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PRACTICE AREAS

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- American Bar Association
- State Bar of Texas (Member, Sections: Environmental and Civil Litigation)
- The Association of Trial Lawyers of America
- Texas Association of Bank Counsel

LAW RELATED PUBLICATIONS

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HOW TO ADEQUATELY PREPARE AND PRESENT A DESIGNATED CORPORATE REPRESENTATIVE

I. INTRODUCTION

Federal Rules of Civil Procedure 30(b)(6) and Texas Rules of Civil Procedure 199.2(b)(1) govern the procedure for depositions of corporate representatives. This article deals with the consequences of those rules, from notice requirements to the effect of testimony of a designated corporate representative.

The presentation of the topic employs a “hands-on” method, making this article a practical tool, rather than an academic piece. The author discusses the obligation to designate the proper corporate representative and offers useful guidelines to insure designation of the appropriate individual or individuals. The author stresses that it is the knowledge of the corporation, not the personal knowledge of the designated representative, that is at issue.

II. NOTICE REQUIREMENTS UNDER BOTH THE FEDERAL AND TEXAS RULE

Both the Federal and Texas Rules require the designated representative to offer testimony based on what is known to the corporation and answers based on matters reasonably available to the corporation. Accordingly, the author analyzes this ‘duty to conduct a diligent search’ imposed upon corporations and offers instruction on how this is accomplished.

The procedure for depositions of corporate representatives is governed by the following rules:


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 set forth, for each person designated, the matters on which the individual will testify. A subpoena shall advise a non-party designated, the matters on which the person will testify. Each individual designated must testify as to matters that are known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules.

b. Texas Rules of Civil Procedure 199.2(b)(1):

Identity of witness; organization. The notice must state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization. If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must— a reasonable time before the deposition— designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify as to matters that are known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules.

The Texas Rule closely resembles the Federal Rule, with the exception that the Texas Rule includes the requirement that “[i]n response, the organization named in the notice must— a reasonable time before the deposition— designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify.” This serves to provide the noticing party the opportunity to prepare for the designated witness, or to object to his or her designation. See Alex W. Albright, et. al., Texas Practice Series, Handbook on Texas Discovery Practice (2002). Please note there are other differences between the rules, but they are beyond the scope of this article.¹

A. The “reasonable particularity” requirement.

Both the Federal and Texas Rule state that the notice must “describe with reasonable particularity the matters on which examination is requested.” That is, when named as a witness, an organization should find within the notice the subject-matter upon which the witness will be examined. The “reasonable particularity” language requires the noticing party to be exceedingly specific as to the scope of the particular subject-matter to be questioned. Notices that utilize inclusive terms such as, “including but not limited to” or “any other matters relevant to this case” do not comply with the rule. See Reed v. Bennett, 193 F.R.D. 689 (D. Kansas 2000); Alexander v. FBI, 188 F.R.D. 111 (DDC 1998). Courts have ruled that such language is too vague and characterize it as ‘fishing’ for additional information or witnesses.

PRACTICE TIP:

- If the notice does not meet the “reasonable particularity” requirement write a letter to the noticing party stating that the notice is too broad and requesting that it be made more specific.

¹ These differences include i) the location of the deposition, ii) application to non-party corporations, and iii) calculation relative to limit on number of depositions and duration of depositions.
- Preserve your objection—consider filing a Motion to Quash and/or a Motion for Protective Order.

The interrogating party should not ask questions about matters outside the scope of the subject matter listed in the notice. Such questioning would completely negate the spirit of depositions of corporate representatives conducted under these rules.

**PRACTICE TIP:** Consider stopping the deposition if questions posed are outside the scope of the notice.

**DISCUSSION:** Is this in violation of Texas Rules of Civil Procedure 199.5(e)?

**B. Limitations on the rights of noticing party.**

1. **Cannot require the production of a specific witness**

   A noticing party cannot require the production of a specific witness. The corporation has the exclusive right to designate the corporate representative. See GTE Products Corp. v. Gee, 115 F.R.D. 67 (D. Mass 1987). In fact, the noticing party unwittingly places an impairment on that party’s ability to obtain information from a witness if the notice names an individual specifically, instead of naming the corporation itself. If the notice names an individual, this person may only be questioned as fact witnesses and need not be prepared as a corporate representative. It is imperative that the noticing party name the corporation in order to obtain full discovery of the issue at hand.

2. **Cannot require the production of a witness with “personal knowledge”**

   Texas authorities do not offer clear guidance on whether the corporation shall produce the most knowledgeable person. Specifically, Texas courts have yet to rule precisely on the issue of personal knowledge vs. preparation. This is complicated by the current prevailing practice in Texas wherein hybrid notices, inconsistent with the rules, are issued. However, requiring the production of a witness with personal knowledge is contrary to the theory of corporate representative depositions. For this reason, one must look to the federal authorities for guidance.

   **PRACTICE TIP:** Always object to hybrid notices.

   In a Rule 30(b)(6) deposition, a corporate representative represents the knowledge of the corporation, not of the individual deponents. United States v. Taylor, 166 F.R.D. 356 (M.D.N.C. 1996), aff’d, 166 F.R.D. 367 (M.D.N.C. 1996). The manner in which the witness gained knowledge of the facts is of no consequence and cannot prevent disclosure of the facts. See State Ex Rel. United Hosp. Ctr., Inc., v. Bedell, 484 S.E. 2d 199 (W. Va. 1997).

   Courts have ruled that even when there are witnesses with personal knowledge, the responding organization need only present a properly prepared corporate representative. See Reed v. Bennett, 193 F.R.D. 689, 692 (D. Kansas 2000). To satisfy the rule, the producing party needs to prepare the witness to answer all the questions within the scope of the subject-matter outlined in the notice.

   **PRACTICE TIP:**

   - With proper preparation, you can transform the witness into an undesignated expert witness and take the offense.
   - The key is spending the time in interviewing several witnesses to select the best for the subject-matter.
   - Knowledge of corporate policies and internal documents becomes crucial.

   The Federal Rule prevents the discovering party from deposing multiple corporate witnesses who each may deny personal knowledge of pertinent information that would reasonably be common to the corporation as a whole. It also limits the discovering party’s ability to randomly depose multiple witnesses in order to ostensibly obtain information. Similarly, the Texas Supreme Court adopted limitations effecting the use of Rule 199.2(b)(1) limiting involvement by corporate managers. Courts have held that noticing parties should obtain information by deposing lesser employees of an organization, namely a prepared corporate representative. Under the ‘apex’ doctrine, an organization’s hierarchy is protected from first line intrusive interrogation. However, officers are not deemed immune from testifying. In fact matters where the officer has personal witness of a transgression, he or she may be compelled to testify, but be limited to testimony as a fact witness.

   **PRACTICE TIP:** Make opposing counsel stick to the designated subject-matter—do not let him turn your corporate representative into an “I don’t know” fact witness.

**III. DUTY TO CONDUCT A DILIGENT SEARCH**

A. **Obligation to present witness to testify of known facts and facts that are available after a diligent search.**

   The producing party is required to present a representative to testify regarding known facts and facts gathered after a diligent search on the subject-matter. The witness must be meticulously prepared in order to comply with the rule requirement; presenting a
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The witness must be knowledgeable and be willing and able to convey the information upon request. Neither the witness nor the corporation need to have participated in transactions or events in question, or have first hand or actual knowledge of facts relative to the action. If specified matters are outside of the breadth and scope of the organization’s knowledge, and outside of their sphere of influence (thus rendering a reasonable means of obtaining the information impracticable) the organization should advise that a diligent search has found that they have no knowledge of the designated matters and, as such, is not reasonably availed to it. This limitation is inclusive of information that may have been lost in the passage of time relative to the personal knowledge of the organization’s current employees.

PRATICE TIP: This is a two-edged sword—by not being able to testify on the subject-matter, you will be prevented from presenting exculpatory evidence on that matter at trial.

B. Knowledge of deceased or separated employees.

An extremely important distinction must be made relative to deceased and separated employees. In the case that the employee with all personal knowledge of a distant event is either deceased or otherwise no longer reasonably available, the organization is continuously compelled to perform its duties under the rules. The duty to diligently search all records and documents from past employees and other sources is an important issue to the organization relative to preparing a corporate representative. Courts have held that an organization is compelled to provide testimony in the absence of former employees. See United States v. Taylor, 166 F.R.D. 356 (M.D.N.C. 1996), aff’d, 166 F.R.D. 367 (M.D.N.C. 1996). This is limited to existing documents, files, and other information that is ‘reasonably available’ to the organization. Courts have held that an organization is required to complete exhaustive review in order to satisfy Rule 30(b)(6). Id.

PRATICE TIP: Beware of the disgruntled employee due to mergers, acquisitions, and/or layoffs. A thorough review of records should be done to avoid having to contact disgruntled former employees.

C. What is “reasonably available?”

In conducting an investigation it is important to define and understand the scope of the reasonably available information. The importance of this is the foundation of preparation in order to avoid the “I don’t know” answers that are very detrimental to the organization in the eyes of the jury, should the case progress. Reasonably available information includes that of subsidiaries and affiliates within the organization’s control. It must be determined whether information relating to a separate corporation, which is a subsidiary of the corporate deponent, is “reasonably available.” Courts have held that a parent corporation is compelled to provide testimony and produce relevant documents from wholly owned subsidiaries. See Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc., No. 01 Civ. 3016 (AGS) (HBP), 2002 WL 1835439 (S.D.N.Y. Aug. 8, 2002)(mem.).

The definition of what is reasonably available is very broad. Even a well-prepared witness will struggle with the entirety of questions posed, especially when the subject matter is broadly designated. This is why great care should be taken in designating the right corporate representative.

PRACTICE TIP:
- Object to broadly worded notices.
- Consider using more than one witness.

IV. WHO SHOULD BE DESIGNATED AND WHY?

Generally, corporations:

- designate a capable witness;
- prepare the witnesses to testify as to matters known and reasonably available; and
- designate additional witness when the designee is unable to divulge information that is relevant.

More specifically, the goal of the corporation in designating a representative should be to humanize the organization. Being mindful of allegory, the corporation must focus on conveying positive values. There must be an appearance of real people and real families as an integral part of the corporate culture. This is the most difficult portion in the task of designating a corporate representative.

Designation of a corporate representative allows the corporation to control with whom the discovering party is able to query. As such, a corporation is able to present a well-prepared and capable individual as a corporate witness in order to present the most cognizant and savvy image possible. In producing a well-prepared individual, the corporation may also limit the discovering party’s ability to fish for information outside the scope of the notice.

As mentioned above, the Texas Rule states that a responding organization “a reasonable time before the deposition-designate one or more individuals to testify on its behalf and set forth, for each individual...
designated, the matters on which the individual will testify.” There is no such provision in Federal Rule; however, local practice may require the responding party designate deponents, their availability, and the subject-matter upon which they will testify.

The selection of a properly prepared individual as corporate representative best serves the needs of the organization. A fully prepared corporate representative allows the corporation to control the extent of the information that the corporate representative might divulge. Care must be taken on behalf of the corporation to view the designation of a corporate representative as an important opportunity to humanize the corporation, since corporate depositions have become a tool that may be exploited by the interrogating party.

PRACTICE TIP:
• The rules, as written and interpreted, can provide a big advantage to corporations IF the right corporate representative is chosen. You can turn the witness into an in-house expert on the designated subject-matter.
• In some cases, with the appropriate witness, you may be able to take the offensive.

A. It is the knowledge of the corporation, not of the representative that is at issue.
   After an individual has been designated as the corporate representative, it must now be solidified that it is the knowledge of the corporation, not of the representative that is at issue. Both Federal Rule 30(b)(6) and Texas Rule 199.2(b)(1) provide that a representative provide answers based not only on matters commonly ‘known’ to the organization but include matters ‘reasonably available’. The more contentious assertion of reasonably available information places a heavy burden upon the corporation in preparing the corporate representative. The courts’ interpretation can be one-sided and cumbersome. In compliance with the notice, the responding organization must prepare the corporate representative to testify as to those matters that are common knowledge or known to the organization, as well matters that are ‘reasonably available’ and designated in the notice, as discussed in the “Duty to conduct a diligent search” section of this article.

V. “I DON’T KNOWS”—FAVORABLE TO NOTICING PARTY
   Inadequately preparing and selecting a corporate representative can be extremely damaging to your case. “I don’t know” answers will hurt the credibility of your client and the deposition will be played for a jury for the sole purpose of embarrassing your client. Keep in mind that most corporate representative depositions are used for the sole purpose of trying to intimidate and harass your client. That is why a thorough and diligent preparation of your witness is extremely important.

VI. CONCLUSION
   In conclusion, a corporate representatives’ lack of preparation results in a disadvantage to corporations and an opportunity for opposing counsel to make the corporations look irresponsible and/or deceptive. Counsel must avoid situations wherein an inadequately prepared corporate representatives’ answers can negatively effect the course of litigation.

This article was inspired and developed from the article “Corporate Representative Depositions in Texas–Often Used But Rarely Appreciated” written by James C. Winton, 55 Baylor L. Rev. 651.