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STRATEGIES FOR CORPORATE REPRESENTATIVE DEPOSITIONS

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STRATEGIES FOR CORPORATE REPRESENTATIVE DEPOSITIONS

I. Introduction

Corporate representative depositions can be a powerful tool for the deposing party, and to a lesser extent the corporation, but they come with special rules that are often misunderstood. For defendant corporations, a properly-prepared representative can provide a compelling face for the organization and tell a persuasive story right off the bat. On the other hand, corporate representative depositions can be dangerous for unprepared defendants and extremely useful for savvy plaintiffs. An under-resourced plaintiff can use these depositions to try to force the corporation to take a position on contested issues at the very beginning of the case. Corporations often find it difficult to locate a witness who is competent to testify on its behalf and to prepare that witness to testify adequately. Yet this preparation is vital because the representative's testimony may be binding, and the topics covered during the examination may be limitless.

Corporate representative depositions are available under Rule 30(b)(6) of the Federal Rules of Civil Procedure or 199.2(b)(1) under the Texas Rules, and are largely the same in both systems. In this article, we discuss the potential pitfalls that arise on both sides in corporate representative depositions and strategies to avoid them. We also highlight the small differences between the federal and state rules for these depositions.

II. Who to depose?

a. Direct depositions of senior managers – Rule 30(b)(1)

If you choose to depose a director, officer, or senior manager with personal knowledge, you have the ability to decide who to depose and that witness's testimony will bind the corporation. However she is only required to testify to the facts known to her and has no duty to investigate to become knowledgeable about the matters at issue. It can also be difficult to determine who in particular would have the personal knowledge that you are seeking.

Both federal and Texas rules allow depositions of corporations by way of certain individuals in addition to the corporate representative. The federal rules separate the two mechanisms into Rule 30(b)(6) for representatives and 30(b)(1) for managing agents, officers, and directors. Texas combines these two types of depositions under Rule 199.2(b).

b. Depositions through the corporate representative – Rule 30(b)(6)

If you depose a corporate representative, his testimony will bind the corporation and he will be compelled to investigate and gather information for you. However it is the corporation who selects the representative and that representative might have no personal knowledge on the issues that you want to question him on.

Any corporation, partnership, association, or government agency can be deposed through Federal Rule 30(b)(6) or Texas Rule 199.2(b). To do so, the entity, not an individual, must be named in the notice (for parties) or subpoena (for non-parties). In response the entity must designate someone who can testify on its behalf. The deposing attorney has no say in who the representative is. For that freedom, choose the Rule 30(b)(1)-style deposition.

III. What is proper notice?

a. Beware of hybrid notices

If the deposing party purports to give notice *to* a corporation but then also names specific individuals, or demands that the corporation designate individuals with *personal* knowledge, this is a “hybrid” deposition notice. Remember that the purpose of the corporate representative deposition is to get to the knowledge of the corporation, not the individual witness. Federal courts have found that the corporation’s only obligation is to designate a witness who can testify to the matters “known or reasonably available to” the corporation.¹ It is not necessary that the witness have any personal knowledge of his own. No Texas courts have discussed this issue but the only two Texas treatises to reach the matter are in accord with the federal courts.² The corporation should challenge these notices by moving for protection or, at the least, formally objecting to the problematic portion of the notice.

b. Subpoena *duces tecum*

The notice may include a subpoena *duces tecum* demanding that certain documents be produced at the deposition. These should be treated like any other request for production. If there are objections to the request and the parties cannot resolve their differences, the corporation should file objections. If the subpoena covers privileged documents, the corporation should prepare a privilege log. If the corporation is a party, it has 30 days to respond to the request under both federal and Texas rules.³ Because corporate representative depositions cannot circumvent normal production rules, the 30-day requirement can be used to extend time for these depositions.⁴

c. Reasonable particularity

The notice or subpoena must describe “with reasonable particularity” the matters on which the corporation must testify. At minimum, the notice must contain enough detail to allow the organization to locate or prepare a witness who is competent to testify.

¹ See, e.g., *Reed v. Nellcor Puritan Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000); *US v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996) (if representative lacks personal knowledge on the matters in the notice, the corporation is not required to select a different representative who would have personal knowledge, it must instead prepare the representative it chose).

² See, e.g., SCOTT BRISTER ET AL., 28 TEXAS PRETRIAL PRACTICE 239 (2001); JOE BROWN, ET AL., 8 TEXAS PRACTICE GUIDE: PERSONAL INJURY 291 (2d ed. 2002).

³ See FED. R. CIV. P. 34(b); TEX. R. CIV. P. 196.2(a).

⁴ See FED. R. CIV. P. 30(b)(5); TEX. R. CIV. P. 199.2(b).

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