



DEPOSING THE VENTRILOQUIST'S DUMMY

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DCR DEPOSITIONS

DEPOSITIONS OF CORPORATE
REPRESENTATIVES

SECONDARY RESOURCES

- pgold@agtriallaw.com;
- Kosieradzki, 30(b)(6), *Deposing Corporations, Organizations & Government* (Trial Guides, 2016);
- Wise and Wooten, ***The Practitioner's Guide To Properly Taking and Defending Depositions Under the Texas Discovery Rules***, *Baylor L. R.*, 68:402 (2016)

EXCELLENT OVERVIEW

*QBE Ins. Corp. V. Jorda
Enterprises, Inc.,*

277 F.R.D. 676

(S.D. Fla. 2012)

FED. R. CIV. P. 30(b)(6)

BREAKDOWN OF RULE

- ❖ **Applies to all types of entities, parties and non-parties;**
- ❖ **Activated by serving topics with reasonable particularity. Must be tailored to claims and defenses;**
- ❖ **Entity chooses representative, but must educate representative on composite knowledge of corporation; what is known or knowable by corporation**
- ❖ **Representative may be separately deposed as a fact witness.**

The Corporate
Representative
Is The Corporation
On The Designated Topics



IMPORTANT

The corporate representative speaks on behalf of the corporation *only* with regard to the topics on which the representative is designated.



You are seeking **what the corporation knows.**

Don't limit yourself by asking for the information with the "most knowledge" on a topic.



The representative testifies
regarding the

composite knowledge

of the corporation on the topic
on which the representative is
designated.

**What is reasonably
knowable by the
corporation**


IMPORTANT CONCEPT

Similar to a corporate entity
verifying answers to
interrogatories based upon
information and belief.



Corporate Entity Selects Representative

The party noticing the deposition does not get to select the corporation's representative(s).



ANYONE CAN BE THE REPRESENTATIVE

Cleveland v. Palmby,
75 F.R.D. 654 (W.D.Ok.. 1977)

A group of women in formal attire, including a woman in a tiara, on a stage. The scene is brightly lit with pink and purple stage lights. The women are dressed in elegant, shimmering gowns. One woman in the center is wearing a large, ornate tiara and a dark blue dress. She is smiling and looking towards the camera. To her left, another woman is wearing a white dress with a large floral corsage. To her right, a woman is wearing a black dress with a large floral corsage. In the background, other women are visible, some in pink and purple dresses. The overall atmosphere is festive and celebratory.

The corporation is free to select as a representative anyone it likes.



The representative
does not have to
have personal
knowledge about the
topics on which the
representative is
designated.

*Securities and Exchange
Commission v.*

Morelli,

143 F.R.D. 42 (D.C. S.D. NY 1992)

The corporation may designate
more than one representative
on each topic.

The corporation may designate
one representative on all
topics.

AN INDIVIDUAL MAY BE **BOTH** A
REPRESENTATIVE **AND** A FACT
WITNESS

The corporate representative may
be a representative on some
topics and a fact witness on other
matters.

A SOURCE OF A LOT OF
CONTROVERSY



Rule 30 specifically provides “[t]his paragraph 6 does not preclude taking a deposition by any other procedure authorized in these rules.” FED. R. CIV. P. 30(b)(6) Several district courts have thus recognized there is no prohibition on deposing a witness as a corporate representative and then in an individual capacity.

*Southwestern Bell Telephone, L.P.
D/B/A AT & T Texas, v. Utex
Communications Corp.*

2009 WL 8541000

(W.D. Tex. – Austin 2009)

The Corporate
Representative is treated
the same as if the
representative **were a party.**

PLACE OF DEPOSITION

Only a notice of a party is required to compel attendance.

No subpoena is a subpoena
duces tecum necessary.



Noticing the deposition of
an individual
requires a subpoena.

The place of deposition is the same as for a party.

TEXAS AND FEDERAL ARE
DIFFERENT

Texas: Place of Suit

Fed: Corporations Principal
Place of Business



A party has **two options** when it comes to seeking a deposition from a corporation. It may notice a particular **officer, director or managing agent** pursuant to Fed. R. Civ. P. 30(b)(1) or it may **notice the corporation** and list “. . . with reasonable particularity [of] the matters on which examination is requested.” Fed. R. Civ. P. 30(b)(6).

GTE Products Corporation v. Gee,

115 F. R.D. 67 (D. Mass. 1987)

REQUESTS FOR PRODUCTION

FRCP 30(b)(2)

The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things **at the deposition.**

A red circle is centered on the page, containing the word "SCOPE" in a bold, black, sans-serif font. The background is a light gray gradient.

SCOPE

The notice for a corporate representative must with

“reasonable particularity”

set out the topics upon which the party seeking the deposition wishes to depose the corporation.

**VERY IMPORTANT
CONSIDERATION**



The notice must set out discrete topics, which cannot be open-ended. . .

~~“included, limited to”
road.~~

Reed v. Bennett,
193 F.R.D. 689
(D.KS. 2000))

USES IN MEDICAL MALPRACTICE CASES

1. Identify individuals with knowledge of relevant facts, including supervisors and managers;
2. General factual bases of contentions;
3. Identify relevant documents, data and things; how maintained and retention policies;
4. ESI systems
5. Identify relevant policies and procedures;

EXAMPLE:

Relevant to the date of the occurrence, URHCS incident/sentinel event report policy procedure and practice as applied to situations similar to and including the incident in question. This topic includes identification of the individual(s) who prepared the incident report(s) in this instance and to whom or what entities the reports were distributed.

EXAMPLE

Other claims similar to the one in question (claims that a baby was injured as a result of negligence of care providers during labor and delivery) that have been brought against URHCS or against physician providing service under privilege at URHCS' over the preceding 5 years prior to the occurrence in question, including those specifically that involved the same care providers as involved in the instant lawsuit.

EXAMPLE

Labor and delivery education regarding labor and delivery nursing, fetal monitor strip interpretation, Pitocin, gestational diabetes, tachysystole, and high risk pregnancy relevant to the date of the occurrence and now, if different, and relevant to each of the nursing personnel who were involved in the direct patient care of Whitney Rickman and her baby, as well as the nursing personnel who were supervising such care. This topic includes identifying the individuals involved in providing and overseeing the education process and evaluating its efficacy. It also includes identification of all education literature and training films, and modules relevant to the above topics. It also includes discussion of how and when training in these regards was provided to each of the nurses involved in Plaintiffs' care and what was done to assess the nurse's understanding, competency, and ability to effectively utilize and implement the information provided.

EXAMPLE

The personnel files of each of the nursing personnel involved either directly or in a supervisory capacity with the labor and delivery of Whitney Rickman and her baby. This includes what should be in the files and what actually is in the file of each nurse involved in the care of Whitney Rickman and her baby. This also includes discussion of the evaluation of the training, competency, knowledge, skill, and proficiencies of each nurse with regard to the standards of care applicable to a labor and delivery nurse, interpretation of fetal heart monitoring, Pitocin administration, and management of a high risk labor and delivery.

EXAMPLE

URHCS policies and procedures that were in effect at the time of the incident in question, and now, if different, relevant to the appropriate standards of care that the nurses who provided care to Whitney Rickman and her baby were expected by URHCS to adhere to and specifically all such policies relevant to fetal monitor strip interpretation, nursing diagnosis, care plan and intervention relevant to labor and delivery nursing care, fetal monitor strip interpretation, Pitocin, gestational diabetes, tachysystole, and management of a labor and delivery involving a high risk pregnancies. This topic includes discussion of the source materials, references, guidelines, and standards that were actually reviewed or relied upon in formulating the policies and procedures.

EXAMPLE

- Identification and discussion of the non-healthcare records or documents (including electronically stored data) that URHCS has compiled in the ordinary course of business relevant to the claims and defenses in this lawsuit, including medical or nursing literature relevant to standards of care and causation.
- Identification and discussion of URHCS's defenses and the bases for them, including who or what URHCS believes or contends is a contributing or sole cause of the injuries alleged by Plaintiffs in the instant case and why.

EXAMPLE

ESI

The communication and electronic medical record systems, data storage systems, dictation systems, scheduling data and systems (surgery center scheduling and assignments), documentation, and available information that were in effect and use relevant to the care of John O'Loughlin at the time of the incident in question. This topic specifically includes all forms of internal electronic communication as well as electronic communication including electronic charting, dictation, and incident and sentinel event recordation. The topic also includes any "audit trails" with regard to all medical records relevant to John O'Loughlin.

BUT

CONSIDER CONCEPT OF

NOTICE PLEADING

SEE,

Function Media, LLC v. Google

2010 WL 276093

(ED. TEX.)

“LICENSE AGREEMENTS AND ROYALTY
AGREEMENTS” PROVIDES
REASONABLE PARTICULARITY OF THE
SUBJECT MATTER

TOPICS MUST BE
RELEVANT

The court adopts the majority view and holds that the scope of a Rule 30(b)(6) is **not limited** to the topics designated in the Rule 30(b)(6) notice.

Brignac v. Celadon Trucking Services, Inc.,

Not Reported in F.Supp.2d
2012 WL 176712 (W.D. LA.
2012)

- Contentions: OK
- Factual Basis
for contentions: **Controversial, but probably OK more times than not.**
- Beliefs: OK
- Interpretation of documents: OK

Legal theories: No



Source of information and manner of search:



No

BUT

Questions Calling For **Exquisite
Detail** (Precise Numbers And
Figures)

Might Be Found To Be **More
Appropriate** Through
Contention Interrogatories

See

U.S. v. M & T Mortgage Co.

235 F.R.D. 11 (DC DC 2006)

DUTY IS NOT INFINITE

Where a witness reviews available documentation "and still would not have been able to give complete answers ... and there were no other available witnesses who could do so, the organization's obligations under Rule 30(b)(6) cease.

Dravco Corp. v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 76
(D. Neb. 1995)

Work Product Remains Protected



*Securities And Exchange
Commission,*

v.

Morelli,

143 F.R.D. 42 (D.C. S.D. NY 1992).

In Re Seroquel Prods.

Liab. Litig.

2008 WL 215707 (MD FLA. 2008)

Sporck v. Peil, selective
process argument **rejected.**
**Must reveal what DCR was
shown.**

ATTORNEY/CLIENT PRIVILEGE



Facts Communicated by
Attorney are **Not Protected** by
Attorney Client Privileged

*Great American Insurance
Company of New York v.
Vegas Construction Co.*

251 F.R.D. 534 (D. Nev. 2008)

Selecting **Attorney** As DCR
Perilous
WAIVER



CORPORATION'S OBLIGATIONS

The representative **must be prepared** to testify to all information known by the corporation **or reasonably knowable** by the corporation on the topic for which the representative is designated.



“The corporation . . . **must** not only produce such number of persons as will satisfy the request, but more importantly, **prepare them** so that they may give complete, knowledgeable and binding answers on behalf of the corporation.”

*Marker v. Union Fidelity Life Ins.
Co,*

125 F.R.D.121 (D. N.C. 1989)

SANCTIONS

may be warranted for a corporation failing to designate and produce a representative for deposition OR for **failing to properly prepare the representative** for deposition on the topics on which the representative is designated.



U.S. v. Taylor,

166 F.R.D.356 (M.D.N.C.1996)

Fed. R. Civ. P. 37(d)

*Great American Insurance
Company of New York v. Vegas
Construction Co.*

251 F.R.D. 534 (D. Nev. 2008)

The corporation may not avoid the deposition by claiming a **lack of knowledge** on the topic. The noticing party is entitled to take the deposition of a representative to test this claim.





Lerardi v. Lorillard,

1991 WL 158911 (E.D. Pa. 1991)

(unreported).

OBLIGATION TO
FIND A SUBSTITUTE
REPRESENTATIVE

Marker V. Union Fid. Life Ins. Co.

125 F.R.D. 121 (MD N.C. 1989)

*Function Media, Llc V.
Google*

2010 WL 276093

(ED. TEX.)

“Elvis Has Left the Building” Defense

NOT VALID



SCOPE OF INQUIRY

TOPICS v. FACTS

Paparelli

(Depose only on topics)

v.

King V. Pratt & Whitney

(Also inquire about factual
knowledge)

MOTIONS FOR PROTECTION STRIKE OR LIMIT TOPICS



*Orchestrate HR, Inc. v.
Trombetta,*

2015 WL 1565716

(N.D. TEX. 2015)

Failure to make timely motion for protection results in waiver. **Cannot wait until time of deposition.**

STRATEGY CONSIDERATION

TIMING

NUMBER OF TOPICS

DOCUMENTS, DATA AND
THINGS

TIME LIMITS

?

PER REP OR PER TOPIC

UNCLEAR

ADVISORY NOTES TO 1993 AMENDMENTS

for purposes of calculating the number of depositions in a case, a 30(b)(6) deposition is counted as a single deposition, regardless of the number of witnesses designated.

See, ***Quality Aero Technology, Inc. v. Telemetrie GMBH***, 212 F.R.D. 313, 319 (E.D.N.C. 2002)

ADVISORY COMMITTEE'S NOTES 2000 AMENDMENTS

For purpose of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition.

CAUTION! Be careful about designating a large number of topics for which only one representative is presented. You might not be able to get everything covered in one 7 hour setting. . . and you may only get one shot!

PARTY MAY NOT TAKE SERIAL DCR
DEPOSITIONS WITHOUT COURT
APPROVAL

*State Farm Mutual Auto. Ins. Co. v.
New Horizont, Inc.,*

254 F.R.D. 227

(E.D. Pa. 2008)

DCR DEPOSITION COUNTS AS ONE
DEPOSITION AGAINST TOTAL
DEPOSITION LIMIT

*Meltzer/Austin Restaurant
Corporation, Et. Al. V. Benihana
National Corp.*

2013 WL 2607589

(W.D. Tex. 2013)

“CORRECTIONS”
TO DEPOSITIONS

Wyeth v. Lupin Ltd.,
252 F.R.D. 295 (2008)

NOT A DO OVER



TRIAL CONSIDERATIONS



MOTIONS IN LIMINE



*Rembrandt Wireless
Technologies, LP v. Samsung,*

2015 WL 627430

(E.D. Tex. Marshall Div. 2015)

The testimony of the
representative **binds**
the corporation on the topics
upon which the representative
is designated.



“Bind”



judicial admission.

AT TRIAL

representative's deposition testimony on the topics for which the representative was designated may be used by opposing party the same as a party's deposition.

ADMISSIONS

Opposing side may use deposition testimony as an admission; however, party that was deposed **may not use the deposition testimony offensively** because it constitutes **hearsay** (to the extent the representative has no personal knowledge of the facts to which she has testified).

CALLING THE
REPRESENTATIVE AT TRIAL

OFFENSIVE USE OF DCR
TESTIMONY HEARSAY; NOT
BASED ON PERSONAL
KNOWLEDGE

*Brazos River Authority v.
GE Ionics, Inc.*

469 F.3D 416 (5TH CIR. 2006)

:)

pgold@agtriallaw.com

- *DDR Holdings, LLC v. Hotels.com*, 2012 WL 2935172 (ED TX 2012) – Motion for Protection re Overbroad
- *SW Bell Tel v. UTEX Communications*, 2009 WL 8541000 (or possibly 8541600 – can't tell) (WD TX) – Depose also in individual capacity