Speak Now
Corporate Representative Testimony in Discovery and at Trial

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Nay, speak thy mind; and let him ne'er speak more that speaks thy words again to do thee harm!

—Richard II

Corporate entities are legal fictions. They have neither mouths nor vocal cords, so they cannot themselves testify. But because so many lawsuits across the country are brought by, against, or between these fictions, they must speak to press their case and answer for any wrongdoing. For this reason, civil procedure allows entities to designate someone to speak for them: a corporate representative. Though the role seems straightforward, it is not. This complexity multiplies when the representative is also an individual fact witness in the case, and it further compounds when the corporation needs to testify at trial. This article aims to highlight strategic considerations in defending corporate representative depositions and leveraging that testimony at trial while, at the same time, shedding light on potential pitfalls for the unwary.

Most corporate litigators have despaired when skimming a newly served corporate representative deposition notice. Scrolling past the formulaic instructions to the important information, hopes crumble to see that the topics extend to something like 20 topics over six single-spaced pages. Although the chaff can be cut during the pre-deposition conferences between counsel, in the large commercial cases, the scope can be broad and (as we will see) place a large burden on the representative. So it is often difficult to narrow such requests to a minimum of manageable information. Still, how can outside counsel possibly educate anyone—let alone the busy senior executive who drew the short straw and must testify—to speak for the company on all this?

The Rule on Designated Corporate Representatives

First, the basics: Adopted in 1970 to curb "bandying"—a practice whereby a defendant corporation offers successive executives for deposition, only for each to proclaim a lack of knowledge—Federal Rule of Civil Procedure 30(b)(6) exists as a mechanism to discover the corporate entity's knowledge. Thus, the designated representative's testimony binds the organization. The rule requires that the noticing party describe the matters for examination with "reasonable particularity." In response, the organization must designate one or more individuals to become educated using information "reasonably available" to the company and then testify on each topic. The representative can be a current employee but does not have to be. Indeed, in one extreme example we encountered, the opposing party and its outside counsel hired another outside lawyer solely to serve as the

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company's corporate representative—to learn the facts from the company and to testify about what he learned.

A relatively new addition to the rule is that the parties must confer about the matters for examination—either before or promptly after the notice is served. So, once the despair at the overwhelming list fades a bit, the next step is to determine what topics to limit and then to start negotiations over the scope of those topics. Once narrowed, the best-case scenario is that you are left with a list of semi-manageable topics about which someone at the company must testify. Although it will be a burden regardless of how these negotiations proceed, there are nevertheless several shortcuts to help make this otherwise painful process a bit smoother.

A good first step is to conduct interviews. Whether coordinating with in-house counsel or with non-lawyer employees, start by circulating the notice to your client—with, perhaps, a caveat that the rules only require preparation to testify about information that is "reasonably available" to the company. The client likely knows the person best positioned to talk to about each topic. These preliminary information-gathering interviews are not necessarily to find the representative, but rather to identify key sources of knowledge with whom your representative will need to consult as part of the preparation process. Depending on the case and the company, sometimes former employees have the most knowledge on the topic. Although that presents special challenges, it is worth spending the time to learn where the human sources of company information reside. During these preliminary interviews, ask about categories of documents or information that may have been overlooked during document discovery.

Although the levels of existing knowledge about a company's policies or practices differ among employees, designating separate individuals for each separate topic will, absent agreement between the parties, likely lead to seven-hour depositions for each designated witness. The notes to the Federal Rules state that, for purposes of the seven-hour deposition time limit, "the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition." Thus, as a rule of thumb, the fewer designated representatives you use, the better. In practice, this means it is often preferable to choose a single individual with some existing cross-disciplinary corporate knowledge, even if that employee may not be the most knowledgeable person at the company on the topic. The key consideration, then, is whether you can properly educate the employee on a variety of topics using both the existing discovery record and interviews with other company employees. It is also important to determine whether this witness has the constitution to serve as a knowledgeable and authoritative spokesperson for the company. In large companies, you may find that an individual—through no fault of his or her own beyond competence—has become the go-to source for company testimony.

Preparing the Representative

Once the representative is selected, outside counsel must then dig deep into the discovery record to allow for an efficient but thorough education process. Document review is often the most burdensome part of this process; complex cases are often plagued by massive databases with millions of documents to wade through, and they often also involve extensive topics. You will want to use the information you gathered through interviews, the pleadings, and exhibits from other depositions to craft keyword searches and review documents. You may want to isolate two sets of documents to use during the preparation session: (1) a narrow set of documents for the witness to review for each topic and (2) a broader set of documents relevant to each topic (so they are handy if they turn out to be more important than you thought).

This is an iterative process. Additional questions will likely surface as you wade through documents and testimony. Even with already large discovery databases, you may need to collect additional documents as part of this process. It is also important to confirm whether any existing discovery reflects a level of personal knowledge. Thus, you should search for the names of your witnesses in the document database to confirm. If they were not involved in the case, there may not be any hits. But you may be surprised. And if a witness is on any documents, you'll want to make sure the witness reviews them.

A corporate representative deposition is not a memory test, but it is a time when answers like "I don't know" or "I don't remember" can be particularly damaging to a case because (assuming

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the question relates to a noticed topic) the company is saying it does not have the requested information. So there is nothing wrong with crafting aids to assist the witness during both preparation and the deposition itself. A timeline of key events is often essential to orient a witness drowning in a sea of dates. It may also help to create a one-page summary of the company's position on key concepts and issues in the case. However, if used during the deposition, then it is a near certainty that the opposing party will ask to review the document. Because of this, it is best to keep such materials to the minimum necessary to ensure that the witness is prepared and knowledgeable.

To catalyze the witness's ability to digest broad categories of corporate information, prepare binders of key documents for the witness to review before, during, and after the preparation session. If a witness is designated on multiple topics, separating each topic into its own binder can streamline the education process. As signposts, it also helps to place the pleadings or a succinct summary of the lawsuit in the binder, as well as the timeline or one-pager mentioned above.

Depending on the scope of the topics, try to set up at least two meetings with the witness: one *at least* a week in advance and one closer to the deposition. If the witness is already familiar with the material, consider sending a narrowly tailored set of discovery materials in advance of the first meeting for the witness to review. Like the steps above, even the preparation itself is an iterative process. After the first meeting, there will be documents (hopefully only a few) to run down and interviews to set up. The timeline may need to be updated with new information or rephrased to mold to the ongoing understanding of corporate knowledge. Also, consider making a clean set of binders for the witness to bring to the deposition itself. The other side gets to ask about what a corporate representative relied on to prepare anyway, and you get to show off visually your witness's extensive preparation. Having a clean set of binders can also help calm a nervous witness during the deposition if the witness wants to refer to a particular document to refresh his or her memory.

After the deposition, don't forget to debrief with your witness. Witnesses are often eager to know how the deposition went. But most importantly, thank them for their time and effort. They had to push off their regular workplace responsibilities to prepare and sit for a deposition, which—as a surprise to some litigators—most people do not find particularly fun.

The Corporate Representative at Trial

While the 30(b)(6) deposition is primarily a discovery tool, it is also useful to consider how the deposition testimony can be leveraged at trial. Federal Rule of Civil Procedure 32(a)(3) authorizes an *adverse* party to use a corporate representative's testimony for any purpose. But what about using your *own* corporate representative's deposition testimony? Together, Federal Rule 32(a)(6) and Federal Rule of Evidence 106 provide an opportunity for a party to introduce its own corporate representative's testimony at trial. Beyond the evidentiary aspect, a corporate representative can sit with counsel at trial and serve as the face of the organization. Importantly, as the corporate representative at trial, this individual is exempt from sequestration and can hear the testimony of all the other witnesses.

A word of caution: In contrast to the rules for a 30(b)(6) deposition, in many jurisdictions, personal knowledge is a requirement for a corporate representative at trial. Ensure you know the requirements (and exceptions) in your jurisdiction before you count on a corporate representative's testimony at trial. Often a corporate representative does have at least some personal knowledge of the 30(b)(6) topics, but if you are in a jurisdiction where personal knowledge is required, ensure you have a plan for those gaps.

If you are in a jurisdiction where a corporate representative is not required to have personal knowledge, using someone *without* much personal knowledge can help distance the company from problematic documents. The representative can appear more objective because he or she seems less personally invested in the events on trial. The representative can therefore talk at a higher, aspirational level without necessarily having to account for unpleasant admissions. On the other hand, a crafty opponent can easily frame such "independence" as partisan sponsorship and a lack of objectivity. Especially when the corporate representative joined the company after the lawsuit was filed, and when other key defense witnesses do not testify, the following cross-examination can be particularly devastating: (1) "You're testifying today as a corporate representative of [the defendant]?" (2) "It's like you're a company spokesperson?" (3) "You joined [the defendant] after this lawsuit was filed?" (4) "You didn't send or receive any of the emails the jury has seen so far in this trial?" (5) "You weren't involved in creating any of the PowerPoints the jury has seen so far?" (6) "You don't have any personal knowledge of the facts at issue in this case, do you?" (7) "Instead, the only knowledge you have comes from communications with your lawyers?"

In the end, the decision to offer a corporate representative at trial depends on a multitude of practical considerations, including the rules in your jurisdiction and the quality and availability of fact witnesses. Indeed, sometimes a company has no other option. But a corporate representative does provide an opportunity for an otherwise voiceless entity to speak. Whether or not the representative actually testifies at trial, by choosing the right witness and with the right preparation, the entity can effectively use 30(b)(6) testimony beyond discovery and interject its story into key moments at trial. ■

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