



30(b)(6):

The Procedural and Ethical Idiosyncrasies of Federal Corporate Representative Depositions



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TEXT OF RULE

- Notice or Subpoena Directed to an Organization: In its notice or subpoena, a party may name as the deponent a [private or public entity] and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. . . . The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.



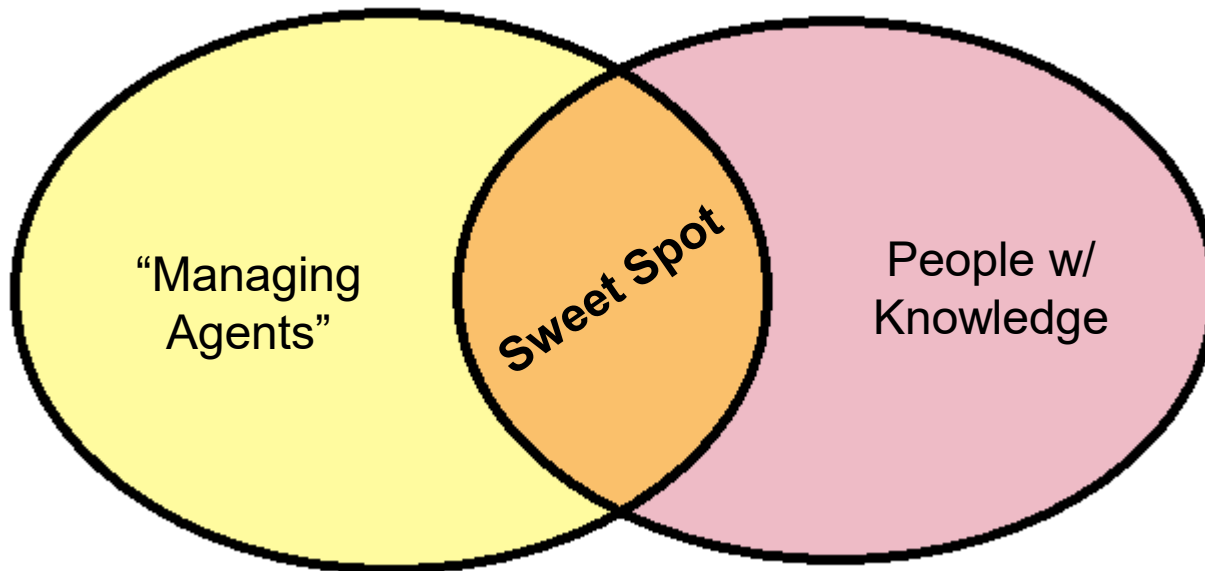
HISTORY & PURPOSE

PURPOSE OF RULE 30(b)(6)



HISTORY & PURPOSE

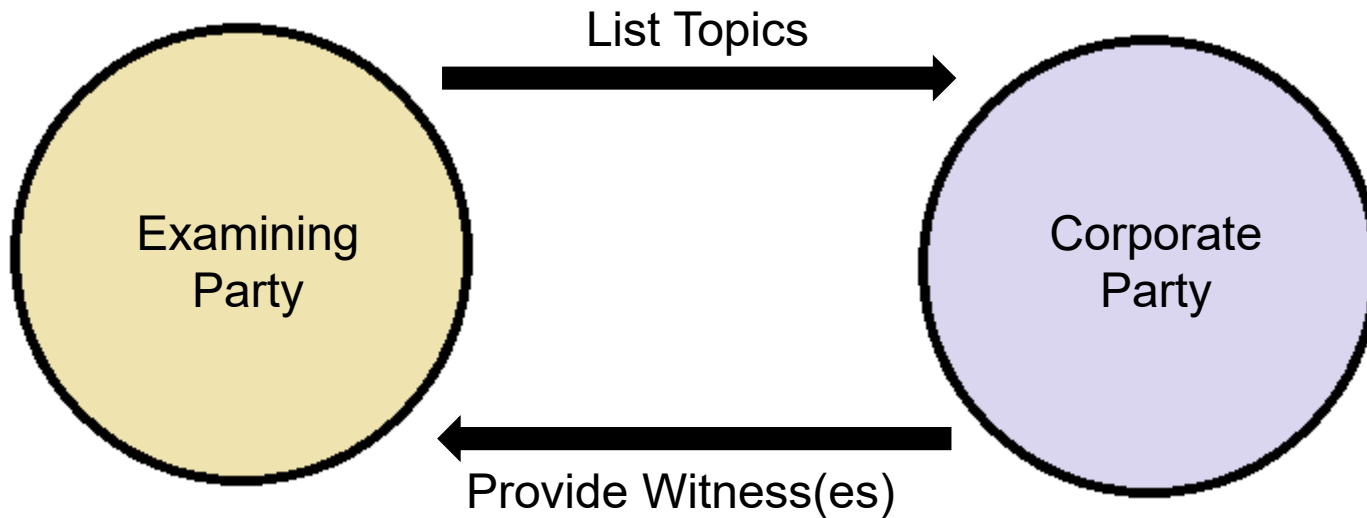
Prior to Rule 30(b)(6): Burden Entirely on Examining Party





HISTORY & PURPOSE

After Rule 30(b)(6): Burden (Sort Of) Split Between Parties





HISTORY & PURPOSE

- **Numerous Questions:**
 - Do the same procedural rules apply?
 - What is the scope of permissible topics?
 - What is the corporation's witness preparation obligation?
 - Are there any special considerations?





PRACTICAL APPLICATION

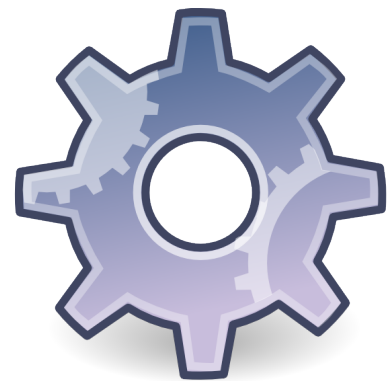
BASIC 30(b)(6) APPLICATION



PRACTICAL APPLICATION

RULE	“TRADITIONAL” DEPOSITION	30(B)(6) DEPOSITION
10 Deposition Limit	Each individual witness counts as a separate deposition	Only counts as 1 deposition, even if corporation designates multiple witnesses
7 Hour Duration	Deposition limited to “1 day of 7 hours”	7 hours for <u>each</u> designated corporate representative

- Examining Party must identify topics
- Topics must be identified “with reasonable particularity”
- Ambiguous term that is not well-defined
 - N.D. Tex: “Painstaking specificity”
 - W.D. Tex: More like “notice” pleading



DESIGNATION OF TOPICS

- “Reasonableness” defined using Rule 26 “relevant and proportionate” standard
- Courts take into account:
 - Discovery conducted to date
 - Good or bad faith of parties
 - Importance of issues to the case
 - Duplication and diminishing returns
 - Other equitable factors
- Bad news: **No hard-and-fast rules!**



- Corporate Party must:
 - Object and
 - Move for protective order
- Cannot refuse to produce a witness or otherwise instruct a witness not to answer
 - FED. R. CIV. P. 37(d)(2) - Failing to produce corporate representative “is not excused on the ground that the discovery sought was objectionable, unless the [corporate party] has a pending motion for a protective order.”



- Courts have fashioned creative remedies:
 - Prohibiting topics entirely
 - Prohibiting topics on which corporate designee previously gave individual testimony (or vice versa)
 - Allowing corporation to “adopt” prior individual testimony from sufficiently high-ranking officers
 - Allowing corporation to “adopt” prior interrogatory answers or otherwise rely on written discovery
- Don't be hesitant to think outside the box!





DESIGNATION OF WITNESS(ES)

- Once topics are established, corporate party must:
 - Designate “one or more” corporate officers, agents, or “other persons who consent to testify” for the corporate party
 - Gather information known or reasonably available to the organization

- Designated witness’s personal knowledge irrelevant



- “Education” may require:
 - Reviewing documents
 - Interviewing other employees with germane knowledge germane
 - Reviewing deposition transcripts
- Be wary: Most preparation is done by corporation’s attorneys, raising privilege and work-product issues
 - Underlying facts - not privileged
 - Attorney’s methods of selection - privileged





USE OF 30(b)(6) TESTIMONY

- FED. R. CIV. P 32(a)(3) - Examining party may use corporate deposition testimony “for any purpose,” including motion, responses, and impeachment
- But corporate deposition testimony is not “binding” in the sense of judicial estoppel or preclusion
- Instead, inconsistencies are treated as credibility issues





SPECIAL ISSUE: DEPOSITION CONDUCT

- Exceeding Noticed Topics During Deposition
 - Two theories of 30(b)(6) topic lists – Ceiling vs Floor
 - 5th Circuit has not decided
 - Majority view outside 5th Circuit - Floor
 - o “Efficiency” concerns – Why make corporate deponent appear again?
 - o Corporate designee must be minimally prepared to discuss corporate position as to designated topics, but must also testify as to personal knowledge, if any
 - o Testimony outside noticed topics usually will not be treated as testimony binding the corporation as a whole

- Proper procedure at deposition:
 - **Cannot** tell witness not to answer questions outside the notice topics, unless attorney plans to terminate deposition and seek protective order
 - **Can** note for the record that testimony outside noticed topics is in witness's individual capacity only





- Can Examining Party notice multiple 30(b)(6) depositions?
 - Fifth Circuit case law appears to allow serial 30(b)(6) depositions without leave of court
 - Remember though - Multiple corporate designees will still only count as 1 deponent for purposes of the 10 deposition limit

- Where should the deposition be held?
 - General rule is where the corporation has its principal place of business
 - Other factors courts may consider:
 - o Location of counsel
 - o Single or multiple designees
 - o Residence of designee reside if away from forum and principal place of business
 - o Whether significant discovery disputes may arise that require resolution by forum court
 - o Nature of parties claims and relationship to forum





OTHER ISSUES

ETHICAL CONSIDERATIONS

- **Rule 1.12 – Organization as a Client**

- First obligation is to the company, not to its constituents or employees
- Obligated to “take remedial action” if corporate counsel learns:
 - o A person affiliated with the corporation has or intends to commit a legal violation,
 - o The violation is likely to result in substantial injury to the corporation, and
 - o The violation is related to a matter within the scope of the lawyer’s representation of the corporation





ETHICAL RULES

- **Rule 3.01 – Meritorious Claims and Contentions**
 - Prohibits attorney from “bring[ing] or defend[ing] a proceeding, or assert[ing] or controvert[ing] an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous”
 - Substantial room for abuse where corporate counsel is primarily responsible for preparing a corporate designee to testify



- **Rule 3.02 – Minimizing Burdens & Delays of Litigation**
 - Applicable to **both** Examining and Corporate counsel
 - Process is ripe for abuse by both sides:
 - o Examining counsel may seek duplicative/cumulative discovery or ask questions designed to harass or waste time
 - o Corporate counsel may fail to appropriately prepare a corporate designee, leading to unnecessary and expensive motion practice
 - Counsel should confer and cooperate to determine best way to obtain requested information



- **Rule 3.04 – Fairness in Adjudicatory Proceedings**
 - Forbids an attorney from:
 - o Obstructing access to or destroying evidence,
 - o Falsifying or counseling others to falsify evidence, and
 - o Disobeying or counseling others to disobey legal rules or orders.
 - As with rule 3.02, ample room for abuse by corporate counsel
 - o Must ensure corporate designee is prepared to testify as to all information reasonably known to corporation
 - o Includes unfavorable testimony



- **Rule 8.04 – Misconduct**

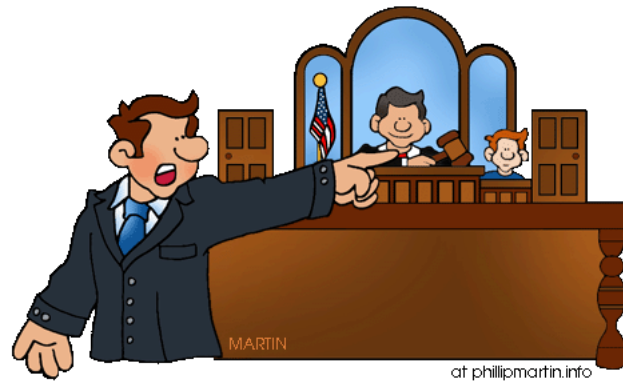
- Forbids an attorney from:
 - o Violating the Rules of Professional Conduct,
 - o Engaging in dishonesty, fraud, deceit, or misrepresentation, or
 - o Obstructing justice.
- Similar considerations as the above





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