WL 817853, at *2 (N.D. Ill. July 19, 2001) ("Canal Barge") ("Generally, inquiry regarding a corporation's legal positions are appropriate in a Rule 30(b)(6) deposition" (citing Taylor); although in some cases contention interrogatories may be the preferred method, in this case "there is both a legal and factual component to the interpretation of these contracts," so that a deposition was preferred); Ierardi v. Lorillard, Inc. 1991 U.S. Dist. LEXIS 11887, at *5 (E.D. Pa. Aug. 20, 1991) ("Ierardi") (with respect to documents, plaintiffs were "entitled to discover the interpretation [defendant] intends to assert at trial" and since such "interpretation" was factual, a Rule 30(b)(6) deposition was preferable to contention interrogatories).

[7] Sinclair & Fendrich, 50 ALA.L.REV. at 700.

[8] See Solovy & Byman, supra note 3 (arguing for this result). Compare Taylor, 166 F.R.D. at 365 (Rule 30(b)(6) testimony precludes additional evidence or argument absent showing of "extremely good cause" for omission from testimony) with Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co., 1993 U.S. Dist. LEXIS 1163, at *8 (S.D.N.Y. Feb. 4, 1993) (Francis, M.J.) ("Arkwright") (Rule 30(b)(6) testimony would not limit trial evidence since witness need not have "comprehensive" knowledge; contention interrogatories would be used to assure full disclosure prior to trial).

[9] Reported cases that consider the preclusive effect of Rule 30(b)(6) testimony appear to be extremely rare. The issue was presented so squarely in Taylor only because the corporation sought an advance ruling that its Corporate Witness' testimony would not limit the scope of proof and argument at trial.

Common, often interrelated, subjects in such disputes include the following:

1. How specific must the Notice be, and to what extent may a Rule 30(b)(6) witness be examined on matters outside the scope of a designated topic?

2. Where the Corporate Witness lacks personal knowledge (or sufficient personal knowledge) on the designated topic for which the witness is proffered, how much preparation is required, particularly as to (i) details of information available somewhere within the corporation, and (ii) information that might be "reasonably available" if the corporation is required to obtain information from former employees or from third parties?

3. Must a witness be prepared when the information is available to the corporation only through the investigative work of counsel (including both work product and attorney-client communications from former employees); if a witness must be prepared, how can this be managed consistent with protection of attorney work product?

4. To what extent may the witness be asked to take a position for the corporation with respect to third-party testimony, to summarize the corporation's evidence on a particular point, to muster evidence in support of pleadings that have been framed by counsel, or to state the corporation's current "interpretation" of documents or events, or the like?

5. What should be the relationship of Rule 30(b)(6) questions and other discovery devices, particularly contention interrogatories?

Responses to these questions reflect a continuum of views, from a position that Rule 30(b)(6)'s central function is to provide reliable leads to the identity of persons with actual knowledge on the topic (and perhaps to provide specific factual information about corporate documents) to the position that Rule 30(b)(6) may be used to require the Corporate Witness to assemble all critical information about the corporation's case and then to elicit corporate contentions and admissions limiting the proof at trial.

B. Particularity in the Notice and the Scope of the Examination

The requirement of reasonable particularity is the counterbalance to the corporation's duty of preparation and the role of the witness as spokesperson. When sanctions are sought for the shortcomings in the testimony of the Corporate Witness, courts are likely to start their analysis by testing the particularity of the Notice, concluding that if answers must be given "fully, completely, and unevasively" (the standard formulation), then "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."[10]

It is perhaps not surprising that a number of courts have been asked to consider whether introducing the list of noticed topics with the phrase "including but not limited to" renders the entire notice defective. While perhaps the corporation's counsel could simply have announced that the list of topics would be deemed exclusive, courts have indeed stricken such notices.[11] This construction is necessary because, on the one hand, the corporation is only required to prepare the Corporate Witness with the "corporation's" knowledge with respect to noticed topics but, on the other hand, examiners generally are permitted to go beyond such topics where the witness has knowledge on other relevant matters.[12] The distinction generally made is that on such other lines of questioning the witness testifies in his individual capacity; the effect of such testimony depends on that capacity rather than the effect of this Rule.[13] Accordingly,

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[10] Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 638 (D. Minn. 2000) ("Prokosch").

[11] See, e.g., Reed v. Nellcor Puritan Bennett & Mallinckrodt, 193 F.R.D. 689, 692 (D. Kan. 2000). See also Innomed Labs, LLC v. Alza Corp, 211 F.R.D. 237, 240 (S.D.N.Y. 2002) (Ellis, M.J.). Wasteful disputes about such terminology might be avoided by a Local Rule deeming "but not limited to" to be surplusage for purposes of a Notice.

[12] See, e.g., Detoy v. City and County of San Francisco, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000).

[13] See, e.g., Primavera Familienstifung v. Askin, 130 F.Supp. 2d 450, 551 (S.D.N.Y. 2001) (Sweet, J.) (corporation "not limited" by testimony of Rule 30(b)(6) witness on topic outside specifics of notice). There seems to be disagreement as to whether the binding effect of Rule 30(b)(6) testimony is simply that accorded any "officers,

counsel for the corporation properly insists that the notice be both reasonable and particular and during deposition may want to state positions as to whether a particular line of questions falls within the notice.[14] Thus, a Rule 30(b)(6) witness may be questioned on topics outside the scope of the Notice and thereby required to give such information as the witness may have on such matters, but there is no duty to prepare the witness with the "corporation's" knowledge outside the enumerated topics.

A Rule 30(b)(6) Notice has been held unduly burdensome where it seeks a witness to identify relevant documents, and all nonprivileged documents have already been produced. In Magistrate Judge Katz's felicitous phrasing:

> No Rosetta stone is necessary to unlock their mysteries. Defendant and his counsel can read them and determine which documents pertain to an allegation, and to what degree, directly or indirectly.[15]

Presumably a witness might still be required for authentication or to establish business record status, if not stipulated to, and a Rule 30(b)(6) examination might still seek additional information about specific documents, suitably identified in the Notice.

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directors, or managing agents" of a corporation (whether or not the Corporate Witness is one), or is to some degree more preclusive. See, e.g., In re Vitamins Antitrust Litig., 216 F.R.D. 168, 174 (D. D.C. 2003) ("While the government submissions constitute admissions by Bioproducts, its Rule 30(b)(6) deposition is a sworn corporate admission that is binding on the corporation."); but see In re Puerto Rico Electric, 687 F.2d 501, 503 (1st Cir. 1982) (noting misconception that Rule 30(b)(6) testimony is conclusively binding). See also Sinclair & Fendrich, 50 ALA. L. REV. at 730; S.I. Schenkier, Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6), LITIGATION, v. 29 note 2 (American Bar Ass'n, Winter 2003) 20, 62 (citing cases in both directions). See also discussion of Taylor in Part D below.

[14] Counsel may also want to insure in preparing the witness that counsel has only conveyed additional information to the witness with respect to the specific topics in the notice, so that if the questioner strays outside the notice the deponent may truthfully convey only such information as the witness already possessed. In one case the notice called for "a witness to testify as to any statement of fact set forth in the amended complaint to which defendant has denied," and the Court struck the notice for insufficient particularity. Skladzien v. St. Francis Reg'l Med. Ctr., 1996 U.S. Dist. LEXIS 20621, at *2 (D.Kan. Dec. 19, 1996).

[15] United States v. Dist. Council, 1992 U.S. Dist. LEXIS 12307, at *43 (S.D.N.Y. Aug. 14, 1992) (Katz, M.J.) ("Brotherhood of Carpenters").

Requiring particularity also allows better consideration of the potential burden of the notice in the context of the litigation as a whole. The Rule does not set an express limit on the number of topics, but Rule 26 allows the court to limit all manner of discovery.[16]

The balancing of the variety of noticed topics and the burden of response takes on additional complications where there are presumptive limitations on the number of depositions (Rule 30(a)(2)(A)). The more complex the case the more likely that different persons are the best source of information on particular topics, and the corporation may well prefer to designate several witnesses who have knowledge on different points rather than seek to prepare one witness for topics of which the witness is otherwise ignorant. On the one hand, the general rule has been that examination of multiple deponents produced in response to a single Rule 30(b)(6) notice is counted as one deposition. However, for purposes of the presumptive seven-hour time limit on a deposition, Rule 30(d)(2), the Advisory Committee's position is that each witness supplied in response to a Rule 30(b)(6) Notice should be treated as a separate witness.

This situation provides an incentive to a corporation to prepare a single witness to be minimally adequate on all noticed topics (thus preserving the seven hour limit), rather than provide several witnesses better-qualified on different aspects of the Notice (thereby permitting the examiner multiples of seven hours for examination), an incentive which is inconsistent with the purposes of Rule 30(b)(6). Applying the presumptive seven-hour limit retains a meaningful restraint on the scope of the topics noticed, and it should not matter significantly to the examiner (who has, after all, chosen the topics) whether the corporation provides responsive information through one or more than one witness, so long as the witness is properly prepared as to the

[16] Cf. Sinclair & Fendrich, 50 ALA. L. REV. at 682 (urging use of the "balancing and triage provisions of Rule 26 when considering the appropriate scope of burdens" on the corporation).

particular topic.[17] The examining party should, however, be allowed to reserve any unused time for subsequent Rule 30(b)(6) examinations.[18] Rule 30(d)(2) would still require the court to allow additional time whenever necessary "for a fair examination of the witness" or if the examination is impeded or delayed.

Finally on this point, the general practice appears to be that, where a witness is designated as a Rule 30(b)(6) representative and is also examined separately, the presumptive seven-hour limit applies separately to each portion of the examination.[19]

C. Sufficiency of Preparation Of, and Performance By, the Corporate Witness

The Corporate Witness must be properly prepared by the corporation with the information reasonably available to the corporation. How do the courts assess the witness's performance -- and by inference the sufficiency of preparation? A related question, addressed in a subsequent section, is what the consequences will be at trial if the corporation's counsel seeks to introduce evidence or arguments relating to the noticed topics which were not mentioned by the Corporate Witness. Cf. Rule 37(c), Fed. R. Civ. P. (failures to disclose).

Although the rhetoric of the courts in setting out what is expected of the corporation and the Corporate Witness is stern and expansive, the decisions indicate that, with rare but important exceptions, the relief or sanctions ordered when the Corporate Witness falls short of the pronounced standards have been modest and mild. Sinclair and Fendrich exhaustively review cases under the Rule and repeatedly note that broad rhetoric is typically

[17] An alternative, counting examination of multiple Rule 30(b)(6) witnesses provided in response to a single Notice as multiple depositions, each of a presumptive-seven hour length, would encourage tactical maneuvers by the corporation to eat into the presumptive ten-witness limit of Rule 30(a)(2)(A). A balance must be struck here, and the one presented in the text seems preferable.

[18] It is often good practice to seek additional Rule 30(b)(6) examinations at later stages in a case where very specific questions about documents or events have not been resolved by other witnesses.

[19] See, e.g., Sabre v. First Dominion Capital LLC, 2001 U.S. Dist. LEXIS 20637, at *4 (S.D.N.Y. Dec. 12, 2001) (Pittman, M.J.).

followed by narrowly focused, restrained relief. Where the witness is thoroughly unprepared to address noticed topics, courts may treat the situation as a failure to appear.[20] The case for sanctions may seem overwhelming in such circumstances, but even then most reported cases seem to give the entity a second chance with only a warning so long as the witness adequately responded on at least some topics.

Review of reported cases suggests that the imposition of any procedural sanction other than ordering additional discovery has been rare. One court has commented:

> The Court should diligently apply sanctions under Rule 37 both to penalize those who have engaged in sanctionable conduct and to deter those who might be tempted to engage in such conduct in the absence of such a deterrent.[21]

Nonetheless, and notwithstanding the near-mandatory language of Rules 37 (a)(4) and (d), Fed. R. Civ. P., monetary awards are quite uncommon. In some courts' view:

> In order for the court to impose sanctions, the inadequacies in a deponent's testimony must be egregious and not merely lacking in desired specificity in discrete areas.[22]

Where imposed at all, monetary awards usually are limited to either a modest allowance for the cost of the motion or some portion of the cost of unproductive time at the initial deposition.[23] Indeed, some reported monetary sanctions appear so light that it is difficult

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[20] See, e.g., Resolution Trust Corp. v. Southern Union Co., 985 F.2d 196 (5th Cir. 1993).

[21] T&W Funding Company XII, L.L.C. v. Pennant Rent-a-Car Midwest, Inc., 210 F.R.D. 730, 733 (D. Kan. 2002) (affirming award of both motion costs and expenses of new deposition).

[22] Zappia Middle East Construction Co., Ltd. v. Emirate of Abu Dhabi, 1995 U.S. Dist. LEXIS 17187 at *25-26 (S.D.N.Y. Nov. 17, 1995) (Francis, M.J.).

[23] See, e.g., In re Vitamins Antitrust Litig., 216 F.R.D. at 174-75 (costs of motion); Mattel, Inc. v. Robard's Inc., 139 F.Supp. 2d 487, 498 (S.D.N.Y. 2001) (additional deposition ordered and expense of motion awarded); Arctic Cat, Inc. v. Injection Research Specialists, Inc., 210 F.R.D. 680, 683-84 (D. Minn. 2002) (small portion of costs of first deposition). However, in Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 78-80 (S.D.N.Y. 1991), Judge Leisure awarded full motion costs plus the time and expense of the initial deposition and made counsel jointly liable with the client for payment of the sanctions.

to imagine them serving as a deterrent,[24] and courts do not seem to have resorted at all to Rule 37(c), Fed. R. Civ. P. (allowing "other appropriate sanctions" for failures to disclose), in connection with unsatisfactory performances at Rule 30(b)(6) depositions.

Disputes about preparation of the witness tend to fall in three groups:

(1) whether the "most knowledgeable" witness must be produced and what remedies are available where the witness is sufficiently prepared to answer many of the questions posed but lacks information on some particulars;

(2) to what extent the witness must be prepared with information "reasonably available" to the corporation from outside sources, particularly former employees or existing discovery in the case; and

(3) how the preparation of the witness interplays with attorney work product and with privileges.

As Magistrate Judge Schenkier of the Northern District of Illinois advised practitioners in a recent article, "you can search high and low in Rule 30(b)(6) and not find a requirement that the corporation produce the 'most knowledgeable witness.'"[25] Indeed, there is no requirement that the corporation produce a witness with firsthand knowledge, even when it has one.[26] More generally, the examining party cannot select the witness to speak for and bind

[24] See, e.g., Koken v. Lederman, 2001 U.S. Dist. LEXIS 628, at *1 (E.D. Pa. Jan. 22, 2001) ($350 sanction for wrongfully terminating Rule 30(b)(6) deposition when questioning was proper).

[25] Schenkier, supra note 13, at 20.

[26] Solovy & Byman, supra note 3. See Gucci America Inc. v. Exclusive Imports Int'l, 2002 WL 1870293, at *10 (S.D.N.Y. Aug. 13, 2002) (Casey, J.) (upholding Magistrate Judge Maas's determination that, where a witness was "marginally adequate," plaintiff was not required to produce a witness with actual knowledge); Cruz v. Coach Stores, Inc., 1998 U.S. Dist. LEXIS 18051, at *17 (S.D.N.Y. Nov. 18, 1998) (Rakoff, J.) (Rule requires prepared witness, not one who is "most knowledgeable"). But see Reilly v. Natwest Mkts. Group Inc., 181 F.3d 253, 268-69 (2d Cir. 1999) (although defendant produced a Rule 30(b)(6) witness, it was proper for the trial court to preclude testimony from other witnesses not produced in response to a Notice).

the Corporation by operation of Rule 30(b)(6) by naming a specific person in the Notice; the Rule plainly allows the corporation to select the witness to be tendered for these purposes.

What is required is that the witness have a sufficient grasp of the information available to the corporation to give responsive answers on the noticed topics. Where the court feels the corporation has not adequately prepared the witness, it may order a new examination with specific preparation mechanisms.[27] As the cases cited in the preceding footnotes demonstrate, however, if the witness can give responsive answers much of the time and point to others persons who can address very detailed questions, most courts will find that sufficient compliance; if the witness does well enough in most areas but lacks knowledge on a particular topic when the court considers the topic important and the record insufficient, a court is likely to direct production of an additional witness or the use of alternative discovery devices, but the court may well not impose any sanctions. Despite constant repetition of the "full" and "complete" tests, moreover, a number of decisions have denied sanctions and refused to order additional preparation or a new witness where, although there were questions the witness could not answer, taking the deposition as a whole the witness' knowledge on each topic appeared reasonably adequate and his testimony included leads about where more detailed information could be obtained.[28]

By the Rule's terms, the witness need only know of "matters known or reasonably available to the organization." What non-privileged information held by third parties or former

[27] See, e.g., FDIC v. C.H. Butcher, 116 F.R.D. 196, 201-02 (E.D. Tenn. 1986) (FDIC to redesignate witnesses and provide them as part of their preparation with responsive documents including extensive investigative memorandum); Paul Revere Life Ins. Co. v. Jafari, 2002 U.S. Dist. LEXIS 5594, at *8 (D. Md. Mar. 28, 2002) (ordering new deposition at plaintiff's expense).

[28] Cf. Equal Opportunity Comm'n v. Am. Int'l Group, Inc., 1994 WL 376052, at *3 (S.D.N.Y. July 18, 1994) (Ellis, M.J.) (Rule 30(b)(6) examination is not a "memory contest"); Barron v. Caterpillar Inc., 168 F.R.D. 175, 178 (E.D.Pa. 1996) (in absence of bad faith, shortcomings would be handled by other discovery devices); United States v. Mass. Indus. Fin. Agency, 162 F.R.D. 410, 412 (D. Mass. 1995) ("Massachusetts Finance") (same).

employees is "reasonably available" to the corporation? Several cases indicate that if the only source of information on a topic is a former employee, the corporate designee must not merely provide that "lead," but attempt to gather the information from the employee. Indeed, a few cases suggest that if information pertaining to a topic has been made available elsewhere in discovery, in other depositions for example, the corporate designee must both be familiar with such testimony and be prepared to state the corporation's "position" with respect thereto (i.e., take a position as to the truthfulness, accuracy and completeness of the testimony). Several courts have stated that "reasonably available" information includes that which can be obtained from former employees[29] -- and this certainly implies that if the witness does not interview the former employees himself, he must be prepared with responsive information gathered by counsel.[30]

Cases recognize that even after exhausting what is "reasonably available," a corporation may have no information on topics counsel has included in the Notice, or have some information but be unable to answer as to some specifics. The resulting balancing act is demonstrated in an opinion involving discovery of the Iranian government:

> Iran has not proffered any witnesses regarding these items. If Iran is unable to locate, after a proper effort, any witnesses able to testify as to these issues, then so be it. However, the court may subject Iran to sanctions, such as a prohibition on the presentation of evidence on this issue, if Iran later discovers proper witnesses and fails to offer a sufficient explanation to the court. Accordingly,

[29] See, e.g., Bank of New York v. Meridian Biao Bank Tanzania, Ltd., 171 F.R.D. 135, 151 (S.D.N.Y. 1997) (sources for matters reasonably available include "documents, past employees, or other sources"); Prokosch, 193 F.R.D. at 639. Several cases raise the threshold by stating that witness preparation on noticed topics must include prior fact witness deposition testimony, although -- except in Taylor itself -- results do not seem to turn on whether preparation went that far.

[30] See Calzaturficio S.C.A.R.P.A., s.p.a. v. Fabiano Shoe Co., Inc., 201 F.R.D. 33, 37 (D.Mass. 2001) (reciting that requirement).

> Iran should engage in a genuine and thorough effort to identify an adequate deponent with regard to these items.[31]

Setting the scope of "reasonable particularity" for the notice, on the one hand, and what is "reasonably available" to the corporation's witness (or witnesses), on the other hand, can take on an entirely different level of complexity when the information lies with third parties or former employees, or is "available" to the corporation solely through the investigations of counsel. Consider the following hypothetical posed by Sinclair and Fendrich:

> . . . assume that an entity has been noticed for a deposition under the Rule. The events giving rise to the claims, let us assume, are complex and involve the actions of any number of participants over a course of time. Assume further that the events which are central to the lawsuit occurred long ago, so that some number of the people who were agents of the entity are no longer under its control. Other participants in the events may be dead or missing. Still others are third parties who are not, and perhaps were never, under the control of the organization. Documents that bear upon the events are extremely voluminous, scattered, and often ambiguous--especially when their authors or recipients do not remember them, not to speak of when they are no longer available to interpret them. Counsel for the entity is now faced with the task of helping the client select and prepare one or more designees to testify on its behalf on what is "known or reasonably available" about the subjects which have been identified in a Rule 30(b)(6) notice.[32]

In such cases attorney work product is inevitably at risk, as may be privileged communications from former employees to counsel, since such information is in some senses "reasonably available" to the client. (We return to the subject of witness preparation and work product below in Part E).

This Report focuses on the use of Rule 30(b)(6) in discovery of a corporate party to a litigation, although much of the discussion about witness preparation, specificity, and

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[31] McKesson Corp. v. Islamic Republic of Iran, 185 F.R.D. 70, 81 (D.D.C. 1999) ("Republic of Iran").

[32] Sinclair & Fendrich, 50 ALA. L. REV. at 699 n.259.

privilege applies equally where the corporate deponent is a subpoenaed non-party. There is one distinction which should be noted at this point. Because the Corporate Witness testifies "on behalf" of the corporation, the deposition testimony is treated as admissible at trial against the corporation even if the testimony is given without direct personal knowledge (i.e., the witness is not personally competent but is conveying information supplied to the witness for purposes of the deposition).[33] What should be the admissibility of such incompetent or hearsay testimony gathered from a non-party corporation via Rule 30(b)(6)?

This question was presented very recently in the context of a summary judgment motion decided by Judge Casey, when the defendant moved to strike the testimony of a third-party Corporate Witness as not based on personal knowledge.[34] Referring to other decisions holding that a Rule 30(b)(6) witness is not required to have "personal knowledge on a given subject, so long as they are able to convey the information known to the corporation,"[35] Judge Casey denied the motion to strike. Judge Casey's opinion appears to be the only reported case on this point, and we must respectfully suggest that it is wrongly decided.

Cases certainly do routinely hold that the corporation may fulfill its Rule 30(b)(6) deposition obligations by providing a witness who can answer the pertinent questions but lacks personal knowledge. Hearsay testimony is obtained in all sorts of deposition contexts, however, and nonetheless will be admissible in court only if an evidentiary exception applies. Rule 30(b)(6) does not purport to create an evidentiary exception, although in almost all cases the fact that the corporate deponent is a party makes the testimony an evidentiary admission admissible

[33] In substance, the deposition testimony is treated as an evidentiary admission of the corporate party (but not a judicial admission). See note 37 below for discussion.

[34] Gucci America, Inc. v. Ashley Reed Trading Inc. 2003 WL 22327162 (S.D.N.Y. Oct. 10, 2003).

[35] Id., 2003 WL 22327162 at *3 (internal citation omitted).

against that party at trial. When the witness is not a party, however, or the testimony is otherwise offered against a party other than the corporation deposed (and thereby against a party that did not make the evidentiary admission), the rules about competence and hearsay should be applicable.

D. Taylor and The Trial Consequences of Rule 30(b)(6) Testimony

The decisions just discussed present a view of Rule 30(b)(6) as an exploratory tool of the examining party and focus on getting the examining party the information it reasonably needs. In this context courts rarely consider what the consequences should be if the corporation seeks to offer at trial evidence not mentioned by its designee. Because that was one of the two considerations about Rule 30(b)(6) most famously discussed in Taylor, we turn now to a discussion of that case. Because so much is often made of Taylor as a seminal case on the application of this Rule, it is worth reviewing in considerable detail what actually happened in that case.

Union Carbide ("UCC") was a defendant in a CERCLA "superfund" environmental clean-up case in which the government asserted that UCC was legally responsible both for its own contribution to the site's condition and for the conduct of a division, Grower Service, which had been sold years before the litigation commenced and as to which no current UCC employees had knowledge. Faced with a Notice from the government, UCC argued that it should only be required to provide its current internal corporate knowledge and to identify former employees who might have knowledge of earlier events and "leave it up to the government" to pursue that knowledge. UCC also sought to have the Court rule in advance that UCC could call such witnesses (or others) at trial and argue from their evidence even though the Corporate Witness had provided no information about the substance of such testimony.

Magistrate Judge Eliason held that it was UCC's obligation to gather all evidence reasonably available to it on the noticed topics, including information from past employees and information already available in discovery and that, absent explanation (such as later discovery of information despite initial due diligence), UCC would not be permitted to offer at trial evidence or argument, direct or rebuttal, on topics as to which its Corporate Witness had denied knowledge or not taken a position.[36] Thus, while most cases addressing Rule 30(b)(6) only consider whether the corporation has sufficiently "appeared" by a knowledgeable witness, Magistrate Judge Elaison took the further step of setting out a preclusive scheme that, absent explanation, limited the party's trial case to what was disclosed at the Rule 30(b)(6) deposition.

The Magistrate Judge expressly acknowledged that Rule 30(b)(6) testimony was not the equivalent of a judicial admission.[37] He cited earlier cases stating that a Rule 30(b)(6) witness must convey the "subjective beliefs and opinions" of the corporation and present its "opinion" on the noticed topics.[38] The Magistrate Judge also acknowledged that ascertaining a

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[36] The opinion does not provide much information about the content or particularity of the Notice.

[37] The Court described it as "a statement of the corporate person which, if altered, may be explained and explored through cross examination," but noted that the designee could make admissions against interest "which are binding on the corporation." Taylor, 166 F.R.D. at 361 n.6. In many cases (including Taylor) the use of the term "binding" only heightens confusion, since the testimony of a corporate designee under Rule 30(b)(6) is already admissible as the statements of an officer or managing agent; whether such are evidentiary admissions "against interest" (Fed. R. Evid. 804(b)(3)) would seem to be beside the point. See also Industrial Hard Chrome, Ltd. v. Hetran Inc., 92 F.Supp. 2d 786, 791 (N.D. Ill. 2000) (Rule 30(b)(6) testimony "is not a judicial admission that ultimately decides an issue," it can be both contradicted and used for impeachment); W.R. Grace v. Viskase Corp., 1991 WL 211647 at *2 (N.D. Ill. Oct. 15, 1991) (Rule 30(b)(6) testimony is an evidentiary, not a judicial, admission and may be contradicted).

[38] Id. at 361. Taylor cited Lapenna v. Upjohn Co., 110 F.R.D. 15, 20 (E.D. Pa. 1986), for the proposition that a Rule 30(b)(6) inquiry could reach the corporation's "subjective beliefs and opinions," but the comment in Lapenna is an abbreviated aside and does not make clear whether this means relevant beliefs and opinions held in the context of the initial dispute (e.g., what did Y's supervisor think of Y's job performance) or opinions reached in the litigation (e.g, which witness is telling the truth). Ierardi is cited for the proposition that the corporation "must provide its interpretation of documents and events," but in fact Ierardi said merely that when the defendant argued that a document "could be interpreted in different ways... plaintiffs are entitled to discover the interpretation [defendant] intends to assert at trial" 1991 U.S. Dist. LEXIS 11320, at *5 (emphasis added). Finally, although Massachusetts Finance is cited for the proposition that a Corporate Witness must provide the corporation's "position," the case does not stand for that proposition and used the term "position" only when ordering a defendant to "clarify its position in response to certain interrogatories." 162 F.R.D. at 412.

party's "position" might be handled by contention interrogatory and that deciding which method "is more appropriate will be a case by case factual determination."[39] Nonetheless the Magistrate Judge concluded that if a corporation

> wishes to assert a position based on testimony from third parties, or their documents, the designee still must present an opinion as to why the corporation believes the facts should be so construed. The attorney for the corporation is not at liberty to manufacture the corporation's contentions. Rather, the corporation may designate a person to speak on its behalf and it is this position which the attorney must advocate.[40]

Few would quarrel with the first basic premise of the Taylor opinion, that the information "reasonably available" to a corporation on a particular topic includes what can be learned from prior employees, whether in interviews or in deposition transcripts, at least where the notice has been sufficiently specific as to topic. But many would challenge the clear message that within the confines of the Notice the Corporate Witness must be prepared to recite every bit of evidence the party's attorney will offer and to explain and justify every "position" counsel will take, even if such evidence was never known to the corporation until unearthed by counsel in discovery. That this was indeed how the Magistrate Judge viewed the situation is evidenced by the following response to UCC's argument that it could rely at trial on, or at least make arguments about, "the documents and testimony of others" where the Rule 30(b)(6) witness had offered "no knowledge or position:"

> This suggested procedure assumes that the attorneys can directly represent UCC's interest on their own as opposed to merely being a conduit of the party. This, of course, is not true. If a corporation has knowledge or a position as to a set of alleged facts or an area of inquiry, it is its officers, employees, agents, or others who must present the position, give reasons for the position, and, more

[39] 166 F.R.D. at 362 n.7.

[40] Id. at 361-62.

> importantly, stand subject to cross-examination . . . . Otherwise, it is the attorney who is given evidence, not the party.[41]

Most trial attorneys would not accept the proposition that they are "merely being a conduit of the party," but one can sense the point the Magistrate Judge was trying to make. Where most trial lawyers would surely disagree with the Magistrate Judge, however, is on the description of how the corporation's position will be presented at trial: most trial lawyers would agree that the corporation cannot call the Corporate Witness to testify as to topics or "positions" covered at the deposition outside the deponent's competent, personal knowledge. The corporation's counsel will have to call competent witnesses, and counsel will indeed present "positions" in the processes of briefing and jury presentations. Moreover, while the adversary may use the Rule 30(b)(6) testimony insofar as the Rules permit, we have located no case allowing the adversary to call the Corporate Witness at trial in order to cross-examine the witness about the hearsay bases for the "positions" taken.

As noted, Taylor did not introduce the reading of Rule 30(b)(6) as allowing questions about the corporation's "position." But it arguably misread the earlier cases, and it surely did suggest that position-seeking be given a wider ambit than in any preceding case. Rule 30(b)(6) requires testimony and that testimony is supposed to convey educated corporate knowledge; nothing is said about "positions." The angry tone of the response by Sinclair and Fendrich suggests just how much is at issue in terms of how a case may be proved at trial:

> ... there is no basis for imposing a requirement that the corporation take a "position" on all deposition testimony in a case . . . the proper mission of a deposition under the rule should be to provide the discovering party with advance warning about what persons within the entity know. It is not a device intended to provide reactions to or assessments of the myriad assertions in all depositions given by other witnesses . . .

[41] Id. at 362-63 (emphasis added).

* * *

> There are obviously many cases in which there are competing and inconsistent pieces of evidence. The notion that when the corporation has no knowledge through employees and documents in its possession, custody, or control, the company must select from, say, three nonparty witnesses' versions of the events the one it adopts as its knowledge or position is glib at best. To require the deposition designee to consider adversary witness testimony as part of the corporation's knowledge base is even less defensible.[42]

To be fair, Magistrate Judge Eliason several times stated that a corporation is not obligated to take a "position" as to every "set of alleged facts or area of inquiry;" his position was only that if a corporation passed on a particular topic it should not be allowed at trial to present evidence or argument on that topic. And in response to the Sinclair and Fendrich hypothetical, if the testimony of the three non-party witnesses concerns relevant conduct of the corporation, perhaps it is not unreasonable to require the corporation to take a "position" as to what it did or did not do that is informed by such evidence (although whether that position should be expressed in a deposition response or an interrogatory answer may be a different question).

Again, few would quarrel with the proposition that counsel should not be permitted to offer factual evidence on specific topics concerning the corporation's conduct where the deponent pleaded ignorance (e.g., did the manager approve this advance? Who prepared this memorandum?) without a clear explanation why such information was not "reasonably available" to the corporation at the time of the deposition or that it was only inadvertently omitted.[43] On the other hand, given the availability of contention interrogatories, it is difficult to

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[42] 50 ALA. L. REV. at 694-95 (emphases in original).

[43] An interesting variation on this point is presented in Newport Electronics, Inc. v. Newport Corp, 157 F.Supp. 2d 202, 219-20 (D. Conn. 2001). There the corporate defendant opposed summary judgment with an affidavit from the person who had been its Rule 30(b)(6) designee; the affidavit supplied information on topics which, at the deposition, the witness said he lacked knowledge. The Court cited the Second Circuit practice that on a Rule 56 motion a material issue of fact cannot be created by affidavit testimony that contradicts the affiant's previous deposition testimony, and concluded that the Rule 30(b)(6) witness "was not at liberty to delay reviewing information on these topics until after the deposition" and later contradict his then-proffered lack of knowledge.

see what purpose is served by limiting the scope of trial evidence to what the Rule 30(b)(6) witness masters of the evidence, particularly evidence counsel expects to obtain from third parties who are not former employees, or limiting argument to "positions" taken by that witness on matters other than the factual characterization of the conduct of the Corporation. Nonetheless, in addition to the square holding in Taylor, several cases state in passing that the party will not be allowed to add information or "change its position."[44] Such blanket preclusive language appears inconsistent with the status of Rule 30 (b)(6) testimony as an evidentiary admission but not a judicial admission.[45]

There is an important distinction between the rules for interrogatory responses and those for depositions, moreover: the obligation to update the response. Rule 30(b)(6) imposes no obligations to follow up with information learned subsequent to the deposition, and many of these depositions occur at the early stages of a case. There is no provision for these (or other) depositions that is comparable to Rule 26(e)(2), Fed. R. Civ. P., dealing with the updating of responses to interrogatories, requests for production and requests to admit. Certainly there could be disputes about whether the information had been "reasonably available" to the corporation at the time of the deposition, but there may be sound reasons why it was not.[46] A party may even

[44] Canal Barge, 2001 WL 817853, at *2; Ierardi, 1991 WL 158911, at *8. See Solovy & Byman, supra note 3 (arguing that where information available to a corporation is omitted by a Corporate Witness the corporation should be prevented from offering other testimony on the point). By contrast, in Massachusetts Finance the Court ruled that the defendant would be allowed at trial to present "its position through witnesses who have already been deposed by the United States," even though the deponent apparently had not "sorted out" that testimony. 162 F.R.D. at 412. And in Arkwright, Magistrate Judge Francis concluded that the testimony of a sufficiently prepared Rule 30(b)(6) witness would not limit the corporation's presentation of evidence at trial because the witness need not have "comprehensive" knowledge; other discovery devices could be used to nail down the corporation's positions prior to trial. 1993 U.S. Dist. LEXIS 1163, at *8. See also In re Ind. Serv. Org. Antitrust Litig., 168 F.R.D. 651, 654 (D. Kan. 1996) (discovering "supporting facts" and marshalling proof not an appropriate use of Rule 30(b)(6); any legitimate discovery interests best accommodated by other methods).

[45] See cases cited at note 37.

[46] Cf. Republic of Iran, 185 F.R.D. at 81, where the court warned of potential sanctions "if Iran later discovers proper witnesses and fails to offer a sufficient explanation" of why these witnesses had not been consulted "in a genuine and thorough effort" to respond to the Notice.

conclude that the "position" taken by the witness was incorrect in light of subsequent information. This may be embarrassing at trial, but there appears to be no requirement that notice of the change of view be given (although one would expect that in practice something in the pretrial order would force disclosure).[47] A disclosure process (with mea culpa) is what Magistrate Judge Eliason put into place prior to resuming the Rule 30(b)(6) deposition process in Taylor -- but perhaps, absent UCC forcing the issue early on, this would have been dealt with there too in the pre-trial order.

The more complex the case, the more dispersed the information, and the more mixed the matters of fact and law, the more difficult these questions become. We appreciate that many local rules, including S.D.N.Y. Local R. 33.3, place interrogatories about "claims and contentions" at the end of the case, whereas a litigant may feel it critical at an early stage in the case to nail down the bases for a particular claim by the adversary or to find out what position an adversary will take on a critical factual issue. This is not, we argue, a reason to allow questions at a Rule 30(b)(6) examination which, if propounded as interrogatories, would be deferred until the close of discovery; rather it is a good argument in the particular case for accelerating the use of interrogatories on those particular points.

There is, moreover, a bit of irony in the professed concern that trial counsel not be able to ambush an adversary at trial with evidence or arguments not revealed at the Rule 30(b)(6) deposition. As several courts have pointed out, there are several pretrial mechanisms for blunting this threat, including contention-type interrogatories and pretrial orders. The real

[47] In Otis Eng'g Corp. v. Trade & Development Corp., 1994 U.S. Dist. LEXIS 3132, at *2-3 (E.D. La. Mar. 16, 1994), the Corporate Witness was the lead design engineer, a person with knowledge. Some months after her testimony, Otis informed defendant of a change in her view about the cause of the machine failure. Denying a motion to preclude the deponent from offering testimony at trial that differed from the deposition, the Court held that the trier of fact should deal with credibility: the witness could be impeached with her prior testimony, but would not be precluded from changing it.

unfairness lies in expecting a witness who lacks direct knowledge to retain comprehensive memory of, and accurately regurgitate in the context of oral questions and answers, all the witness has been told about a noticed topic in deposition preparation and perhaps also to handle questions, anticipated or unanticipated, about "interpretations," "opinions" or "positions" of the corporation in the litigation. At best a miscue or misunderstanding becomes something that once remedied comes back as impeachment material -- even though the witness had no direct knowledge and testified based on double hearsay. At worst the statement has some preclusive effect.

Moreover, the practical reality is that it can be extremely difficult to put reasonable objections about scope (is the question within the notice or not, and therefore "binding" or not) or privilege before the court while a deposition proceeds, and it is usually easier to rule on the sufficiency of objections and answers (and perhaps give answers preclusive effect) when interrogatories have been carefully propounded and responsibly answered.

Many courts have adopted at least the language of Magistrate Judge Eliason's opinion in Taylor, and that case has been repeatedly cited and quoted in rulings on Rule 30(b)(6) issues.[48] For example, in one recent case Magistrate Judge Pittman wrote:

> The Rule 30(b)(6) designee does not give his personal opinions. Rather, he presents the corporation's "position" on the topic. Moreover, the designee must not only testify about facts within the corporation's knowledge, but also its subjective beliefs and opinions. The corporation must provide its interpretation of documents and events. The designee, in essence, represents the corporation just as an individual represents him or herself at a deposition. Were it otherwise, a corporation would be able to

[48] By contrast, the actual remedy adopted in that case -- barring a corporation from offering evidence obtained from third parties in counsel's trial preparation to the extent such evidence was not disclosed at the Rule 30(b)(6) deposition absent an in limine showing of good cause -- does not appear to have been adopted by other courts. Sinclair and Fendrich describe Taylor as "setting a record for expansive reading of the rule." 50 ALA. L. REV. at 746.

> deceitfully select at trial the most convenient answer presented by a number of finger-pointing witnesses at the depositions. Truth would suffer.[49]

Magistrate Judge Pittman made similar statements about the scope of Rule 30(b)(6) in another case a few months later.[50] It should be noted that in neither of these cases did Magistrate Judge Pittman actually compel a corporate witness to take a "position," provide "subjective beliefs and opinions," or offer "interpretation of documents and events." In Marvel, a corporate witness was required to produce an additional deponent with knowledge relating to specific items about a subsidiary. In AIA, Magistrate Judge Pittman required a corporation to produce a Rule 30(b)(6) witness even though its "principal" had already been deposed, unless the corporation could show that "its corporate knowledge is no greater than that of its principals." However other courts have followed similar language to the conclusion that "[g]enerally, inquiry regarding a corporation's legal positions is appropriate in a Rule 30(b)(6) deposition," at least where there is a mixed "legal and factual component."[51]

Such statements about the scope and use of Rule 30(b)(6) might be contrasted to these recent words from Judge Rakoff:

> 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.[52]

This view finds strenuous support from Sinclair and Fendrich, who argue from analysis of the Advisory Committee Notes to the various 1970 amendments that the deposition device was a

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[49] A.I.A. Holdings, S.A. v. Lehman Brothers, Inc., 2002 U.S. Dist. LEXIS 9218, at *15-16 (S.D.N.Y. May 20, 2002) (citations omitted).

[50] Twentieth Century Fox Film Corp. v. Marvel Enterprises Inc., 2002 U.S. Dist. LEXIS 14682, at *6-7 (S.D.N.Y. Aug. 6, 2002).

[51] Canal Barge, 2001 WL 817853 at *2.

[52] J.P. Morgan Chase Bank v. Liberty Mut. Ins. Co., 209 F.R.D. 361, 362 (S.D.N.Y 2002).

minor convenience being created to avoid unnecessary guesswork at the outset of a case when the party litigating against the entity may lack information as to which of many officers and employees has personal knowledge of topics relevant to the lawsuit.[53] Those authors contrast the discussion of this change in the 1970 Notes and related discovery reports to the "extensive discussion of the difficulties attending contentions in the Rule 33 amendments" considered and adopted at the same time after "years of bickering over contention interrogatories," and concluded that, with nary a mention of contentions in the Notes to Rule 30(b)(6), the Committee could not have intended that oral depositions be used for this purpose.[54]

The corporation's "subjective beliefs and opinions" as these existed in connection with the controversy being litigated (e.g., evaluations of an employee, beliefs about the knowledge of the party with whom a contract was being negotiated, etc.) are themselves matters of fact at the time of trial. In the context just discussed, however, the discovery is directed to current beliefs, evaluation of the evidence of witness credibility or litigation positions. Rule 30(b)(6) should be amended to eliminate questioning of this sort, both because of the practical concerns discussed above and to protect attorney work product. This recommendation is discussed further after turning to the subject of work product.

E. Extent of Preparation -- Work Product Considerations

Of course factual information possessed by corporate personnel is not privileged merely because it was communicated by counsel,[55] but often only trial counsel (or -- very often -- only trial counsel and the in-house attorneys with whom trial counsel is working) has gathered,

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[53] 50 ALA. L. REV. at 718.

[54] Id.

[55] Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981). Sinclair & Fendrich, 50 ALA. L. REV. at 719; WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2023 at 330-33 (1994) (collecting cases).

and possesses, the information. It may well be that much of such factual information might eventually have to be disclosed in responding to interrogatories, but counsel there (i) only has to assist the client in responding to questions posed in advance rather than having to prepare an otherwise uninformed witness with sufficient information to respond to a range of questions on a topic and (ii) has the opportunity to craft good-faith responses that minimize interference with privileges. Moreover, it is far more efficient to present the Court with privilege issues in reviewing written responses to interrogatories than on the fly as oral questions are posed.

Rule 612 (2), Fed. R. Evid., makes writings used prior to testifying "to refresh memory" discoverable "if the court in its discretion determines it is necessary in the interests of justice."[56] Assuming the Corporate Witness is not testifying from personal knowledge, one could argue that showing that witness attorney work product (such as investigative or interview memoranda) cannot "refresh" his recollection. Some courts have opined that showing work-product documents to a Rule 30(b)(6) witness does not make those documents discoverable.[57] Certainly there would be an apparent unfairness in requiring counsel to educate the witness with the fruit of counsel's investigation and then holding that by complying counsel has waived protection for the work product used in the process.

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[56] The House Judiciary Committee wrote that it intended "that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory." Notes of the Committee on the Judiciary, H.R. Rep. No. 650, 93rd Cong., 1st Sess. 8 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7086.

[57] See, e.g., FDIC v. Butcher, 116 F.R.D. at 200. Butcher appears consistent with the cases that hold generally that attorney work product communicated to a witness, including the selection of documents, is not discoverable -- although, it bears repeated emphasis, factual information that thereby becomes known to the witness will be discoverable. See, e.g., Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985) (selection of documents); Ford v. Philips Electronics Instruments Co., 82 F.R.D. 359 (E.D.Pa. 1979) (may obtain witness knowledge but not counsel's impressions or evaluation of significance of facts); but see, e.g. , James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144, 146 (D. Del. 1982) (binder of selected documents used to educate company's witnesses discoverable; work-product protection waived), and Sinclair & Fendrich 50 ALA. L. REV. at 7226 ("the argument exists that the examining counsel has a basis for requesting to know what material was reviewed").

If a Rule 30(b)(6) deposition is to be used to elicit "positions" on disputed issues of fact where direct corporate knowledge is limited or to ascertain the "bases" for pleaded claims or defenses, particularity in the Notice becomes critical, because in practice the corporate witness (in a perversion of Taylor's logic) must become the conduit for the attorney! As Sinclair and Fendrich note,

> In the case of litigation, the discovery and collation of what needs to be known is characteristically undertaken by lawyers. It is the lawyer who investigates the facts, reviews a mosaic of documents, weeds through recollections of participants in the central events, and then attempts to put together a coherent account of "what really happened."[58]

If the attorney is going to have to educate the witness not only on factual matters but also on "positions" the corporation will want to take at trial, attorney work product considerations will have to be parsed carefully. Requiring a very high level of specificity in the notice is reasonable in such circumstances to allow such considerations to be addressed in advance and to enable the court, if the corporate party seeks its aid, to determine whether the route of a contention interrogatory is preferable.

A number of decisions involving discovery of governmental agencies have denied Rule 30(b)(6) discovery of information gathered by attorneys or their investigators on behalf of the agency.[59] Private organizations, however, have been less successful in seeking protective

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[58] 50 ALA. L. REV. at 656.

[59] SEC v. Rosenfeld, 1997 U.S. Dist LEXIS 13996, at *6 (S.D.N.Y. Sep. 10, 1997) (Patterson, J.) (where examinations of a Rule 30(b)(6) deponent prepared by SEC legal staff would reveal counsel's "legal and factual theories as regards the alleged violations . . . and their opinions as to the significance of documents," work product protection should be afforded); SEC v. Morelli, 143 F.R.D. 42, 47-48 (S.D.N.Y. 1992) (Leisure, J.) (Notice impermissibly sought attorney work product when it "intended to ascertain how the SEC intends to marshall the facts" and defendant sought to discover inferences SEC believes "properly can be drawn from the evidence it has accumulated"); Brotherhood of Carpenters, 1992 U.S. Dist. LEXIS 12307 at *43. But see FDIC v. Butcher, 116 F.R.D. at 200 (if only way to prepare FDIC deponent was to use protected investigative memoranda, FDIC nonetheless must prepare a witness and prepare that witness to answer "fully").

orders on such grounds.[60] Sinclair and Fendrich question the assumption

> that questions asking a witness about what facts she was aware of which supported a particular allegation in a claim or defense do not improperly tend to elicit the mental impressions of the entity's lawyers who participated in the preparation of the witness or advice to the company. . .[61]

Whether a fact "supports" a contention, claim, or defense is almost always a question that the witness can answer only by obtaining and revealing attorney work product -- as the inevitable follow-up question ("well, why do you contend that this fact supports your company's defense?") clearly reveals. The Corporate Witness' view of what "supports" an allegation is almost certainly rooted in counsel's analysis of the case -- counsel's selection of evidence and organization of issues -- and addressing such questions to the witness is an "easy window into what the attorney for the entity thinks is important . . . ."[62] As one court pungently put it, either the attorney thought the fact important "or, presuming rationality, the attorney would not have communicated the fact to the client."[63]

The examining party is entitled to discover facts (whether or not, incidentally, those facts "support" a particular contention), but the examining party should not be able to force counsel to supply evaluative work product to the client or the client to reveal such work product in order to comply with Rule 30(b)(6). Hence questions properly seeking facts should not be phrased in a manner that potentially calls for evaluative work product.

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[60] See, e.g., Protective Nat'l, 137 F.R.D. at 280 (appropriate to ask deponent for facts learned from counsel); In re Vitamins Antitrust Litig., 216 F.R.D. at 172 (corporation obligated to educate witness on facts even if through documents that are attorney work product).

[61] 50 ALA. L. REV. at 720.

[62] Id..

[63] Protective Nat'l, 137 F.R.D. at 280.

Questioning about what "supports" a particular allegation or defense can usually be rephrased to reduce offense to the work-product protection while still eliciting the necessary factual information. Questions about "positions" or the legal significance of documents, however, really are seeking case strategies. By and large, to the extent trial counsel eventually decides to take certain positions at trial, such conclusions are discoverable before trial to avoid unfair surprise or "sandbagging." But, as Magistrate Judge Eliason recognized, there may be many factual or other issues as to which the corporation decides not to take a position at trial, decides not to reveal counsel's analysis. Written discovery near the close of the process allows counsel to formulate "positions" or take a pass on an issue and live with the consequences. Oral depositions -- and particularly such depositions early in the case -- do not allow time for considered judgments before what was work product becomes a disclosed "position," and the deposition context makes it difficult in practice to seek the court's guidance on the line to be drawn. Other discovery tools provide a more balanced mechanism for spelling out claims and contentions, particularly if the responses are to have preclusive, or even impeachment, effect.

Rule 30(b)(6) should be amended to remove from the scope of such depositions questioning that evaluates the legal significance of facts, elicits positions or contentions, or pursues similar lines.[64] This change, coupled with greater flexibility in the timing of contention interrogatories where appropriate, will still permit appropriate and timely discovery of trial positions and contentions without the awkwardness, and potential prejudice, of pursuing such information in an oral deposition where the person who is charged with shaping trial strategy -- the party's counsel -- cannot properly assist the witness.

[64] Again, opinions or evaluations that existed in connection with the events being litigated (such as employee evaluations) are facts in the context of the later litigation.

In the absence of such an amendment, questioning of this sort should be disfavored and permitted only where the nature of the questions had been clearly specified in the Notice so that the corporation's counsel will have had an opportunity to raise work product concerns with the court.

F. Recommendations

Our recommendations fall into four general categories: (a) notices and burden of preparation; (b) sanctions; (c) the use of Rule 30(b)(6) to elicit a party's "positions" in contradistinction to contention interrogatories; and (d) the potential preclusive effect of Rule 30(b)(6) testimony.

(a) Notices and Preparation

(1) Absent stipulation or order, all Rule 30(b)(6) examinations of a party should be treated as one deposition with a presumptive cumulative limit of seven hours, whether the corporation tenders one or multiple witnesses to respond on its behalf on the noticed topics, and whether only one or more than one such deposition is sought during the course of discovery.

(2) When the phrase "including but not limited to" is used in a Notice the words "but not limited to" should be deemed surplusage.

(3) The obligation of Rule 30(b)(6) witness preparation should not generally extend to the review of testimony or documents from other parties or non-parties unless these are from present or former employees or agents of the corporation. Notwithstanding this, the examining party should be permitted to direct attention in the Notice to specific testimony about, or documents concerning, the corporation's conduct.

(b) Sanctions

(4) Courts should impose meaningful sanctions where counsel routinely instruct a deponent not to answer questions directed to factual information because the deponent learned the factual information from counsel as well as where the Corporate Witness is ill-prepared to answer factual questions about a noticed topic for which the witness has been tendered.

(c) "Positions" and Contentions

(5) Rule 30(b)(6) should be amended to insert the word "factual" before "matters" in the fourth sentence and thereby establish that such depositions should not be a vehicle for seeking discovery of legal arguments, "contentions" or "positions" that are not simply factual statements, seeking evaluations of the legal significance of facts, or the like. In order to allow parties timely disclosure of litigation positions or contentions, this change may require greater flexibility in allowing contention-style interrogatories at early stages of discovery, but this is preferable to allowing contentions to be explored by oral examination of a witness.

(6) Even in the absence of the proposed amendment, Rule 30(b)(6) notices should be stricken (and questions at such examinations should be deemed presumptively improper) as violative of the protection of attorney work product where phrased in terms of the evaluation of the evidentiary significance of factual information (e.g., "support," "prove," etc.), e.g., as it bears on a claim or defense. Examining counsel is entitled to full disclosure of factual information, but competent counsel can find many other avenues to elicit factual information relevant to a particular topic without framing questions that depend on the adversary counsel's evaluation of the facts.

(7) While Rule 30(b)(6) examinations may properly inquire about a corporation's "subjective opinions" insofar as these constitute facts relevant to the litigation, even in the absence of the proposed amendment the use of this discovery mechanism for inquiring into litigation positions and the application of law to the facts conveyed should be disfavored. In the absence of the proposed amendment, this should not preclude the examining party from specifically identifying in the Notice a factual issue on which the corporation's position or version of events is sought. Such advance specification allows the corporation, if it chooses, to offer alternative mechanisms of response (e.g., voluntarily tendering a statement to be treated as an interrogatory answer or response to written question) or to seek the court's intervention as to the discovery device.

(d) Preclusion

(8) So long as the court is persuaded that the Rule 30(b)(6) witness was properly prepared to provide responsive answers, Rule 30(b)(6) testimony generally should not be treated as preclusive with respect to either evidence or arguments. Rule 30(b)(6) testimony is not a judicial admission (and hence may be contradicted or rebutted), and the failure of a Corporate Witness to mention particular information, absent bad faith, should not be grounds to preclude the subsequent proffer of such information. Whether an omission was inadvertent or the evidence was only subsequently developed, the better view of a Rule 30(b)(6) deposition is that it is an exploratory tool, and other devices are better suited to limiting the evidence at trial. Notwithstanding this, because Rule 30(b)(6) testimony constitutes an admission, the omission of information or interpretations from a Corporate Witness's response may still be probative at times, e.g., to evidence when the corporation became aware of certain information or first took a certain position.

(9) Moreover, if the Corporate Witness inadvertently omitted factual information that was reasonably available to the corporation at the time of the deposition and this information is not otherwise disclosed during the discovery process (or if a court concludes that the omission or the extent of the delay in providing the information was a deliberate litigation tactic), the court should then consider preclusive sanctions under Rule 37(c), Fed. R. Civ. P., particularly where other parties have been prejudiced.

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