Corporate Representative Deposition Update --Traps Remain for the Unwary

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Federal Rule of Civil Procedure 30(b)(6) is the vehicle for taking depositions of corporate representatives in civil cases. Such depositions have a number of distinct characteristics and contain traps for the unwary. Unfamiliarity with the rule's provisions can prove disastrous for a noticed corporation and a bonanza for the noticing party.

This article provides an overview of notice, selection, preparation issues in corporate representative depositions -- including the role of in-house counsel – in the context of the recent proportionality amendment to Rule 26(1)(b).

30(b)(6) Notice Provision

Federal Rule of Civil Procedure's 30(b)(6) notice provision states:

> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a government agency, or other entity and must describe with reasonable particularity the matters for examination.

Following the truism that "you cannot understand the present if you do not understand the past," we will begin to discuss the rule's notice provision by reviewing the history that gave rise to it.

Before the rule existed, the burden was on the party taking the deposition to designate a specific corporate representative — an officer, director or managing agent — with knowledge about the areas at issue who could offer testimony binding on the corporation. Bradley M. Elbein, *How Rule 30(b)(6) Became a Trojan Horse: A Proposal for a Change*, FICC Quarterly, at 365, 366-367 (Spring, 1996) and James C. Winton, *Corporate Representative Depositions Revisited*, 65 Baylor L. Rev. 938, 944 (2013).

Corporate representatives so designated would often deny knowledge, leading to successive depositions to simply find someone connected with the corporations who could provide binding, responsive testimony. This process was a "'wasteful charade' in which repeated shots in the dark were fired until the appropriate target was located." Winton, at 944 (citing 7 James Wm. Moore et al., Moore's Federal Practice §30.25[1](3d ed. 2002); *see* Elbein, at 366-367.

Rule 30(b)(6), adopted in 1970, shifted the burden to the corporation to produce a representative to provide testimony responsive to the notice and binding on the corporation, regardless of the representative's corporate status. This burden is familiar to litigators, and one that is more fairly placed on the noticed corporation:

> This burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of any examining party ignorant of who in the corporation has knowledge.

Notes of Advisory Committee on Rules (1970) Rule 30(b)(6).

A recent rule revision – effective December, 2015 -- important to corporate representative depositions is the explicit inclusion of proportionality factors to be considered in a determination of the permissible scope of discovery under Federal Rule of Civil Procedure 26(b)(1), which now reads in applicable part:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and *proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit*.

(Emphasis supplied)

While the full impact the revision remains to be seen, the intent is to ensure "efficient access to what is needed to prove a claim or defense, but eliminate unnecessary and wasteful discovery" through the "active involvement" of federal judges. Roberts, the Chief Justice's Year–End Report, at 6-7 (Dec. 2015), https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf; *see* Hon. Craig B. Shaffer, *The "Burdens" of Applying Proportionality*, The Sedona Conference Journal Volume 16 (Fall 2015), at 69, 80-81.

Scope of the Notice

Rule 30(b)(6) places an initial burden on the noticing party to provide a notice that describes with "reasonable particularity" the matters on which examination is requested.

The reasonable particularity requirement is necessary to enable the noticed party to adequately prepare a corporate representative, as noted in *Reed v. Bennett*, 193 R.R.D. 689, 692 (D. Kan. 2000):

> An overbroad Rule 30(b)(6) notice subjects the noticed party to an impossible task. To avoid liability, the noticed party must designate persons

> knowledgeable in the areas of inquiry listed in the notice. [citations omitted.] Where, as here, the defendant cannot identify the outer limits of the areas of inquiry noticed, complaint designation is not feasible.

Another reason for the requirement is to provide reasonable limits on the binding nature of the corporate representative's testimony. Overbroad notice language has the potential of exponentially expanding the deposition responses deemed to fall within the notice, which are binding on the corporation as discussed below.

Reasonable particularity is not defined in the Federal Rules of Civil Procedure; however, courts have held it means the notice must be specific and not overbroad or unduly-burdensome. *See Reed*, 193 R.R.D. at 692 (notice is overbroad that indicates questioning is to "include[e], but not [be] limited to" areas specifically enumerated in notice), *Falcone v. Provident Life & Accident Ins. Co.,* 2008 WL 2323528, at *6-7 (S.D.Ohio 2008) (notice that failed to designate a time period was "unbounded" and, hence, improper), *Aikens v. Deluxe Financial Services, Inc.,* 217 F.R.D. 533, at 538 (D. Kan. 2003) (use of "regarding" and "relating to" is improper where they fail to modify a specific document), *Skladzien v. St. Francis Reg'l Med. Ctr*., 1996 U.S.Dist. LEXIS 20621, at *2 (D. Kan. 1996) (notice seeking "any statement of fact" in pleading is improper); see *Mackey v. IBP, Inc.,* 167 F.R.D 186, at 197-198 (D. Kan. 1996) ('pertaining to" and similar "open ended" phrases render request overbroad and unduly burdensome "on its face"), *General Foods Corp. v. Computer Election Systems, Inc.,* 211 U.S.P.Q, 49, 50 (S.D.N.Y.1980) (notice seeking "every fact, conception, intention, understanding, belief and sense impression" is of "almost limitless scope" and improper), and *Carriage Hills Condo., Inc. v. JBH Roofing & Constructors, Inc.,* 109 So. 3d 329, 336 (Fla. Dist. Ct. App. 2013) (notice designating "the allegations contained in the complaint" is unduly broad); *see also Murphy v. Kmart Corp*., 255 F.R.D. 497, 505-506 (D.S.Dak. 2009) (rejects "painstaking specificity" standard as inconsistent with plain language of rule) and *E.E.O.C. v. Thorman & Wright Corp*., 243 F.R.D. 421, 426 (D, Kan. 2007) (notice must designate matters for examination with "painstaking specificity").

Compliance with the reasonable particularity requirement is expected to face increased scrutiny in light of the proportionality revision to Rule 26(b)(1). Shaffer, at 74-75 (calling use of overbroad notice language a "belt and suspenders approach to discovery" that "will almost certainly invite objections on proportionality grounds" – in light of the 2015 Rule 26(b)(1) revision-- that are likely to "leave the requesting party undone").

Even where the notice meets the reasonable particularity requirement, its scope may be challenged where the use of other discovery is more appropriate. In *Bank of Am. v. SFR Investments Pool 1 LLC*, 2016 WL 2843802 (D. Nev. 2016) -- a post Rule 26(b)(1) revision case -- the court quashed a 30(b)(6) notice served contemporaneous with the

initial discovery requests, which consisting of 85 interrogatories, requests for admission, and requests for production duplicative of the areas of inquiry in the notice.

The court held the notice was not reasonably tailored or proportional to the case because until responses were received, it could not be said that a corporate representative deposition was needed. Only in the event that the noticed party's responses to written discovery are shown not fully responsive – the court noted – is a 30(b)(6) deposition appropriate.

The ruling is consistent with the advisory committee's note to Rule 30(b)(6) which states that corporate representative depositions are intended to "supplement existing discovery practice." Fed. R. Civ. P 30(b)(6) advisory committee note; *see TV Interactive Data Corp. v. Sony Corp.*, 2012 WL 1413368, *2 (N.D. Cal. August 23, 2012) (court required use of contention interrogatories in lieu of a Rule 30(b)(6) deposition addressing basis for legal defenses asserted) and *Reed,* 193 R.R.D. at 692, (cites rule in quashing 30(b)(6) notice).

It is also reflective of the increased focus on proportionality in light of the revision to Rule 26(b)(1). *Pittman v. Am. Airlines, Inc.*, 2016 WL 375138, at *1 (N.D. Okla. 2016) (where topics were already covered in prior discovery, 30(b)6) depositions should be limited to a "wrap-up" for any missing testimony), and *ChriMar Sys. Inc. v. Cisco Sys. Inc,* 312 F.R.D. 560, 563 (N.D. Cal. 2016) (upheld denial of motion to compel corporate representative deposition in light of existing evidence regarding topics at issue); *see Sender v. Franklin Res. Inc*, 2016 WL 814627, at *2 (N.D. Cal. 2016) (court applies proportionality factors to preclude duplicative discovery); see generally Roberts, at 7, (cites need for "active involvement of a neutral arbiter" in the form of federal judge to closely examine discovery disputes in light of proportionality, and *Roberts v. Clark County School District*, 312 F.R.D. 594, 601-604 (D. Nev. 2016) (citing and adopting Chief Justice Roberts' admonition).

Designation of prior testimony and discovery responses as responsive and binding should be considered as a way to narrow the scope of the notice and obviate the need to have a corporate representative address some or all of the noticed items. *See Ballentine v. Las Vegas Metro. Police Dep't*, 2016 WL 2743504, at *7 (D.Nev. 2016), *E.E.O.C. v. Boeing Co.*, 2007 WL 1146446, at *2 (D. Ariz. 2007), and *Prosonic Corp v. Stafforn*, 2008 WL 2323528, at *4 (S.D. Ohio 2008).

Assertion of Objections to Notice

Upon receipt and review of a Fed. R. Civ. P. 30(b)(6) notice, counsel for the noticed corporation should carefully review it for potential objections – such as those mentioned herein -- and object when appropriate. Failing to timely and properly object to the notice can result in a waiver of objections and sanctions against the noticed party.

As the court noted in *Int'l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc.*, 2013 WL 627149, at *7 (D. Colo. Feb. 19, 2013):

> The unique prerequisite that Rule 30(b)(6) deposition topics must be identified in advance, [means] disputes about the topics are most effectively addressed in advance of the deposition.

The court further noted that "[m]erely forewarning opposing counsel that the information sought is not relevant or could be privileged" prior to a 30(b)(6) deposition is just as unacceptable as never objecting at all. *Id* at *12. The proper course is for the noticed party to file for a protective order. *Id.* (citing *New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, 242 F.R.D. 164, 165 (D. Mass. 2007)), and *Shaffer* at 86-91 (discussion of topic generally); *see Prosonic*, 2008 WL 2323528, at *2 (failure to properly raise objections till deposition is impermissible "self-help" remedy); *see also* Federal Civil Rule 26(c) (meet and confer requirement as to discovery disputes) and applicable federal local rules and standing orders, such as Local Rule 37.1 of the N. Dist. of Ohio ("party seeking the disputed discovery" is required to make and certify to court it made a "good faith" effort to resolve the dispute prior to seeking court intervention).

Selection and Preparation of Corporate Representative

Federal Rule of Civil Procedure 30(b)(6) states, in pertinent part, that it is corporate defendant's obligation to:

> [D]esignate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify… . The person designated must testify about matters known or reasonably available to the organization.

Selecting and preparing a corporate representative in response to a Fed. R. Civ. P. 30(b)(6) notice is of critical importance to the success or failure of the deposition, as is the role of in-house counsel in that process. A failure comply with the rule can result in inaccurate binding testimony, disclosure of work product and/or attorney client information, and sanctions.

It is important for counsel for the noticed corporation -- working with the corporation's in-house counsel -- to control the selection and preparation process.

Selection

It is counsel for the noticed party -- not counsel for the noticing party – that selects the representative(s) who will testify about the items in the notice. Thus, if counsel for the

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noticing party requests a specific corporate representative, requests a representative with "personal knowledge" or requests the person "most knowledgeable," the notice is improper. *Progress Bulk Carriers v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n, Inc.*, 939 F. Supp. 2d 422, 430 (S.D.N.Y. 2013), *aff'd*, 2 F. Supp. 3d 499 (S.D.N.Y. 2014), and *McPherson v. Wells Fargo Bank, N.A.,* 292 F.R.D. 695, 698 (S.D. Fla. 2013), *QBE Ins. Corp. v. Jorda Enterprises, Inc.,* 277 F.R.D. 676, 688 (S.D. Fla. 2012)(rule does not permit "most knowledgeable" request, and were it otherwise, there would be "time wasting disputes over the comparative level of the witness' knowledge"), and *Carriage Hills*, 109 So. 3d at 337 (noticed party right to designate anyone it deems best as its "voice" to convey its position even where others another may, in fact, possess more knowledge as to noticed items); *see also Reed*, 193 R.R.D., at 692, and ABA Civil Discovery Standards, § V (19), available at http://www.americanbar.org/content/dam/aba/administrative/litigation/litigation-aba-2004-civil-discovery-standards.authcheckdam.pdf (right of noticed party to select the person "best suited," in its opinion to serve as its spokesperson).

Counsel for the noticed corporation should take advantage of the opportunity to select representatives who can offer a compelling case as the "face" of the corporation. William Barnett, General Counsel and Vice President of Cleveland, Ohio-based State Industrial Products Corp. understands the importance of selecting an appropriate corporate representative and the key role played by in-house counsel in it:

> In-house counsel have an in depth knowledge and appreciation of the corporation and its people. As such, they should play a central role in the corporate representative selection process. I view such depositions as an ideal opportunity for a company to present its position though a well-qualified, knowledgeable witness who can represent the company, and it is in-house counsel's knowledge of the corporation and its people that is indispensable to that process.
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> In making its corporate representative selection, it is advisable to consider individuals who have experienced the litigation process, because they will likely be easier to prepare and more confident than a novice to litigation. Other considerations include the person's demeanor and appearance, ability to devote the time and energy necessary to become fully prepared to testify, and extent of any personal knowledge the person may have about anything that may be relevant to the case that may be asked at the 30(b)(6) deposition.

Another consideration is the number of representatives to use as corporate representatives in response to the noticed items. Having multiple witness may help ensure compliance with the notice – particularly where there are many noticed items. However, that must be balanced against other factors, including additional preparation time as well as any increased likelihood of inconsistent testimony.

The civil rules limiting the number of depositions and time permitted for each should also be considered when considering the number of representatives to use. As to the number, a 30(b)(6) deposition counts as one deposition, irrespective of how many people testify to fulfill the notice. Advisory Committee Note to Rule 30 (specifies that a 30(b)(6) deposition counts as one deposition when determining the 10 deposition limit of Rule 30(a)(2)(A)(1), regardless of number of corporate representatives used); see *Purdue Pharma L.P. v. Ranbaxy Inc.*, 2012 WL 1414308, at *3 (M.D. Ga. Apr. 20, 2012). However, if a representative is deposed in both a personal and corporate representative capacity – it may count as two separate depositions. *Compare Purdue*, at *3 (M.D. Ga. Apr. 20, 2012) (nonparty 30(b)(6) deponent separately subpoenaed to testify in her individual capacity viewed as two separate depositions),*with Detoy*, 196 F.R.D., at 367 (court states only one deposition occurs where single is notice issued for corporate representative, who was is questioned as to personal knowledge); see also Steven Caley, *How Limitations on Number and Duration Apply to Corporate Depositions*, The National Law Journal, 2011.

As to the 7 hour per deposition time limit of Rule 30(d)(2), each representative's testimony is considered a separate deposition. Rule 30(d)(2), and Advisory Committee Note to Rule 30; see also Caley. So the more corporate representatives utilized, the more time will be allotted to the 30(b)(6) deposition, absent a contrary stipulation or court order. Id.

Once selected, a corporation will identify the representative who will respond to each area of inquiry. *See Martin v. Bimbo Foods Bakeries Distribution, LLC*, 313 F.R.D. 1, 9 (E.D.N.C. 2016), and *HSK v. Provident Life & Accident Ins. Co.,* 128 F. Supp. 3d 874, 881 (D. Md. 2015).

Preparation

As earlier referenced, Rule 30(b)(6) places a duty on the noticed corporation to select a "knowledgeable" representative to testify about "matters known or reasonably available" to the corporation.

Rule 30(b)(6) also requires the corporation to "prepare the representative to fully and unevasively answer questions about the designated subject matter." *Ballentine,* 2016 WL 2743504, at *5, *Updike v. Clackamas Cty.*, 2016 WL 111424, at *2 (D. Or. 2016), and *Louisiana Pac. Corp. v. Money Mkt. 1 Institutional Inv. Dealer*, 285 F.R.D. 481, 485 (N.D. Cal. 2012) (noticed corporation has "a duty to educate its witnesses so they are prepared to fully answer the questions posed at the deposition.").

To ensure compliance with Rule 30(b)(6), preparation of the corporate representative is key. And because of the broad scope and importance of a 30(b)(6) deposition, the time and effort focused on preparation must be extensive. For that reason, it is important that the preparation begin when the litigation commences and the central issues become

clear, thereby avoiding "catch-up" mode when a 30(b)(6) notice is actually received. See Michael R. Gordon and Claudia De Palma, *Practice Tips and Developments in Handling 30(b)(6) Depositions*, ABA Litigation Section Annual Conference, at 23-25 (April, 2014).

Working effectively with in-house corporate counsel – important in witness selection as noted earlier -- is also important in preparing the representative to be able to testify knowledgeably as to the noticed topics.

William Barnett -- who earlier discussed witness selection -- knows the importance of outside counsel working closely with in-house counsel in adequately preparing the corporate representative:

> As former outside counsel, I frequently worked with corporate counsel in preparing 30(b)(6) deponents. In my in-house role, I fully appreciate the importance of corporate representative depositions, not only for the case at issue but also for potential future use given the shelf life of the transcript or video.
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> The key to a successful 30(b)(6) deposition is preparation. For that preparation to be successful, outside and corporate counsel need to work cooperatively and as early as possible in the case. Ideally, this is well in advance of receiving the 30(b)(6) notice so outside and corporate counsel can leverage their individual knowledge and skills to work towards an excellent result.

Information -- including company records, prior depositions, and interviews with current and, perhaps, former employees or officers – must be located, reviewed, and analyzed so that the "corporate knowledge" regarding the noticed items is sufficiently clear to enable a representative to adequately prepare. *See Risinger v. SOC, LLC,* 306 F.R.D. 655, 663 (D. Nev. 2015) and *First Mariner Bank v. Resolution Law Grp., P.C.,* 2014 WL 1652550, at *14 (D. Md. Apr. 22, 2014).

Testimony for which a corporate representative witness need be prepared includes corporation's "subjective beliefs and opinions" concerning the corporation's "interpretation of documents" and its opinion on why facts should be construed a certain way. *California Foundation for Independent Living Centers v. County of Sacramento*, 142 F. Supp. 3d 1035 (E.D. Calif. 2015); *see* Joseph W. Hovermill and Matthew T. Wagman, *When Nobody Knows What the Company "Knows": A Look at the Options Available to a Company in Meeting its Rule 30(b)(6) Obligations While Protecting Its Best Interests*, For the Defense, at 52-56 (Nov. 2008).

Important to witness preparation is a full understanding of what the corporate representative knows about the areas covered in the notice as well as any areas that may be relevant to any aspect of the litigation, even if not covered by the notice. This latter

aspect of preparation is necessary because it may be the subject of questioning at the deposition, as it discussed more fully below.

In the best of circumstances, finding and preparing a corporate representative for deposition presents a challenge, but for certain types of cases with long latency periods, such as mass tort or environmental matters, it may not be possible to find representatives with actual knowledge of some or all of the items in the notice. In these situations – and sometimes others -- counsel for a noticed corporation may need to find sources of information outside the corporation, such as former employees and officers, to help educate corporate representatives, or consider using these persons as corporate representatives. *See Elan Microelectronics Corp. v. Pixcir Microelectronics Co.*, 2013 WL 4101811, at *6 (D. Nev. Aug. 13, 2013).

Use of a former employee or officer, is usually the noticed party's choice, not its obligation; however, at times courts have required their use. See Ken Sinclair and Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms*, 50 ALA. L. Rev. 651, 665 (1999).

While a noticed corporation can state that it has no "corporate memory" to offer on a noticed topic, the consequences of doing so are dire, as the corporation will likely be precluded from offering any other testimony later. *See Prosonic,* 2008 WL 2323528, at *3, and *U.S. v Taylor*, 116 F.R.D. 356, 362-363 (M.D.N.C. 1996) (failure to provide witness who could testify to notice topic results in bar against doing so later). So, providing a representative with some knowledge – if that is the best knowledge that can be obtained – is better than someone with none.

A consequence of a failure to properly prepare for a 30(b)(6) deposition is the potential for court imposed sanctions. Many courts treat a failure to fulfill a duty to educate "as tantamount to a nonappearance at a deposition, meriting the imposition of sanctions pursuant to Rule 37(d)(3)." *S. Cal. Stroke Rehab. Associates, Inc. v. Nautilus*, 2010 WL 2998839, at *1 (S.D. Cal. July 29, 2010); *see In re Lopez*, 2015 WL 7572097, at *11 (Bankr. S.D. Tex. Nov. 24, 2015), and *Omega Hosp., LLC v. Cmty. Ins. Co.*, 310 F.R.D. 319, 322 (E.D. La. 2015).

Courts frown on corporations that try to play "hide the ball" with their representative by designating someone with no knowledge when it is clear that others with knowledge could have been provided but were not. *Robinson v. Nexion Health At Terrell, Inc.*, 312 F.R.D. 438, 441-42 (N.D. Tex. 2014), and *Leonard v. PNC Bank, NA,* 2014 WL 458041, at *2 (D. Mass. 2014).

When considering sanctions for non-appearance or constructive non-appearance, courts will look to the following factors: "(1) what is the least severe sanction adequate to punish the offending conduct; (2) the reasonableness of the attorneys' fees; (3) the precise

conduct being punished; and (4) the speed with which the sanctions were sought." *Robinson v. Nexion Health At Terrell, Inc.*, 312 F.R.D. 438, 441-42 (N.D. Tex. 2014) (citing *Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866, 878–81 (5th Cir.1988)).

Where a representative is --- during the deposition – unable for whatever reason to provide a sufficient response to the noticed item, counsel for the noticed corporation has a duty to provide another representative on that topic at a later date. *Audiotext Communications Network, Inc. v. U.S. Telecom, Inc.,* 1995 WL 625962, at *13 (D.Kan. 1995) (noticed corporation required to pay costs associated with follow up deposition), and *Marker v. United Fidelity Life Ins.,* 125 F.R.D. 121, 162 (M.D.N.C. 1989).

Preparation Privilege Issues

Preparation of a 30(b)(6) corporate representative can result in an unintended waiver of attorney-client confidences and/or attorney work-product. While this is a concern in any witness preparation, it is particularly problematic in the preparation of a 30(b)(6) witness who may be totally reliant on information provided by others, including counsel for the noticed corporation.

Counsel for the corporation must walk the important line between protecting work product and attorney-client communications from discovery while fulfilling the corporation's duty to fully investigate the corporation's knowledge and prepare the corporate representative for deposition.

Privilege issues in 30(b)(6) depositions typically arise when counsel for the noticing party asks what information the 30(b)(6) witness reviewed in preparation for the deposition and is met with a work product objection based on the fact that disclosure of the information would reveal the attorney's thought process.

Courts are not uniform in their rulings in such cases, prompting one court to note the "widely varying application by the courts, is little better than no privilege at all. In re *Kellogg Brown & Root, Inc.,* 796 F. 3d 137, 144 (D.C. 2015) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

In *Sprock v. Peil,* 759 F. 2d 312 (3d Cir. 1985), the court held that documents grouped by counsel for the defendant corporation and used with the witness as part of deposition preparation -- constituted "opinion" work product. The very grouping of the documents "reveal[ed] defense counsel's selection process, and thus his mental impressions." *Id.* at 315. The court also noted the absence of testimony establishing the witness relied upon the documents for his testimony. *Id.* at 31 8-319.

Other cases holding that the absence of testimony the witness relied on the documents bars discovery of the documents include *In re Kellogg Brown & Root, Inc.*, 796 F. 3d 137,

143-144 (5th Cir. 1996), and *Fed. Trade Comm'n v. Directv, Inc.,* 2015 WL 7775274, at *5 (N.D. Cal. Dec. 3, 2015).

However, numerous other courts have held that witness preparation documents are discoverable -- even in the face of privilege claims -- provided reliance is established. *See Mattel, Inc. v. MGA Entm't Inc.,* 2010 WL 3705782, at *5-6 (C.D. Cal. 2010) (work product or deliberative process protection waived once the summary was reviewed by the witness to support her testimony); *Audiotex Communication Network, Inc. v. U.S. Telecom, Inc.,* 164 F.R.D. 250, 254 (D. Kan. 1996), *and Bank Hapoalim B.M. v. American Home Assurance Co.,* 1994 WL 119575, at *5-7 (S.D.N.Y. 1994).

Scope and Binding Nature of Testimony

It is important to be aware of the permissible scope and binding nature of a Fed. R. Civ. P. 30 (b)(6) deposition.

Generally, the deposition's scope is as broad as the scope of discovery outlined in Fed. R. Civ. P. 26(b)(1). Thus, opposing counsel can ask a corporate representative about any personal knowledge that person may have about the topics identified in the notice. *See Detoy,* 196 F.R.D, at 365-367 (N.D. Calif. 2000) and *California Foundation for Independent Living Centers v. County of Sacramento,* 142 F. Supp. 3d 1035, at 1045-1046.

Authority is split regarding whether a corporate representative must answer questions about which the deponent has personal knowledge but which fall outside the scope of the notice; however, the majority rule is that such questions can go beyond the scope of the notice. *Compare Detoy,* 196 F.R.D. at 365-36 (citing majority rule and stating that purpose of notice is to identify possible areas of inquiry and limit noticed party's responsibility to prepare a representative to testify, not to preclude noticing party from asking relevant questions that may fall outside the scope of the notice), *California Foundation*, 142 F. Supp. at 1046, and *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995), *aff'd sub nom.* 213 F.3d 646 (11th Cir. 2000), *with Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 729-730 (D. Mass. 1985) (follows minority rule not permitting examination beyond scope of notice).

Where a corporate representative is an officer or managing agent and does answer questions based on personal knowledge that fall outside the issues listed in the notice, the corporation becomes bound by the responses. *California Foundation,* 142 F. Supp. at 1046, *Detoy,* 196 F.R.D. at 365-36, and *Crest Infiniti, II, LP v. Swinton*, 174 P.3d 996, 1000 (Okla. 2007), *as corrected* (Oct. 10, 2007).

Counsel should – of course -- object during the deposition to any questions that are outside the scope of the notice, as a failure to do so waives any later objection. *See Detoy, 196 F.R.D. at 365-36,* and *California*, 142 F. Supp. at 1046.

However, properly asserting the objection is also important. In *Detoy, supra*, counsel for the noticed party did object at the deposition to questions he felt were beyond the scope of the notice. After asserting his objection, he suspended the deposition and sought a protective order seeing to restrict questioning to the areas identified in the notice. In denying the noticed party's motion, the court held the objection was improperly asserted. The proper procedure, the court noted, is not to suspend the deposition; rather, it is to object on the record that the question is beyond the scope of the notice and is not intended to be binding on the corporation. *Id.* at 367. Then prior to trial, the court further stated, counsel for the corporation can request that the jury be instructed that any responses given at the deposition that are outside the notice should be considered "merely the answers or opinions of individual fact witnesses, not admissions of the party." *Id.* at 367.

If the representative cannot answer a question that is outside the scope of the notice, it is the noticing party's problem, as it failed to provide the "reasonable particularity" in the notice that would have compelled preparation for such questions. *King*, 161 F.R.D., at 476.

As noted, a corporation is bound by the testimony of its corporate representative; however, 30(b)(6) testimony does not constitute a judicial admission. *N. Venture Partners, LLC v. Vocus, Inc.*, 2016 WL 1177923, at *8 (N.D. Cal. Mar. 22, 2016) (30(b)(6) depositions "produce evidence, but the … deponent's testimony is not tantamount to a judicial admission"), *Carriage Hills Condo., Inc.,* 109 So. 3d at 335-338. and *Taylor*, 116 F.R.D. at 363.

Commenting on the meaning of a corporate representative's binding testimony, one court held:

> It is true that a corporation is 'bound' by its Rule 30(b)(6) testimony, in the same sense that any individual deposed under Rule 30(b)(1) would be 'bound' by his or her testimony. All this means is that 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.

W.R. Grace & Co. v. Viskase Corp., 1991 WL 211647, at *2 (N.D. Ill 1991).

As a result, a Fed. R. Civ. P. 30(b)(6) deposition can be contradicted by the noticed party and face impeachment when it does so just like any other deposition testimony. *Maronda Homes, Inc. of Florida v. Progressive Exp. Ins. Co.,* 2015 WL 2169234, at *4 (M.D. Fla. May 8, 2015).

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Note, however, that the party intending attempting to contradict the testimony it offered at deposition may be estopped from doing so if it is unable to provide a "reasonable explanation" for the newly offered, contradictory testimony. *Julie Davis v. Josi Hospitality, L.L.C*, 2016 WL 3023288, at *5 (M.D. La. May 24, 2016) (court finds no such explanation for contradictory evidence offered just two days after original statement), *Carriage Hills Condo.,* 109 So. 3d at 335-338 (reversed trial court exclusion of affidavits offered by corporation that were contradictory to those of its corporate representative's testimony, noting -- among other reasons -- that affidavits did not "directly contradict" prior testimony)

Conclusion

Federal Rule of Civil Procedure 30(b)(6) provides the mechanism for taking depositions of corporate representatives, which depositions are now subject to the recent proportionality revision to Rule 26(b)(1) and contain "traps for the unwary."

As noted, the party seeking a deposition is obligated to provide a 30 (b)(6) notice that describes "with reasonable particularity" the matters on which it seeks examination. Upon receipt of a notice, the noticed corporation must properly assert its objections prior to the representative's deposition, including any objection that the discovery sought violates the proportionality language of Rule 26(b)(1).

It is critical that the noticed party – working closely with in-house counsel for the corporation – select then adequately prepare a representative who will provide knowledgeable, binding answers on behalf of the corporation.

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