

## 1 **Corporate Rep 30(B)(6) Depositions**

Christine L. Stanley Esq. & Donald L. Miller, II Esq.

## 2 **What is a Corporate Rep. 30(B)(6) Deposition?**

Where a corporation, association or a governmental agency designates a representative to be deposed on behalf of the company.

Testimony by this representative is binding on the corporation.

## 3 **Fact v. Corporate Deponent**

During a fact deposition a deponent must speak only to those matters of which he or she has personal information, and there should be no speculation.

A 30(b)(6) deponent, however, must be able to speak on behalf of the entire corporation to the matter that has been identified, which includes all the information that the *corporation* may have on the topic.

The 30(b)(6) deponent must also be ready to testify on opinions, beliefs and interpretations that the corporation may have, which certainly includes speculation and plenty of matters outside the scope of the deponent's personal knowledge.

## 4 **Notice**

FRCP 30(b)(6) / Ky. R. Civ. P. 30.02 (6)

- A party may in his 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 may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph (6) does not preclude taking a deposition by any other procedure authorized in these rules.

## 5 **Notice - Objections**

Counsel may object to the movants notice with the standard applicable objections if the requests are overly broad, vague, unduly burdensome, or objectionable on other grounds.

## 6 **Notice – Objections – Reasonable Particularity**

Topics are described with enough detail for the deponents and their counsel to prepare for the deposition satisfactorily.

- "Painstaking specificity" - *Sprint Commc'nc Co. L.P. v. Theglobe.com, Inc.* 236 F.R.D. 524, 528 (D. Kan. 2006)
- "Including but not limited to language is insufficient and overly broad" – *Tri-State Hospital Supply Corp.*, 226 F. R. D. 118, 125 (D.D.C. 2005)

A protective order may be filed to prevent the moving party from raising objectionable topics during deposition.

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## 7 **Choosing the representative**

The corporation is required to undertake a "diligent inquiry" to determine the best person to

testify. *Poole v. Textron, Inc.*, 192 F.R.D. 494, 503 (D. Md. 2000) (quoting Civil Discovery Standards, American Bar Association, Section of Litigation, August 1999).

When one witness cannot testify about all the notice topics, the corporation must designate as many witnesses as necessary to respond to each area of inquiry. *Alexander v. F.B.I.*, 186 F.R.D. 137, 141 (D.D.C. 1998).

If it appears during the deposition that the designated witness is unknowledgeable or unprepared to testify on a certain topic, inquire as to whether there is a more knowledgeable person at the company.

If the designee confirms your suspicion, this fact can be used as evidence that the witness was not adequately prepared and may amount to the entity failing to appear for its deposition. See *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 05-2164-MLB-DWB, 2007 WL 1054279, at \*6 (D. Kan. Apr. 9, 2007).

## 8 Preparation

The U.S. District Court for the Eastern District of Kentucky sets forth the clearly-established law that “[a] party which intends to assert claims and defenses in litigation must adequately prepare an individual to testify as to those claims and defenses...” *In re Classicstar Mare Lease Litigation*, 2009 WL 1313311, \*2 (E.D. Ky., May 12, 2009).

## 9 Sanctions

Depending on the jurisdiction, sanctions may be assessed against the responding corporation for failing to produce an adequately prepared corporate representative.

There is no Kentucky case stating when sanctions may be ordered for failure to prepare a corporate representative, and the federal circuits are divided.

- However, Kentucky’s Rules of Civil Procedure do offer some support for sanctions. CR 37.04(1) allows that sanctions may be ordered: [i]f a party or an office, director, or managing agent of a party or a person designated under Rule 30.02(6) or 31.01(2) to testify on behalf of a party fails (a) to appear before the officer who is to take his deposition, after being served with proper notice.
- Sanctions for failing to appear at a corporate deposition may be severe. In *Martin County Coal Corp. v. Universal Underwriters*, 2011 WL 836859, \*6 (E.D. Ky., Mar. 4, 2011), the court stated that, “[i]f a corporate party takes the position during its [corporate representative] deposition that it has no knowledge concerning an area of inquiry, it cannot thereafter argue a contrary position at trial.” *Id.* (citing Taylor, 166 F.R.D. at 362).

Thus, if the corporation refuses to produce a corporate representative, the court may prohibit the corporation from taking any position on the facts or asserting any claims and defenses at trial.

Sanctions are generally ordered only where the deponent-party wholly neglects to respond to the deposition notice. See *Charter House Ins. Brokers, Ltd.*, 667 F.2d 600, 604 (7th Cir. 1981). Some courts have ruled that where a party appears physically for the taking of the deposition, but refuses to cooperate by being sworn or by testifying, CR 37.04 does not apply. *Estrada v. Rowland*, 69 F.3d 405, 406 (9th Cir. 1995) (no failure to appear where a deponent attended but refused to testify); *Aziz v. Wright*, 34 F.3d 587, 589 (8th Cir. 1994) (holding that “a refusal to answer questions or participate does not constitute a ‘failure to appear’”). However, some courts have held that failure to present a prepared witness is tantamount to no appearance at all. *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416 (5th Cir. 2006). Unfortunately, no Kentucky law is instructive on this particular issue.

## 10 Preparation by representative

The corporate representative needs to make a reasonable or good-faith effort to get the information necessary to answer anticipated questions effectively...

**11  Corporate Testimony**

Testimony by this representative is binding on the corporation.

- It does not constitute a judicial admission. Therefore, it is not the final word on legal issues, and it can still be contradicted by other evidence tendered by the corporation. *Industrial Hard Chrome, Ltd. V. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000)
- Also, the corporate representative's testimony constitutes an "admission by a party opponent" and, therefore, is not inadmissible hearsay. It can also be used in trial the same way that a normal deposition would be used.
- While there is opportunity to introduce differing testimony or new evidence, opposing counsel may still move to impeach your witness during trial with the previous deposition testimony.

**12  Defend the Deposition**

Off topic questions should be objected to as exceeding the scope of the notice or on the grounds that the questions exceed the scope of the corporate knowledge of the witness

- Allowing the witness to answer questions outside the scope of the notice runs the risk of impeachment during trial, waiving attorney-client or work-product privilege or binding the corporation.
- The deponent can serve as a fact witness in a deposition that starts at the close of the 30(b)(6) deposition.

**13  Takeaways**

1. Review notice
2. Select appropriate representative
3. Prepare the witness
4. Be ready to object

**14  Any Questions?**