

Appendix A

39 Rules for 30(b)(6) Depositions

1. The rule's purpose is to streamline the discovery process. In particular, the rule serves a unique function in allowing a specialized form of deposition. *Great Am. Ins. Co. v. Vegas Constr. Co., Inc.*, 251 F.R.D. 534, 539 (D.Nev.2008)

2. The rule gives the corporation being deposed more control by allowing it to designate and prepare a witness to testify on the corporation's behalf. *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C.1996).

3. It is a discovery device designed to avoid the bandying by corporations where individual officers or employees disclaim knowledge of facts clearly known to the corporation. *Great Am.*, 251 F.R.D. at 539; *Taylor*, 166 F.R.D. at 361.

4. Therefore, one purpose is to curb any temptation by the corporation to shunt a discovering party from “pillar to post” by presenting deponents who each disclaim knowledge of facts known to someone in the corporation. *Great Am.*, 251 F.R.D. at 539. Cf. *Ierardi v. Lorillard, Inc.*, No. 90–7049, 1991 WL 66799, *2 (E.D.Pa. Apr. 15, 1991), at *2 (without the rule, a corporation could “hide behind the alleged ‘failed’ memories of its employees”).

5. Rule 30(b)(6) imposes burdens on both the discovering party and the designating party. The party seeking discovery must describe the matters with reasonable particularity and the responding corporation or entity must produce one or more witnesses who can testify about the corporation's knowledge of the noticed topics. *Great Am.*, 251 F.R.D. at 539.

6. The testimony of a Rule 30(b)(6) witness represents the collective knowledge of the corporation, not of the specific individual deponents. A Rule 30(b)(6) designee presents the corporation's position on the listed topics. The corporation appears vicariously through its designees. *Taylor*, 166 F.R.D. at 361.

7. A corporation has an affirmative duty to provide a witness who is able to provide binding answers on behalf of the corporation. *Ecclesiastes 9:10–11–12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1147 (10th Cir.2007).

8. Thus, a Rule 30(b)(6) witness need not have personal knowledge of the designated subject matter. *Ecclesiastes*, 497 F.3d at 1147; see generally Federal Civil Rules Handbook, 2012 Ed., at p. 838 (“the individual will often testify to matters outside the individual's personal knowledge”).

9. The designating party has a duty to designate more than one deponent if necessary to respond to questions on all relevant areas of inquiry listed in the notice or subpoena. *Ecclesiastes*, 497 F.3d at 1147; *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 127 (M.D.N.C.1989) (duty to substitute another witness as a designee once the initial designee's deficiencies become apparent during the deposition); *Alexander v. F.B.I.*, 186 F.R.D. 137, 142 (D.D.C.1998).

10. The rule does not expressly or implicitly require the corporation or entity to produce the “person most knowledgeable” for the corporate deposition. Nevertheless, many lawyers issue notices and subpoenas which purport to re-quire the producing party to provide “the most knowledgeable” witness. Not only does the rule not provide for this type of discovery demand, but the request is also fundamentally inconsistent with the purpose and dynamics of the rule. As noted, the witness/designee need not have any personal knowledge, so the “most knowledgeable” designation is illogical. *PPM Fin., Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894–95 (7th Cir.2004) (rejecting argument that trial court should not have credited the testimony of a witness who lacked personal knowledge because the witness was a 30(b)(6) witness and “was free to testify to matters outside his personal knowledge as long as they were within the corporate rubric”). Moreover, a corporation may have good grounds not to produce the “most knowledgeable” witness for a 30(b)(6) deposition.

For example, that witness might be comparatively inarticulate, he might have a criminal conviction, she might be out of town for an extended trip, he might not be photogenic (for a videotaped deposition), she might prefer to avoid the entire process or the corporation might want to save the witness for trial. From a practical perspective, it might be difficult to determine which witness is the “most” knowledgeable on any given topic. And permitting a requesting party to insist on the production of the most knowledgeable witness could lead to time-wasting disputes over the comparative level of the witness' knowledge. For example, if the rule authorized a demand for the most knowledgeable witness, then the requesting party could presumably obtain sanctions if the witness produced had the second most amount of knowledge. This result is impractical, inefficient and problematic, but it would be required by a procedure authorizing a demand for the “most” knowledgeable witness. But the rule says no such thing.

11. Although the rule is not designed to be a memory contest, the corporation has a duty to make a good faith, conscientious effort to designate appropriate persons and to prepare them to testify fully and non-evasively about the subjects. *Great Am.*, 251 F.R.D. at 540.

12. The duty to prepare a Rule 30(b)(6) witness goes beyond matters personally known to the designee or to matters in which the designated witness was personally involved. *Wilson v. Lakner*, 228 F.R.D. 524 (D.Md.2005).

13. The duty extends to matters reasonably known to the responding party. *Fowler v. State Farm Mut. Auto. Ins. Co.*, No. 07–00071 SPK–KSC, 2008 WL 4907865, at *4 (D.Haw.2008).

14. The mere fact that an organization no longer employs a person with knowledge on the specified topics does not relieve the organization of the duty to prepare and produce an appropriate designee. *Id.*; *Great Am.*, 251 F.R.D. at 540; Taylor, 166 F.R.D. at 362; cf. *Ecclesiastes*, 497 F.3d at 1148 (in “one common scenario,” the corporation designates individuals who lack personal knowledge “but who have been educated about it”) (emphasis added).

15. Faced with such a scenario, a corporation with no current knowledgeable employees must prepare its designees by having them review available materials, such as fact witness deposition testimony, exhibits to depositions, documents produced in discovery, materials in former employees' files and, if necessary, interviews of former employees or others with knowledge. *Great Am.*, 251 F.R.D. at 540; Federal Civil Rules Hand-book, p. 838; see generally *Wilson*, 228 F.R.D. at 529 (preparation required from myriad sources, including “documents, present or past employees, or other sources”).

16. In other words, a corporation is expected to create an appropriate witness or witnesses from information reasonably available to it if necessary. *Wilson*, 228 F.R.D. at 529.

17. As a corollary to the corporation's duty to designate and prepare a witness, it must perform a reasonable inquiry for information that is reasonably available to it. *Fowler*, 2008 WL 4907865 at *5; Marker, 125 F.R.D. at 127.

18. A corporate designee must provide responsive answers even if the information was transmitted through the corporation's lawyers. *Great Am.*, 251 F.R.D. at 542.

19. In responding to a Rule 30(b)(6) notice or subpoena, a corporation may not take the position that its documents state the company's position and that a corporate deposition is therefore unnecessary. *Great Am.*, 251 F.R.D. at 540.

20. Similarly, a corporation cannot point to interrogatory answers in lieu of producing a live, in-person corporate representative designee. Marker, 125 F.R.D. at 127.

21. Preparing a Rule 30(b)(6) designee may be an onerous and burdensome task, but this consequence is merely an obligation that flows from the privilege of using the corporate form to do business. *Great Am.*, 251 F.R.D. at 541; see also *Calzaturificio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 38 (D.Mass.2001) (review required even if “documents are voluminous and the review of those documents would be burdensome”).

22. Not only must the designee testify about facts within the corporation's collective knowledge, including the results of an investigation initiated for the purpose of complying with the 30(b)(6) notice, but the designee must also testify about the corporation's position, beliefs and opinions. *Great Am.*, 251 F.R.D. at 539; *Taylor*, 166 F.R.D. at 362 (designee presents corporation's "position," its "subjective beliefs and opinions" and its "interpretation of documents and events").

23. The rule implicitly requires the corporation to review all matters known or reasonable available to it in preparation for a Rule 30(b)(6) deposition. *Wilson*, 228 F.R.D. at 529 ("good faith effort" to "find out the relevant facts" and to "collect information, review documents and interview employees with personal knowledge").

24. If a corporation genuinely cannot provide an appropriate designee because it does not have the information, cannot reasonably obtain it from other sources and still lacks sufficient knowledge after reviewing all available information, then its obligations under the Rule cease. *Calzaturificio*, 201 F.R.D. at 39; see also *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 76 (D.Neb.1995).

25. If it becomes apparent during the deposition that the designee is unable to adequately respond to relevant questions on listed subjects, then the responding corporation has a duty to timely designate additional, supplemental witnesses as substitute deponents. *Alexander*, 186 F.R.D. at 142; *Marker*, 125 F.R.D. at 127.

26. The rule provides for a variety of sanctions for a party's failure to comply with its Rule 30(b)(6) obligations, ranging from the imposition of costs to preclusion of testimony and even entry of default. *Reilly v. Natwest Mkts. Grp. Inc.*, 181 F.3d 253, 269 (2d Cir.1999) (affirming order precluding witness five witnesses from testifying at trial); see also *Taylor*, 166 F.R.D. at 363 ("panoply of sanctions"); *Great Am.*, 251 F.R.D. at 543 ("variety of sanctions").

27. The failure to properly designate a Rule 30(b)(6) witness can be deemed a nonappearance justifying the imposition of sanctions. (*Resolution Trust Corp. v. Southern Union Co., Inc.*, 985 F.2d 196, 198 (5th Cir.1993)). See also *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 305 (3d Cir.2000) (a 30(b)(6) witness who is unable to give useful information is "no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it").

28. When a corporation's designee legitimately lacks the ability to answer relevant questions on listed topics and the corporation cannot better prepare that witness or obtain an adequate substitute, then the "we-don't-know" response can be binding on the corporation and prohibit it from offering evidence at trial on those points. Phrased differently, the lack of knowledge answer is itself an answer which will bind the corporation at trial. *Fraser Yachts Fla., Inc. v. Milne*, No. 05-21168-CIV-JORDAN, 2007 WL 1113251, at *3 (S.D.Fla. Apr. 13, 2007); *Chick-fil-A v. ExxonMobil Corp.*, No. 08-61422-CIV, 2009 WL 3763032, at *13 (S.D.Fla. Nov. 10, 2009); see also *Ierardi*, 1991 WL 66799 at *3 (if party's 30(b)(6) witness, because of lack of knowledge or failing memory, provides a "don't know" answer, then "that is itself an answer" and the corporation "will be bound by that answer").

29. Similarly, a corporation which provides a 30(b)(6) designee who testifies that the corporation does not know the answers to the questions "will not be allowed effectively to change its answer by introducing evidence at trial." *Ierardi v. Lorillard*, No. 90-7049, 1991 WL 158911 (Aug. 13, 1991) (E.D.Pa. 1991, at *4).

30. The conclusion that the corporation is bound at trial by a legitimate lack of knowledge response at the 30(b)(6) deposition is, for all practical purposes a variation on the rule and philosophy against trial by ambush. *Calzaturificio*, 201 F.R.D. at 38; *Wilson*, 228 F.R.D. at 531; *Taylor*, 166 F.R.D. at 363 (rule prevents "sandbagging" and prevents corporation from making a "half-hearted inquiry before the deposition but a thorough and vigorous one before the trial").

31. If the corporation pleads lack of memory after diligently conducting a good faith effort to obtain information reasonably available to it, then it still must present an opinion as to why the corporation believes the facts should be construed a certain way if it wishes to assert a position on that topic at trial. *Taylor*, 166 F.R.D. at 362.

32. There is nothing in the rule which prohibits a corporation from adopting the testimony or position of another witness in the case, though that would still require a corporate designee to formally provide testimony that the corporation's position is that of another witness. *Fraser Yachts*, 2007 WL 1113251, at *3.

33. The rule does not expressly require the designee to personally review all information available to the corporation. So long as the designee is prepared to provide binding answers under oath, then the corporation may prepare the designee in whatever way it deems appropriate—as long as someone acting for the corporation reviews the available documents and information. *Reichhold, Inc. v. U.S. Metals Ref. Co.*, No. 03–453(DRD), 2007 WL 1428559, at *9 (D.N.J. May 10, 2007) (the rule “does not require that the corporate designee personally conduct inter-views,” but, instead, requires him to testify to matters known or reasonably available to the corporation).

34. Rule 30(b)(6) means what it says. Corporations must act responsibly. They are not permitted to simply declare themselves to be mere document-gatherers. They must produce live witnesses who have been prepared to provide testimony to bind the entity and to explain the corporation's position. *Wilson*, 228 F.R.D. at 531; *Great Am.*, 251 F.R.D. at 542 (entitled to “corporation's position”).

35. Despite the potentially difficult burdens which sometimes are generated by Rule 30(b)(6) depositions, the corporation is not without some protection, as it may timely seek a protective order or other relief. *C.F.T.C. v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 772 (9th Cir.1995).

36. Absolute perfection is not required of a 30(b)(6) witness. The mere fact that a designee could not answer every question on a certain topic does not necessarily mean that the corporation failed to comply with its obligation. *Costa v. County of Burlington*, 254 F.R.D. 187, 191 (D.N.J.2008); *Chick-fil-A*, 2009 WL 3763032, at *13 (explaining that the corporation need not produce witnesses who know every single fact—only those relevant and material to the incidents underlying the lawsuit).

37. A corporation cannot be faulted for not interviewing individuals who refuse to speak with it. *Costa*, 254 F.R.D. at 191.

38. There are certain cases, such as subrogation cases or those involving dated facts, where a corporation will not be able to locate an appropriate 30(b)(6) witness. In those types of scenarios, the parties “should anticipate the unavailability of certain information” and “should expect that the inescapable and unstoppable forces of time have erased items from ... memory which neither party can retrieve.” *Barron v. Caterpillar, Inc.*, 168 F.R.D. 175, 178 (E.D.Pa.1996) (concluding that corporation did not act in bad faith when its designee did not remember events from almost thirty years earlier).

39. A corporation which expects its designee to be unprepared to testify on any relevant, listed topic at the corporate representative deposition should advise the requesting party of the designee's limitations before the deposition begins. *Calzaturificio*, 201 F.R.D. at 39.