WHY THE CORPORATE REPRESENTATIVE MAY BE THE MOST NEGLECTED KEY WITNESS . . . AND HOW THEY CAN MAKE YOUR CASE

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What it is. The corporate representative deposition is one of the most useful depositions for any party with a corporation or other business entity on the other side. The deponent in this deposition serves as the voice of the corporate Defendant. For that reason, this deposition is where the corporation has to take a stand, divulge information, and admit that it either has or does not have evidence or knowledge to support its counts in the complaint or its defenses.

The Rules. The deposition is noticed and taken pursuant to Fed.R.Civ.P. 30(b)(6). The deposition is used at trial for any reason and regardless of availability of the witness pursuant to Fed. R. Civ. P. 32 (a) 3. Therefore, this deposition can be testimony actually used at trial. For that reason, the key to noticing and taking any corporate representative deposition is preparation and knowing and following these rules of civil procedure and the case law under them.

The automobile, highway, or premises liability case. The corporate representative deposition is important in all cases but especially important in these types of cases. In the automobile case, if the Defendant is a corporation, the Rule 30(b)(6) deposition can clear up who was driving, the training policies and program of the trucking company, and a myriad of issues. In the slip and fall case, the Rule 30(b)(6) deposition can clear up whether the accident happened the way that the plaintiff says it did, who owns the premises, and where the spill or other dangerous condition came from. The corporate representative deposition of the Defendant always should be used to secure information about the scene and the witnesses and to establish "the basics".

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Rule 30 (b) 6. Fed.R.Civ.P. 30(b)(6) governs the notice and the obligations of the corporate party producing a witness or witnesses. The Rule provides:

> **Notice or Subpoena Directed to an Organization**. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other 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. A subpoena must advise a nonparty organization of its duty to make this designation. 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.

Purpose of the Rule. The purpose of Rule 30(b)(6) is to prevent corporations from "bandying".[1] Bandying is when the corporation produces one officer or managing agent after another each of whom disclaims knowledge of certain facts or issues which clearly are known to someone within the organization. The deposing party is bandied about from one witness to another and getting nowhere.[2] Corporations would use the tactic of bandying to thwart inquiries during discovery and then stage an ambush during a later phase of the case.[3]

Obligations of each side. The Notice of Deposition is required to describe with reasonable particularity the areas of inquiry for examination.[4] Sufficient compliance by the deponent requires the deponent to provide the corporate entity with sufficient knowledge of the designated areas of inquiry stated by the requesting party.[5] The corporate deponent under Rule 30(b)(6) is obligated to prepare the corporate representative(s) to ensure that he or she give knowledgeable and binding

[1] *United States v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996).
[2] *Id*.
[3] *Rainey v. Am. Forest & Paper Ass'n*, 26 F. Supp. 2d 82, 95 (D.D.C. 1998).
[4] FED. R. CIV. P. 30(b)(6).
[5] *Id*.

answers for the corporation.[6] Failure by the corporate deponent to provide representatives with sufficient knowledge of the areas of inquiry can lead to a variety of sanctions.[7]

The notice of deposition. A sample notice of deposition in a motor vehicle case is attached hereto as EXHIBIT A.

The notice itself should: (a) name the corporation only, not any individual or representative of the corporation; (b) clearly indicate at the top and in the body of the notice that it is being taken pursuant to Fed.R.Civ.P. 30(b)(6) or whatever the state equivalent is in your state; and (c) describe in an exhibit the areas of inquiry.

The naming of the corporate entity is important. Do not name an individual whom you think you would want. That deposition does not have the binding power of the Rule 30(b)(6) deposition and is not subject to use at trial regardless of availability of the witness. Also, do not name the "person with the most knowledge of XYZ". That is also improper. See, e.g., *Carriage Hills Condominium Assoc., Inc. v. JBH Roofing & Constructors, Inc.* 109 So. 3d 329, 337-8 (Fla. 3d DCA 2013).

Fed.R.Civ.P. 30(b)(6) requires that the areas of inquiry listed in the requesting parties notice be described with reasonable particularity.[8] The Rule however does not define "reasonable particularity". Cases have wrestled with defining what is unduly broad.[9] The following are examples of areas of inquiry that district courts have held to be overbroad: (1)"the areas of inquiry will include but not be limited to the areas specifically enumerated[10]" and (2) "to examine such

[6] *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb. 1995) (citing *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989)).
[7] *Taylor*, 166 F.R.D. at 360.
[8] FED. R. CIV. P. 30(b)(6).
[9] *Marker v. Union Fid. Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989).
[10] *Id.*

officers and employees of such plaintiff as have knowledge of the matters involved in this action." [11] The corporate defendant in the first example "cannot identify the outer limits of the areas of inquiry noticed" therefore, the notice is not feasible. [12] Whereas the second example is too general, there is no proper designation or description of the person sought to be examined.[13]

In contrast, a notice identifying the area of inquiry as "the group health insurance plan issued to plaintiff through his employment with Xerox, Inc., believed to be numbered E9387" satisfied the reasonable particularity requirement.[14] The court looked to the plain language of the notice and held that "believed to be numbered E9387" did satisfy the reasonable particularity requirement.[15] A North Carolina district court in *Marker v. Union Fid. Life Ins.*, ruled that a request seeking "a person knowledgeable about the claims processing and claims records, and persons familiar with general file keeping, storage and retrieval systems of (the) defendant" satisfied the reasonable particularity requirement. [16] The court in *Marker* understood the request to be specific and understandable. [17]

In determining whether the area of inquiry satisfies the reasonable particularity requirement the court is not limited to the four corners of the Notice.[18] In *Alexander v. F.B.I.*, the district court ruled that letters sent after the Notice which enumerated several areas of testimony on which a named witness would be expected to testify was reasonably particular. [19]

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[11] *Morrison Exp. Co. v. Goldstone*, 12 F.R.D. 258, 260 (S.D.N.Y. 1952).
[12] *Reed*, 193 F.R.D. at 692.
[13] *Morrison Exp. Co. v. Goldstone*, 12 F.R.D. 258, 260 (S.D.N.Y. 1952) ; *Moore v. Lehigh Val. R. Co.*, 7 F.R.D. 65 (S.D.N.Y. 1946).
[14] *Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 442, 444 (D. Kan. 2000).
[15] *Id*.
[16] *Marker*, 125 F.R.D. at 126.
[17] *Id*.
[18] *Alexander v. FBI*, 186 F.R.D. 137, 140 (D.D.C. 1998).
[19] *Id*.

As a practical matter, the notice is required to be a combination of general and specific descriptions or list of the areas of inquiry. If it is too specific, the representative will testify only about those areas and when you examine him or her on the follow up questions, the defense will argue that that was outside the scope of the notice. If the notice is too broad, the defendant will object that they cannot prepare someone for that area.

The corporation's duty to prepare the witness. Rule 30(b)(6) places a duty on a corporation to provide a representative or representatives who are knowledgeable as to the area of inquiry stated in the notice by the requesting party.[20] A corporation is not relieved of its duties under Rule 30(b)(6) simply because it does not have an employee who participated in the underlying event or transaction who "has sufficient personal knowledge to provide the requested information."[21] In a case where the corporation does not have an employee on staff who has personal knowledge as to the event or transaction at issue the corporation must look to any **reasonably available** information to the corporation including: documents, past employees or other sources to prepare the representative to answer fully and completely any questions related to the area of inquiry.[22] The court in *Taylor*, explained that Rule 30(b)(6) implicitly requires:

> The designated representative "to review all matters known or reasonably available to it in preparation for the Rule 30(b)(6) deposition. This interpretation is necessary in order to make the deposition a meaningful one and to prevent the sandbagging of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial. . . .
> [A party] does not fulfill its obligations at the Rule 30(b)(6) deposition by stating it has no knowledge or position with respect to a set of facts or area of inquiry within its knowledge or reasonably available."[23]

[20] FED. R. CIV. P. 30(b)(6).
[21] *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb. 1995).
[22] *Taylor*, 166 F.R.D. at 361.
[23] *Id*. at 362.

However, Rule 30(b)(6) does not explicitly state the degree of research or investigation that must be conducted by the corporate representative in order to be deemed knowledgeable to testify as to the designated areas of inquiry. Thus, it is for the courts to construe whether the corporate representative has satisfied the knowledge requirement. The Court in *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc*. held that the corporate representative is obligated to review all corporate documentation that might have a bearing on the 30(b)(6) deposition topics.[24] The Massachusetts District Court stated that "even if the documents are voluminous and the review of those documents would be burdensome, the deponents are still required to review them in order to prepare themselves to be deposed."[25] Many District Courts across the country cite to this statement as the correct standard for testing the preparation of the representative.[26] In *Starlight International Inc. v. Herlihy,* the Court clarified that the obligation of the corporation producing the witness is to review all materials, not just materials generated thus far in the litigation as some have argued is the ruling of the Court in *Taylor*.[27] The Court in *Starlight* found that a corporation may not satisfy the requisite knowledge base of its corporate representative under Rule 30(b)(6) when the corporate representative only reviewed documents previously produced in depositions and spoke to the corporations attorney.[28] The court stated that this will not sufficiently prepare the corporate representative to testify to the area of inquiry.[29]

A widely cited standard is found in the District Court of Puerto Rico's decision *Mitsui & Co. v. Puerto Rico Water Res. Auth.*:

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[24] *Calzaturficio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 37(D. Mass. 2001).
[25] *Id*.
[26] *See QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 690 (S.D. Fla. 2012); *Chick–fil–A v. ExxonMobil Corp.*, No. 08–61422–CIV, 2009 WL 3763032 (S.D.Fla. Nov. 10, 2009).
[27] *Starlight Int'l, Inc. v. Herlihy,* 186 F.R.D. 626 (D. Kan. 1999).
[28] *Id*. at 638.
[29] *Id*.

> [a corporation]must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the requesting party] and to prepare those persons in order that they can **answer fully, completely, and unevasively, the questions posed as to the relevant subject matters**."[30]

(Emphasis added). It should be noted that Rule 30(b)(6) does not require the corporation to produce a person with the most knowledge regarding the area of inquiry; rather the corporation must only provide a corporate representative who is able to testify about matters known or reasonably available to the organization.[31] That is, the "person with the most knowledge" language should not be used in the notice.[32] That does not make sense if you read the rule and understand the respective obligations of the parties. The corporate witness is obligated to properly and fully educate the witness. The witness does not have to be someone with "firsthand" knowledge. But if the corporation chooses someone without firsthand knowledge, it is more likely that the witness is not going to know enough of the details to "**answer fully, completely, and unevasively, the questions posed as to the relevant subject matters".**[33]

Knowledge within the corporation's "control". The majority of District Courts faced with the issue of how to define the obligation of the corporation when the knowledge or information is not readily within their offices. Courts have applied the same "reasonably available" standard in Federal Rule of Civil Procedure 34. "Reasonably available" Under Rule 34 requires the responding parties to produce all documents that are in their "control." [34] "Control"

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[30] *Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Res. Auth.*, 93 F.R.D. 62, 67 (D.P.R. 1981).
[31] See *Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 729-30 (D. Mass. 1985).
[32] *Carriage Hills Condominium, Inc. v. JBH Roofing & Constructors, Inc.*, 109 So. 3d 329 (Fla. 4th DCA 2013).
[33] *Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Res. Auth.*, 93 F.R.D. 62, 67 (D.P.R. 1981).
[34] *Calzaturficio*, 201 F.R.D. at 38-9.; *Twentieth Century Fox Film Corp. v. Marvel Enterprises*, Inc., 01 CIV. 3016(AGS)(HB, 2002 WL 1835439 (S.D.N.Y. Aug. 8, 2002); *S.C. Johnson & Son, Inc. v. Dial Corp.*, 08 C 4696, 2008 WL 4223659 (N.D. Ill. Sept. 10, 2008)

does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, **documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action**.[35] For example, the Court in *Calzaturficio* concluded that the corporation had an obligation to review the tax related documents that were in possession of the corporation's accountant. Those documents were in the corporation's control because the corporation had the **legal right and the practical ability to obtain the documents** from the accountant.[36]

The Southern District Court of New York in In *Fox Film Corp. v. Marvel Enterprises, Inc.*, was the first District Court faced with the issue whether under Rule 30(b)(6) a corporation is obligated to prepare its corporate representative with both the corporation's own knowledge and the knowledge of its subsidiaries and or affiliates.[37] Following *Calzaturficio*, the Court applied the principles under Rule 34.[38] Thus, an entity subpoenaed pursuant to Rule 30(b)(6) must produce a witness prepared to testify with the knowledge of its subsidiaries if the subsidiaries are "within its control."[39]

However, four years later the Southern District Court of New York faced the same issue in *In re Ski Train Fire of November 11, 2000* would decline to adopt the holding in *Twentieth Century Fox*.[40] The District Court instead held that a corporate parent was not required to "acquire all of the knowledge of the subsidiary on matters in which the parent was not involved, and to testify to

[35] *Calzaturficio*, 201 F.R.D. at 39.
[36] *Id*.
[37] *Twentieth Century Fox Film Corp. v. Marvel Enters.*, Inc., No. 01 C 3016, 2002 WL 1835439 (S.D.N.Y. August 8, 2002).
[38] *Twentieth Century Fox Film Corp*, 2002 WL 1835439, at *2, 4.
[39] *Id*. at 4.
[40] *In re Ski Train Fire of November 11, 2000,* Kaprun, Austria, No. MDL 1428(SAS)THK, 2006 WL 1328259 *9 (S.D.N.Y. May 16, 2006).

those matters in a manner which binds the parent, a separate legal entity," because the subsidiary's knowledge was not "reasonably available" for purposes of Rule 30(b)(6).[41] The decision in *In re Ski Train Fire of November 11, 2000*, by the Southern District of New York created a split in authority on whether a corporate parent was required to acquire knowledge of its subsidiary on matters in which the parent corporation was not involved.[42]

The Northern District of Illinois in 2010 was faced with this split in authority in *S.C. Johnson & Son, Inc.*[43] The court turned to the 1970 Advisory Committee notes for Rule 30(b)(6) for guidance. The Court stated that "the Advisory Committee was aware that Rule 30(b)(6) imposed new burdens on the organization being deposed, such as the burden of identifying the proper witness."[44] The court noted that the Advisory Committee wrote that this burden is "not essentially different than the burden of answering interrogatories ... and is in any case lighter than that of an examining party ignorant of who in the corporation has knowledge."[45] The Court found that the comment manifests intent to shift certain burdens to the entity that is in a better position to obtain useful information.[46] Following guidance from the Advisory Committee's note, the court concluded that the corporation was not forced to acquire all of the knowledge of its subsidiaries, rather only the focused area of inquiry stated in the Notice.[47] The Court also added that the corporation was not required to designate one of its own employees to provide testimony regarding

[41] *Id*.
[42] In re Ski Train Fire of November 11, 2000, 2006 WL 1328259 *9 (S.D.N.Y. May 16, 2006);S.*C. Johnson & Son, Inc. v. Dial Corp.*, 08 C 4696, 2008 WL 4223659 at *2 (N.D. Ill. Sept. 10, 2008).
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*.

its subsidiary, but rather could designate any person or persons most familiar with the designated topics.[48]

What if the Corporate Representative Does Not Possess Knowledge. A corporation may not avoid a Rule 30(b)(6) deposition by claiming a lack of knowledge on the topic.[49] The requesting party is entitled to take the deposition of the corporate representative to test this claim.[50] When a corporate defendant failed to provide a corporate representative on two different occasions, the Court held the corporate defendant had demonstrated "deliberate and contumacious disregard of the Court's previous orders" and as a result struck down the corporate defendant's pleadings.[51]

In *Resolution Trust Corp. v. Southern Union Co.*, the Fifth Circuit Court of Appeals held that a defendant corporation's failure to produce a knowledgeable representative was the equivalent of producing no representative.[52] During the deposition of the first corporate representative the requesting party recited each item of inquiry designated in their Notice and asked if the corporate representative had knowledge thereof.[53] In every instance the corporate representative responded by saying "no."[54] The second corporate representative offered by the corporation was equally unknowledgeable.[55] The court's rationale was that the corporate defendant appears vicariously through the corporate representative.[56] Hence, if the corporate representative

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[48] *Id*.
[49] I*erardi v. Lorillard*, 1991 WL 158911 at *1 (E.D. Pa. 1991) (citing Amherst Leasing Corp. v. Emhart Corp., 65 F.R.D. 121, 122 (D.Conn.1974)).
[50] *Id*.
[51] *Id*.
[52] *Resolution Trust Corp. v. S. Union Co., Inc.*, 985 F.2d 196, 197 (5th Cir. 1993).
[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] *Id*.

is not knowledgeable, the appearance of the corporate representative is equivalent to no appearance at all. [57]

To prevent a deposition of a corporate representative who does not possess knowledge, Courts have required that a corporation provide more than one corporate representative for the area of inquiry to be available during the deposition.[58] The court in *Dravo Corp. v. Liberty Mut.*, stated that if during the deposition it becomes obvious that that the corporate representative is not knowledgeable on the area of inquiry, the defendant corporation must provide a substitute representative.[59] Failure to provide a corporate representative who has knowledge and or a substitute who has knowledge in the area of inquiry will generally result in mandatory monetary sanctions under Federal Rule of Civil Procedure 37(d).[60]

Sanctions for Failing to Provide Knowledgeable Corporate Representative. The Southern District of Florida in *King v. Pratt & Whitney (King I)* said:

> Rule 30(b)(6) obligates the responding corporation to provide a witness who can answer questions regarding the subject matter listed in the notice.... If the designated deponent cannot answer those questions, then the corporation has failed to comply with its Rule 30(b)(6) obligations and may be subject to sanctions.[61]

Under Federal Rule of Civil Procedure 37(d), mandatory monetary sanctions will be assessed against a corporation who fails to provide a corporate representative who possesses knowledge so long as the corporation's conduct was not substantially justified.[62] The rule provides

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[57] *Id*.
[58] *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. at 75.
[59] *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb. 1995)
[60] *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 174 (D.D.C. 2003).
[61] *King 1*, 161 F.R.D. at 476.
[62] *Int'l Ass'n of Machinists & Aerospace Workers v. Werner-Masuda*, 390 F. Supp. 2d 479, 489 (D. Md. 2005) (quoting *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 174 (D.D.C. 2003)).

that a court "shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees caused by the failure…."[63] The court in *Bank of New York v. Meridien BIAO Bank Tanzania Ltd* held that "In order for the Court to impose sanctions, the inadequacies in a deponent's testimony must be egregious and not merely lacking in desired specificity in discrete areas."[64] An example of a corporate representative's testimony that is considered egregious and lacking in desired specificity in discrete areas was displayed in *Resolution Trust Corp. v. Southern Union,* when the corporate representative testified that he had no knowledge as to each area of inquiry designated in the Notice.[65] Sanctions were also issued in *Thomas v. Hoffman-Laroche, Inc.,* when the corporation provided medical doctors as corporate representatives to testify to areas of inquiry they did not possess knowledge of, such as the marketing of a drug and dissemination of information.[66] The Southern District of Florida found sanctions appropriate when the corporation failed to prepare its corporate representatives to testify to two areas of inquiry and the corporation's attorney improperly instructed witnesses not to answer questions and improperly made speaking objections during the course of these depositions.[67]

In contrast, A New York district court did not find sanctions appropriate when all four deponents testified at length concerning the areas of their respective designations and only demonstrated confusion due to a language barrier. [68] One Court has said that if the corporate

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[63] *Id*.
[64] *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997)
[65] *Resolution Trust Corp.*, 985 F.2d at 197.
[66] *Thomas v. Hoffman-Laroche, Inc.*, 126 F.R.D. 522, 523-4 (N.D. Miss. 1989).
[67] Quantachrome Corp. v. Micromeritics Instrument Corp., 189 F.R.D. 697, 699 (S.D. Fla. 1999).
[68] *Zappia Middle East Constr. Co. v. The Emirate of Abu Dhabi*, No. 94 Civ. 1942, 1995 U.S. Dist. LEXIS 17187, at *14,26 (S.D.N.Y. Nov. 17, 1995).

representative answers at least some questions in depth and there has been a good faith effort to prepare the representative, the defendant corporation will not receive dispositive sanctions and only order a re-deposition.[69]

Former employees. The Court in *Taylor*, stated that in a case where the corporation does not have an employee on staff who has personal knowledge as to the event or transaction at issue the corporation must look to any reasonably available information to the corporation including past employees.[70] *United States v. Massachusetts Indus. Fin. Agency* followed the reasoning set forth in *Taylor* when the Court rejected the corporation's claim that the corporation was not required under Rule 30(b)(6) to educate its corporate representative about actions taken by former employees of the corporation.[71] A corporation also has the option of designating a former employee as a corporate representative.[72]

One issue where a former employee testifies is whether communications between counsel and the former employee waive the attorney-client privilege or the work product privilege? In *Miramar Const. Co. v. Home Depot, Inc.*, the Court held that the attorney-client privilege protects communications between counsel and former employee who is designated as the corporate representative.[73]

Fact witnesses as corporate representatives. An individual may testify as both a fact witness and a corporate representative under Rule 30(b)(6).[74] The fact that a witness was deposed in their individual capacity as fact witness does not thwart the corporation from designating the

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[69] *Wilson v. Lakner*, 228 F.R.D. 524, 530 (D. Md. 2005)(citing Zappia Middle East Constr. Co., 1995 U.S. Dist. LEXIS 17187, at *9).
[70] Taylor, 166 F.R.D. at 361.
[71] *United States v. Massachusetts Indus. Fin. Agency*, 162 F.R.D. 410, 412 (D. Mass. 1995).
[72] Ierardi, 1991 WL 158911 at *2.
[73] *Miramar Const. Co. v. Home Depot, Inc.*, 167 F. Supp. 2d 182, 183 (D. Puerto Rico 2001).
[74] Ierardi, 1991 WL 158911 at *2.

same witness as the corporation's corporate representative or vice-versa.[75] The court in *AIA Holdings S.A. v. Lehman Bros. Inc.*, held that a corporation under Rule 30(b)(6) could adopt the testimony of its principals in their individual capacities as the testimony of the entity. [76]

The testimony; facts v. subjective beliefs and opinions. The majority of District Courts follow the reasoning in *United States v. Taylor* on whether a corporate representative is obligated to provide the corporations subjective beliefs and opinions.[77] The corporate representative represents the corporation at the deposition, just as an individual would represent themselves at their deposition.[78] The corporate representative does not give his personal opinions; rather he presents the corporation's beliefs and opinions on the topic.[79] Some Courts have created safeguards for the corporate defendant by holding that a Court should first be satisfied that the employee has the requisite knowledge and authority to make an accurate statement.[80]

In *Brazos River Auth. v. GE Ionics, Inc.*, the Fifth Circuit Court of Appeals held that the corporate defendant violated Rule 30(b)(6) when the corporate representative failed to provide the subjective beliefs of the corporation and such beliefs were within the collective knowledge of the corporate defendant.[81] The corporation's claim that the corporate representative lacked personal knowledge to testify to the subjective belief of the corporation was without merit, the corporate representative does not testify to his personal knowledge and perception rather he testifies vicariously for the corporation as to the corporation's knowledge and perceptions.[82] The

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[75] *Veritas-Scalable Investment Products Fund v. FB Foods, Inc.*, 2006 WL 1102757 (D. Conn. 2006)(unreported).
[76] *AIA Holdings S.A. v. Lehman Bros. Inc.*, 2002 WL 141356 (S.D.N.Y. 2002)(unreported).
[77] *Taylor*, 166 F.R.D. at 361.
[78] *Id*.
[79] *Id*.
[80] *Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 20 (E.D. Pa. 1986).
[81] *In Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 434 (5th Cir. 2006).
[82] *Id*.

corporation had a duty to prepare the corporate defendant on the issue and to convey information obtained from individuals with personal knowledge within the organization to the representative.[83] The Court of Appeals did however limit the corporate representative from offering subjective beliefs that would otherwise require expert qualifications.[84]

Interrogatories and the corporation's interpretation of documents. A Pennsylvania District Court held that contention interrogatories were neither adequate nor appropriate when the requesting party was seeking the corporation's knowledge of facts.[85] In contrast, in *Exxon Research & Eng'g Co. v. United States*, 44 Fed. Cl. 597, 602 (Fed. Cl. 1999), the Federal Court held that at least initially contention interrogatories would be more appropriate where the issue involved interpretation of complex patent documents were at issue.[86] If the answers to the contention interrogatory were inadequate, the Court held that the other party could take a Rule 30(b)(6) deposition at which Exxon's in-house patent attorney would need to testify.[87]

The scope of the deposition itself. In *King v. Pratt & Whitney*, the Southern District of Florida held that Rule 30(b)(6) does not limit the scope of the inquiry at deposition. The corporate representative cannot avoid answering questions of which he or she has knowledge even if the question not within an area of inquiry described or listed on the notice.[88] The Rule does not limit the scope of the questions at deposition, the purpose of the rule is to streamline discovery not to extend it, and the party seeking the deposition could simply re-notice a deponent under Rule 30(b)(6) and ask the same question that was objected to.[89] The deposing party should not be forced

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[83] *Id*.
[84] *Id*. at 435.
[85] Ierardi, 1991 WL 158911 at *1.
[86] *Exxon Research & Eng'g Co. v. United States*, 44 Fed. Cl. 597, 603 (Fed. Cl. 1999).
[87] *Id*.
[88] *King v. Pratt & Whitney*(I), 161 F.R.D. 475, 476 (S.D.Fla.1995).
[89] *Id*.

to jump through that extra hoop absent some compelling reason.[90] The District Court in *King* was affirmed by the 11th Circuit in a memorandum decision at *King v. Pratt & Whitney (King II).*[91] See also, *Detoy v. City and County of San Francisco,* where the Court held that the holding in *King* provided an accurate and more logical interpretation of Rule 30(b)(6), stating that the "reasonable particularity" requirement, as interpreted in *King* facilitates discovery as the Advisory Committee intended, instead of hampering discovery as *Paparelli* (the one case holding against the King decision) does.[92] While analyzing *Paparelli*, the Court found that it ignored the liberal discovery requirements of Federal Rule of Civil Procedure 26(b)(1)[93] that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.[94] "The 30(b)(6) Notice establishes the minimum about which the witness must be prepared to testify, not the maximum."[95] Following the *Detoy* decision, the line of reasoning set forth in *King* has been unanimously accepted by courts across the country.[96]

The effect of the corporate representative testimony which is outside the scope of the notice. The Court in *Detoy* held:

> This court agrees with the rationale of the court in the *King* case. At the same time, the court recognizes that defending counsel may fear ambush, and that the designating entity could be bound by the witness's answers or that the answers could be construed as admissions by the designating

[90] *Id*.
[91] King v. Pratt & Whitney (King II), 213 F.3d 647, 647 (11th Cir. 2000) (unpublished table decision).
[92] *Id*. at 367.
[93] *Id*. at 366.
[94] *Id*.
[95] *Id*.
[96] *Am. Gen. Life Ins. Co. v. Billard*, C10-1012, 2010 WL 4367052 (N.D. Iowa Oct. 28, 2010); See, e.g., *Philbrick v. Enom, Inc.*, 593 F.Supp.2d 352, 363 (D.N.H.2009); Detoy v. City and County of San *Francisco*, 196 F.R.D. 362,366(N.D.Cal.2000*); Cabot Corp. v. Yamulla Enterprises, Inc.*, 194 F.R.D. 499 (M.D.Pa .2000); *Overseas Private Inv. Corp. v. Mandelbaum*, 185 F.R.D. 67 (D.D.C.1999); *Edison Corp. v. Town of Secaucus*, 17 N.J. Tax 178, 182 (1998).

> entity, or that the questions may enter into territory where the witness is unprepared.[97]

The court in *Detoy* explicitly stated that a corporate representative's answer to a question outside the area of inquiry could be construed as an admission by the corporation.[98] However, the Court in *Detoy* did allow counsel to note on the record that answers to questions outside the scope of the notice and were not intended as answers of the designating party and would not bind that party.[99] The Court also suggested that prior to trial, counsel could request from the court instructions to the jury that such answers were merely the answers or opinions of individual fact witnesses, not admissions of the party.[100] The practical effect may be the same; The testimony which is outside the scope of the notice will be an admission of the party and therefore admissible.

Work product privilege of the corporation. The Work Product Privilege has generally been raised as a shield by corporations when their proponent mirrors the following inquiries: "all facts that lead to raised defenses"[101] or the corporation cannot retain a corporate representative who has personal knowledge of the incident at question and the inquiry states "all facts of the relevant incident."[102] In 2005, a Maryland District Court in *Wilson v. Lakner* was faced with the issue of whether an inquiry regarding "facts of a relevant incident" violated the privilege when the corporation's investigation into the facts of the relevant incident was conducted by the defendant corporation's counsel and an in-house committee where the investigation by the committee was privileged under state law.[103] *Wilson* held that **an entity may not use the Work**

[97] *Detoy* 196 F.R.D. at 367.
[98] *Id*.
[99] *Id*.
[100] *Id*.
[101] See *U.S. E.E.O.C. v. Caesars Entm't, Inc.*, 237 F.R.D. 428 (D. Nev. 2006).
[102] See *Wilson v. Lakner*, 228 F.R.D. 524 (D. Md. 2005).
[103] *Id*.

Product Doctrine as a shield from preparing a corporate representative for their 30(b)(6) deposition when knowledge of inquiry was only discovered by means that are privileged.[104]

The corporate representatives in *Wilson* claimed that the information was discovered by way of investigations that were privileged.[105] The Court said that while counsel's investigation was protected by the work product privilege and that the in-house committee peer review was privileged by reason of a Maryland statute, the hospital must still provide a corporate representative prepared to respond to the 30(b)(6) notice.[106] The court declared that **if preparation of the corporate representative means following much of the same investigative grounds that counsel and in-house committee had done, but independently of that investigation, so be it**.[107]

Courts have distinguished the holding in *Wilson* when the case involves a governmental agency which does not have independent knowledge of the incident at issue in the litigation. In *Wilson*, the hospital had independent knowledge of the incident at issue due to the fact that the incident occurred at the hospital. In contrast, the court in S*.E.C. v. SBM Inv. Certificates, Inc.,* the District Court found that the SEC, a law enforcement agency, has no independent knowledge of the defendants' financial affairs, thus only the results of the SEC's investigation could be inquired into in a Rule 30(b)(6) deposition, and such inquiry would inevitably and improperly invade the work product of SEC investigating attorneys.[108] Similarly, in *E.E.O.C. v. McCormick & Schmick's Seafood Restaurants, Inc*., the District Court held that the EEOC did not have independent knowledge of the events at issue and could only speak to matters known through attorney

[104] *Id*. at 529.
[105] Id. at 526.
[106] *Id*. at 529.
[107] *Id*.
[108] *S.E.C. v. SBM Inv. Certificates, Inc.*, CIV A DKC 2006-0866, 2007 WL 609888 at *25 (D. Md. Feb. 23, 2007).

involvement in anticipation of litigation, which would inevitably invade the work product privilege.[109]

Courts are split as to whether to allow parties to use 30(b)(6) depositions to explore facts underlying legal claims and theories. In *U.S. E.E.O.C. v. Caesars Entm't, Inc.*, the Court held that the requesting party may state the area of inquiry to be the facts and the source of information about the defendants' claims and defenses so long as the asking party does not probe the mental impressions or thought processes of counsel.[110] The District Court in the *SEC v. Buntrock* explained that the Court should look to the subject matter of the proposed inquiry:

> **There is simply nothing wrong with asking for facts from a deponent even though those facts may have been communicated to the deponent by the deponent's counsel.** But, depending upon how questions are phrased to the witness, deposition questions may tend to elicit the impressions of counsel about the relative significance of the facts; opposing counsel is not entitled to his adversaries' thought processes. Here the effort must be to protect against indirect disclosure of an attorney's mental impressions or theories of the case.[111]

(Emphasis added).

Sanctions for improper assertion of privilege. The Court may impose sanctions on the corporation when the corporation unjustifiably relies on numerous privileges such as the work product privilege or the attorney-client privilege.[112] The Court in *Allstate Texas Lloyds v. Johnson* sanctioned a corporation monetarily and disallowed any further discovery for the corporation in

[109] *E.E.O.C. v. McCormick & Schmick's Seafood Restaurants, Inc.*, CIV.A. WMN-08-CV-984, 2010 WL 2572809 at *4 (D. Md. June 22, 2010).
[110] *U.S. E.E.O.C. v. Caesars Entm't, Inc.*, 237 F.R.D. 428, 434-5 (D. Nev. 2006).
[111] *Buntrock*, 217 F.R.D. at 446 (quoting *Protective Nat'l Ins. Co. of Omaha v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 280 (D. Neb. 1989)).
[112] See *Allstate Texas Lloyds v. Johnson*, 784 S.W. 2d 100 (Tex. App. 1989).

response to the corporation unduly raising the privileges to the majority of the requesting parties inquiries.[113]

The binding nature of the testimony. A corporation has a duty to produce corporate representatives which the corporation has prepared so that the representatives can give complete, knowledgeable, and binding answers on behalf of the corporation.[114]

The District of Columbia in *Rainey v. American Forest & Paper Ass'n*, prevented the defendant corporation from presenting evidence which conflicted with the corporation's corporate representative's deposition testimony.[115] The court in *Rainey*, stated Rule 30(b)(6) obligates a corporate party to prepare its representative to be able to give binding answers on its behalf; unless it can be proven that the information was not known or was inaccessible.[116] A corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition.[117]

In *Estate of Thompson v. Kawaski Heavy Indus., Ltd.*, a design defect case, an Iowa district court found the approach in *Rainey* to be the most consistent with the purpose of rule 30(b)(6), which is to permit the requesting party to discover the corporation's position.[118] It is also appropriate to bind the corporation to the corporate representative's testimony based on the fact that the corporation itself selects the corporate representative to speak for it and has the opportunity

[113] *Allstate Texas Lloyds v. Johnson*, 784 S.W. 2d 100, 106 (Tex. App. 1989).
[114] *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb. 1995) (citing Marker v. Union Fid. Life Ins. Co., 125 F.R.D. 121, 126 (M.D.N.C. 1989)).
[115] *Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998).
[116] *Id.*
[117] *Id.*
[118] *Estate of Thompson v. Kawasaki Heavy Indus., Ltd.*, 291 F.R.D. 297, 304 (N.D. Iowa 2013).

to prepare the representative.[119] The *Rainey* Court distinguishes Rule 30(b)(6) testimony from an individual deposed under rule 30(b)(1).[120]

Some courts believe that "the testimony given at a Rule 30(b)(6) deposition is evidence, which like any other deposition testimony, can be contradicted and used for impeachment purposes"[121] and that such testimony does not bind the designating entity "in the sense of a judicial admission."[122] Other courts suggest that that a corporation is bound by the testimony of its Rule 30(b)(6) designee and cannot introduce evidence contradicting the testimony.[123]

One Court has said: "When the Court indicates that the Rule 30(b)(6) designee gives a statement or opinion binding on the corporation, this does not mean that said statement is tantamount to a judicial admission. Rather, just as in the deposition of individuals, it is only a statement of the corporate person which, if altered, may be explained and explored through cross-examination as to why the opinion or statement was altered. However, the designee can make admissions against interest under Fed.R.Evid. 804(b)(3) which are binding on the corporation."[124]

The Northern District of Illinois in two separate decisions hold that "the testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be

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[119] *Id.*
[120] *Mitchell Eng'g v. City & Cnty. of San Francisco*, C 08-04022 SI, 2010 WL 455290 * at 1(N.D. Cal. Feb. 2, 2010)(citing *Sabre v. First Dominion Capital, LLC*, No. 01-2145, 2001 WL 1590544, at * 1 (S.D.N.Y. Dec.12, 2001).
[121] *Indus. Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000).
[122] *Taylor*, 166 F.R.D. at fn7.
[123] I*erardi*, 1991 WL 158911 at *2; See *Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82 (D.D.C. 1998).
[124] *Taylor*, 166 F.R.D. at fn7.

contradicted and of course used for impeachment purposes."[125] See also, A.I. Credit Corp. v. Legion Ins. Co.[126] and *Great Am. Ins. Co. of NY v. Summit Exterior Works*, LLC. [127]

Some Courts, including the Southern District of Florida, follow a "hybrid" approach.[128] These cases state that when the corporate representative legitimately lacks the ability (because of lack of knowledge or failing memory) to answer relevant questions and the corporation fails to provide an adequate substitute the corporation will then be bound by the corporate representative's "I don't know" or "we don't know" response.[129] This precludes the corporation from offering evidence at trial on these points.[130] The practical purpose behind the hybrid theory is that it prevents trial by ambush.[131]

A gray area exists among the courts under the *Rainey* and "hybrid" approach. Both lines of cases preclude the corporation from offering new evidence pertaining to the corporate representative's testimony. The question then is whether the binding effect qualifies as a judicial admission.[132] Some Courts have interpreted the "binding" testimony as an evidentiary admissions rather than a judicial admission.[133] However, one decision from a Mississippi District Bankruptcy Court held that the corporate representative's Rule 30(b)(6) deposition did conclusively bind the

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[125] *Indus. Hard Chrome, Ltd. v. Hetran, Inc*., 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000); *W.R. Grace & Co. v. Viskase Corp.*, No. 990 C 5383, 1991 WL 211647, at *2 (N.D.Ill. Oct.15, 1991).
[126] *A.I. Credit Corp. v. Legion Ins. Co.*,265 F.3d 630, 637 (7th Cir.2001).
[127] *Great Am. Ins. Co. of NY v. Summit Exterior Works*, LLC, 3:10 CV 1669 JGM, 2012 WL 459885 at *4 (D. Conn. Feb. 13, 2012).
[128] *Wilson v. Lakner*, 228 F.R.D. 524, 530 (D. Md. 2005); *QBE Ins. Corp. v. Jorda Enterprises*, Inc., 277 F.R.D. 676, 690 (S.D. Fla. 2012); *Ierardi v. Lorillard*, Inc., CIV. A. 90-7049, 1991 WL 66799 at *2,3 (E.D. Pa. Apr. 15, 1991).
[129] *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 690 (S.D. Fla. 2012)
[130] *Id*.
[131] *Id*.
[132] See *Johnson v. Big Lots Stores, Inc.*, CIV.A. 04-3201, 2008 WL 6928161 (E.D. La. May 2, 2008).
[133] *Media Servs. Grp., Inc. v. Lesso, Inc.*, 45 F. Supp. 2d 1237, 1254 (D. Kan. 1999); *Johnson v. Big Lots Stores, Inc.*, CIV.A. 04-3201, 2008 WL 6928161 *6 (E.D. La. May 2, 2008).

corporation to the position that "collusive fraud" did occur.[134] As a result the court dismissed the corporation's libel count against the defendants.[135]

Use of errata sheets. Under Fed.R.Civ.P. 30(e), deponents are given thirty days after receiving notice that their deposition testimony is ready in which, "if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them."[136] Rule 30(e) allows the deponent to use an errata sheet, indicating the changes and corrections to the witness's deposition testimony. If the changes are granted, the changes are admissible in evidence as it becomes part of the testimony.[137]

Under a strict interpretation of the Rule, Courts have limited the changes to matters of form and not the substance of the testimony given under oath.[138] Other courts have taken a more literal interpretation of Rule 30(e), allowing the deponent to make any changes to the deposition transcript. Early interpretations of the Rule 30(e) followed the literal interpretation, while more recent decisions follow the strict interpretation of Rule 30(e).[139]

In *Lugtig v. Thomas*, the Northern District of Illinois followed the literal interpretation of Rule 30(e) and contended that Rule 30(e) allows deponents to make any changes in form or substance even if the changes contradict the original answers and even if the deponent's reason for making the changes are unconvincing.[140] The language of Rule 30)(e) does not place limitations on the type of changes that may be made by a witness before a witness finalizes his or her

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[134] *In re River Oaks Furniture, Inc.*, 276 B.R. 507, 525 (Bankr. N.D. Miss. 2001).
[135] *Id*.
[136] FED. R. CIV. P. 30(e).
[137] *Motel 6, Inc. v. Dowling*, 595 So. 2d 260, 262 (Fla. 1st Dist. Ct. App. 1992).
[138] *Id*.
[139] See, e.g., *Lugtig v. Thomas, 89 F.R.D. 639*, (N.D. Ill. 1981)
[140] *Id*. at 641.

deposition.[141] The Court did not believe that the language requires a judge to examine the "the sufficiency, reasonableness, or legitimacy of the reasons for the changes."[142] The Court's rationale was that allowing a witness to change his deposition testimony before trial eliminates the likelihood of deviations from the original deposition testimony at trial which would reduce surprises at trial.[143]

In contrast, the District Court in *Greenway v. International Paper Co.*, set forth the rationale for the strict interpretation of Rule 30(e), when the deposed party sought to make sixty-four corrections to her deposition and the majority of the changes sought to materially alter the testimony.[144]

> The Rule cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination.[145]

The Eleventh Circuit followed the strict interpretation of Rule 30(e), in the unpublished opinion *Amlong & Amlong, P.A. v. Denny's Inc*. In *Amlong*, the Court affirmed the Florida District Court decision in *Reynolds v. IBM*, where the court applied a strict interpretation of Rule 30(e) and disregarded an errata sheet that attempted to make material changes to a deposition on the grounds

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[141] *Id*.
[142] *Id*.
[143] Id.
[144] *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 323 (W.D. La. 1992).
[145] *Id*. at 325.

that the deponent was "confused" at the time of the deposition.[146] The majority of circuits have followed Eleventh Circuit by applying a strict interpretation to Rule 30(e).[147]

The number of witnesses. The corporation may have to provide more than one representative. It is the corporation's burden to provide witnesses on each of the areas of inquiry listed. That may require several witnesses. In *Bichage v. United States,* the District Court affirmed the Court allowed 5 Rule 30(b)(6) depositions on the jurisdictional issues alone. [148]

Use of Rule 30(b)(6) depositions at trial. Under Fed.R.Civ.P.32(a)(3), Rule 30(b)(6) deposition testimony of a corporate party may be used at trial by the adverse party for any purpose.[149] The rule is to be liberally construed and though the court "has discretion to exclude parts of the deposition that are unnecessarily repetitious in relation to the testimony of the party on the stand, it may not refuse to allow the deposition to be used merely because the corporate representative is available to testify in person."[150] Thus, an adverse party is permitted to introduce the deposition of the corporate representative as part of his substantive proof, regardless of the corporate representative's availability to testify at trial.[151]

As stated in the rule, only the adverse party may introduce the testimony, barring the corporation from affirmatively introducing its own Rule 30(b)(6) witness's deposition testimony.[152] The court in *Brazos* held that the corporation cannot put on the testimony of its

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[146] *Amlong & Amlong, P.A. v. Denny's, Inc.*, 457 F.3d 1180, 1221 (11th Cir. 2006).
[147] Gregory A. Ruehlmann, Jr., "A Deposition Is Not A Take Home Examination": Fixing Federal Rule 30(e) and Policing the Errata Sheet, 106 Nw. U. L. Rev. 893, 901 (2012).
[148] *Id*.
[149] FED. R. CIV. P. 30(a)(2).
[150] *Superior Diving Co. v. Watts*, 2008 WL 533804, at *2 (E.D.La. Feb.22, 2008)(citing Gauthier v. Crosby Marine Serv., Inc., 752 F.2d 1085, 1089 (5th Cir. 1985)) ; 8A Wright et al., Federal Practice and Procedure § 2145 (2d ed.2008).
[151] *Coughlin v. Capitol Cement Co.*, 571 F.2 290, 308 (5th circ. 1978).
[152] *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 432 435 (5th Cir. 2006).

corporate representative which was obtained from hearsay as that is not an admission and therefore is hearsay. Of course, the corporate representative as anyone can testify from personal knowledge as opposed to composite knowledge of the corporation. [153]

Corporate representative testifying at trial. The court in *Brazos* states that:

> Although there is no rule requiring that the corporate designee testify "vicariously" at trial, as distinguished from at the rule 30(b)(6) deposition, if the corporation makes the witness available at trial he should not be able to refuse to testify to matters as to which he testified at the deposition on grounds that he had only corporate knowledge of the issues, not personal knowledge.[154]

The Fifth Circuit has said that the previously designated Rule 30(b)(6) witness can be questioned in his representative capacity at trial if he or she is present.[155] While testifying in the representative capacity, the witness may testify to matters within corporate knowledge to which he or she testified in the Rule 30(b)(6) deposition.[156] The corporation may not use the corporate representative at trial to advance the corporation's position in direct examination unless it can be shown that the witness during the deposition was testifying from personal knowledge as opposed to the composite knowledge of the corporation. [157]

Offensive use of the corporate representative deposition; hearsay. A Plaintiff can use the corporate representative deposition at trial regardless of availability of the witness, Fed.R.Civ.P. 32(a)(3). Further, the testimony of the representative is an admission and therefore not hearsay. Fed.R.Evid. 801 (d) (2) provides that an admission is an opposing party's statement and

The statement is offered **against an opposing party** and:

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[153] *Id*.
[154] *Id*. at 434.
[155] *Id*.
[156] *Id*.
[157] *Id*.

(A) was made by the party in an individual or representative capacity;
(B) is one the party manifested that it adopted or believed to be true;
(C) was made by a person whom the party authorized to make a statement on the subject;
(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

(Emphasis added). Fed.R.Evid. 801. Therefore, if the Defendant offers the corporate representative at trial to testify live or in deposition about the matters on which the representative was educated for the deposition, that testimony is hearsay and should be inadmissible. The same matters if the other side were to offer them would be an admission and therefore not hearsay in the first place.

Under Fed.R.Evid. 602 "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the **witness had personal knowledge** of the matter."[158] Thus, a corporate representative may not testify to matters outside his own personal knowledge "to the extent that information is hearsay not falling within one of the authorized exceptions."[159] A witness may not simply repeat the subject matter of a hearsay statement, nor may he rely on inadmissible hearsay as a substitute for the witness's knowledge.[160] The court in *Union Pump Co., v. Centrifugal Technology Incorporated* found the corporate representative's testimony that another employee discovered the fact that the hard drives were missing was hearsay.[161] The Court was not persuaded by the corporation's argument that the corporate representative was permitted to testify to

[158] *U.S. v. El-Mezain*, 644 F. 3d 467, 495 (5th Cir. 2011);*See* Fed. R. Evid. 602.
[159] *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 F. App'x 899, 907-8 (5th Cir. 2010).
[160] *El-Mezain*, 644 F. 3d at 495.
[161] *Union Pump Co.*, 404 F. App'x at 907-8.

statements of hearsay because the statements were matters within the corporation's knowledge.[162] The Fifth Circuit Court of Appeals found no merit to the corporation's argument that the District Court improperly excluded evidence of actual practices within the industry when the corporate representative testified to statements made by others.[163] The corporate representative testified as to the statements made by other vessel owner's regarding their maintenance practices.[164] The corporation claimed that the testimony of other vessel owners was not offered for the truth of the matters asserted but to demonstrate the corporation's understanding of the industry practices.[165] The court affirmed the district court's holding that the corporate representative had no personal expert knowledge on these matters, and that the testimony pertaining to the statements made by the undisclosed other vessel owners were inadmissible hearsay.[166]

Defendants also have attempted to use the corporate representative as an undisclosed expert. In *Kloster Cruise Ltd. v. Grubbs*, 762 So. 2d 552, 554 (Fla. 3d DCA 2000), the appellate court affirmed a judgment and approved the exclusion of testimony of a corporate representative about safety inspections on the ship. The corporate representative was in essence an undisclosed expert.

Introducing videotaped deposition at trial. By virtue of Fed.R.Civ.P. 32(a)(3), an adverse party is not required to the call the corporate representative "live" in its case-in-chief.[167] Thus, the adverse party may introduce in its case-in-chief the corporate representative's Rule

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[162] *Id*.
[163] *Deutsche Shell Tanker Gesellschaft mbH v. Placid Ref. Co.*, 993 F.2d 466, fn 29 (5th Cir. 1993).
[164] *Id*.
[165] *Id*.
[166] *Id*.
[167] *Estate of Thompson*, 291 F.R.D. at 308-9 (citing *Jamsport Entm't, LLC v. Paradama Prods., Inc.*, 02 C 2298, 2005 WL 14917 *4 (N.D. Ill. Jan. 3, 2005).

30(b)(6) deposition testimony via videotape as long as the videotaped testimony satisfies the Federal Rules of Evidence (ex. Fed.R.Evid. 611(a)) .[168]

The Northern district court of Iowa re-affirmed the *Jamsport* interpretation by holding that Rule 32(a)(3) authorizes an adverse party to introduce a videotaped Rule 30(b)(6) deposition in their case-in-chief notwithstanding the availability of the corporate representative.[169] The Southern District of Florida follows this reasoning. [170]

The apex doctrine. An "apex" deposition is a deposition of a corporate a corporate officer who is at the peak of the corporation, such officers include but are not limited to the: CEO, CFO, President and Vice-President. An objection based on the apex doctrine should not be appropriate to a proper Rule 30(b)(6) notice of deposition.

The Apex Doctrine originates from the Texas Supreme Court decision *Crown Cent. Petroleum Corp. v. Garcia*.[171] The Court in *Garcia* outlined guidelines that must be satisfied in order for the requesting party to depose a person at the apex of the corporate hierarchy.[172] When a corporate president or other high level corporate official files a motion for a protective order to prohibit the deposition of an apex official of the corporation the trial court must first determine whether the requesting party has arguably shown that the apex official has any unique or superior personal knowledge of discoverable information.[173] If the requesting party cannot show that the official has any unique or superior personal knowledge of discoverable the information the trial

[168] *Id*.
[169] *Estate of Thompson*, 291 F.R.D. at 306.
[170] *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676 (S.D. Fla. 2012)
[171] *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W. 2d 125 (Tex. 1995).
[172] *Id*. at 128.
[173] *Id*.

court should then rule to issue the protective order and the requesting party must attempt to obtain the discovery though less intrusive methods. [174]

The Apex doctrine is not codified in the Federal Rules of Civil Procedure and it is the up to the court to decide whether to apply the Apex doctrine. In the Third District Court of Florida decision *General Star Indemnity Company v. Atlantic Hospitality of Florida, LLC.*, the corporate defendant asked the district court to apply the apex doctrine in response to the requesting party request to depose the corporation's CEO and Corporate Secretary.[175] The Court held that the requesting party was required to depose lower level officials before deposing the corporation's apex officials. However, the Court acknowledged that it has never adopted the apex doctrine.[176] While the court did not adopt the apex doctrine the court's reasoning behind its holding was that "discovery is intended to be part of the 'just, speedy, and inexpensive' determination of disputes – not a device to get greater attention at an adversary's headquarters."[177]

Rule 30 (b)(6) depositions in maritime cases. In *Pentair Water Treatment Company v. The Continental Insurance Company,* the plaintiff in its notice sought the areas of inquiry regarding the corporation's insurance policy underwriting practices. [178] In response, the corporate defendant objected, stating that underwriting policy did not constitute an occurrence or an accident within the lawsuit.[179] The court denied the defendant's objections and held that the plaintiff was

[174] *Id*.
[175] *General Star Indemnity Company v. Atlantic Hospitality of Florida, LLC.*, 57 So. 3d 238 (Fla. 3rd DCA 2011).
[176] *Id*.
[177] *Id*.
[178] *Pentair Water Treatment Company v. The Continental Insurance Company,* 2009 WL 3817600 * at 4 (S.D.N.Y. Nov. 16, 2009).
[179] *Id*.

entitled to explore what risks the defendant expected to cover when it used terms similar to those in the policy.[180]

In a wrongful death case where the decedent tripped over a step on a cruise ship the plaintiff through a Rule 30(b)(6) deposition was able to obtain testimony of the cruise ships corporate representative testifying that the:

> Defendant's organization was "very involved" with "the basic strategies, vision, or pursuit of innovation" as it dealt with the design of the Voyager class of vessels.[181]

The statement by the corporate representative alone was not enough to grant summary judgment. But such testimony will be vital for the plaintiff in proving that the defendant actually created, participated in, or approved the design of the single step.[182]

In *Kloster Cruise Ltd. v. Grubbs*, the Court prevented the cruise line defendant from using the corporate representative as an undisclosed expert witness about safety inspections of the ship. [183] The plaintiff objected on the ground that the corporate defendant did not properly disclose that the corporate representative would be offered to give such (expert) testimony. The plaintiff, therefore, did not have ample opportunity to produce opposing expert testimony.[184] The appellate court affirmed the trial court's decision to exclude the corporate representative's testimony.[185]

Motor vehicle, highway, and premises liability cases. The following is case law pertaining to Rule 30(b)(6) and motor vehicle cases. In *Calvasina v. Wal-Mart Real Estate Bus. Trust* a personal injury case, the corporate representative during a Rule 30(b)(6) deposition

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[180] *Id*.
[181] *Whelan v. Royal Caribbean Cruises Ltd.*, 2013 WL 5583970 * at 4 (S.D. Fla. Aug. 14 2013).
[182] *Id*.
[183] *Kloster Cruise Ltd. v. Grubbs*, 762 So. 2d 552, 554 (Fla. 3d DCA 2000).
[184] *Id*.
[185] *Id*.

testified that the guardrail had not been moved from its original installation point when the rack was originally instilled in 2000.[186] The court held that this is sufficient evidence to raise a fact issue concerning whether Wal-Mart was the cause of the defective instillation of the guard rail. [187] In *Pentair Water,* the Court held that a plaintiff may seek the area of inquiry regarding the corporation's insurance policy underwriting practices.[188]

[186] *Calvasina v. Wal-Mart Real Estate Bus. Trust*, 906 F. Supp. 2d 625, 634 (W.D. Tex. 2012).
[187] *Id*.
[188] *Pentair Water Treatment Company v. The Continental Insurance Company,* 2009 WL 3817600 * at 4 (S.D.N.Y. Nov. 16, 2009).