

**DEPOSING THE VENTRILOQUIST'S DUMMY:
A DISCUSSION OF FED. R. CIV. P. 30(b)(6) and
TEXAS STATE PRACTICE**



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Table of Contents

1. OVERVIEW:	1
2. THE RULE AND THE LAW:	5
A. FEDERAL RULE CIVIL PROCEDURE 30(b)(6)	5
B. BREAKDOWN OF RULE	6
C. COMPELLING APPEARANCE	6
D. THE REPRESENTATIVE V. THE MANAGER OR DIRECTOR	8
E. TOPICS - REASONABLE PARTICULARITY	11
F. SELECTION OF REPRESENTATIVE	16
G. OBLIGATION OF CORPORATION/ORGANIZATION	17
H. SCOPE	19
I. PRIVILEGES	21
J. DEPOSITION LIMITS/TIME LIMITS	24
K. MOTIONS TO QUASH AND FOR PROTECTION	26
L. SANCTIONS	31
M. DUAL CAPACITY	32
N. EFFECT OF CORPORATE REPRESENTATIVE TESTIMONY	36
3. STRATEGY:	38
4. FORMS:	39

Table of Authorities

8A, Wright, Miller & Marcus, <i>Federal Practice & Procedure</i> (3d Ed.), §2014	25
<i>A & E Products Group v. Mainetti SA, Inc.</i> , 2004 WL 345841 (S.D.N.Y.) (unreported)	37
<i>A & E Products Group v. Mainetti USA, Inc.</i> , 2004 WL 345841 (S.D.N.Y.) (unreported).....	37
<i>A.I.A. Holding, S.A. v. Lehman Bros., Inc.</i> , 2002 WL 1041356 at *3 (S.D.N.Y. May 23, 2002)	35
<i>AIA Holdings S.A. v. Lehman Bros. Inc.</i> , 2002 WL 1041356 (S.D.N.Y.) (unreported)	33
<i>Alexander v. Fed. Bureau of Investigation</i> , 186 F.R. D. 137, 141 (D.D.C. 1998).....	1
<i>Allstate Texas Lloyds v. Johnson</i> , 784 S.W.2d 100 (Tex. App. – Waco 1989) ...	17, 24
<i>Allstate Texas Lloyds v. Johnson</i> , 784 S.W.2d 100 (Tex. App. – Waco 1989, orig.proceeding)	24
<i>Allstate Texas Lloyds v. Johnson</i> , 784 S.W.2d 100 (Tex. App. – Waco 1989. orig. proceeding)	30
<i>Ameristar Jet Charter, Inc. V. Signal Composites, Inc.</i> , 244 F.3d 189, 192 (1 st Cir. 2001).....	25
<i>AMR Corp. v. Enlow</i> , 926 S.W.2d 640 (Tex. App.--Fort Worth 1996, n.w.h.)	9
<i>Baine v. General Motors Corp.</i> , 141 F.R.D. 332 (M.D. Ala. 1991)	10
<i>Board of Trustee of Leland Stanford Junior University v. Tyco International, LTD</i> , 253 F.R.D. 524 (C.D. Calif. 2008)	32
<i>Boland Marine & Manufacturing v. M/V Bright Field, ETC.</i> , 1999 WL 280451 (E.D.La.) (unreported)	30
<i>Brazos River Authority v. GE Ionics, Inc.</i> , 469 F.3d 416 (5 th Cir. 2006).....	37
<i>Brazos River Authority v. GE Ionics, Inc.</i> , 469 F.3d 416, (5 th Cir. 2006)	37
<i>Bregman v. District of Columbia</i> , 182 F.R.D. 352, 354-355 (D.D.C.1998)	27
<i>Brown & Root, Inc. v. American Home Assur. Co.</i> , 353 F.2d 113 (5 th Cir.1965), <i>cert. denied</i> , 384 U.S. 943 (1966)	36
<i>Calzaturificio S.C.A.R.P.A.</i> , 201 F.R.D. 33, 37	18
<i>CBS, Inc. v. Ahern</i> , 102 F.R.D. 820, 822 (S.D.N.Y. 1984).....	10
<i>Citizens United v. Federal Elections Commission</i> , 130 S.Ct. 836 (2009)	1
<i>Cleveland v. Palmby</i> , 75 F.R.D. 654 (W.D. Ok.. 1977).....	16
<i>Cleveland v. Palmby</i> , 75 F.R.D. 654 (W.D.Okla. 1977).....	16
<i>Concerned Citizens of Belle Haven v. The Belle Haven Club</i> , 223 F.R.D. 39, 43 (D. Conn. 2004).....	18
<i>Coughlin v. Capitol Cement Co.</i> , 571 F.2d 290, 308 (5 th Cir.1978).....	37
<i>Crown Cent. Petroleum Corp. v. Garcia</i> , 904 S.W.2d 125 (Tex. 1995)	9
<i>Davo Corp. v. Liberty Mutual Insurance Co.</i> , 164 F.R.D. 70, 76 (D. Neb.1995)	17
<i>DDR Holdings, LLC v. Hotels. com, L.P.</i> , 2012 WL 2935172 (E.D.Tex.2012)	29
<i>Detoy v. City and Cnty of San Francisco</i> , 196 F.R.D. 362, 367 (N.D. Cal. 2000)	35
<i>Detoy v. City and County of San Francisco</i> , 196 F.R.D. 362, (N.D.Ca. 2000).....	34
<i>Dos Santos V. Bell Helicopter Textron, Inc.</i> , Slip Copy, 2009 WL 3734147 (N.D. Tex. 2009)	15
<i>Dwelly v. Yamaha Motor Corporation</i> , 214 F.R.D. 537 (D. Minn. 2003).....	7, 16, 18

<i>Exxon Research and Engineering Co. v. U.S.</i> , 44 Fed. Cl. 597 (U.S. Ct of Fed Claims, 1999)	20
<i>Ferko v. N.A.S.C.A.R.</i> , 218 F.R.D. 125, 141-145 (E.D. Tex. Sherman Div. 2003)	27
<i>Ferko v. Nat’l Ass’n for Stock Car Auto Racing, Inc.</i> , 218 F.R.D. 125, 142 (E.D. Tex. 2003)	30
<i>First State Bank, Bishop v. Chappell & Handy, P.C.</i> , 729 S.W.2d 917, 922 (Tex. App. – Corpus Christi 1987, writ ref’d n.r.e.)	8
<i>Function Media, L.L.C. v. Google, Inc.</i> , Not Reported in F.Supp.2d, 2010 WL 276093, 75 Fed.R.Serv.3d 1125 (E.D.Tex.2010)	14
<i>Great American Insurance Company of New York v. Vegas Construction Company, Inc.</i> , 251 F.R.D. 534, 542 (D. Nevada 2008)	17
<i>Great American Insurance Company of New York v. Vegas Construction Company, Inc.</i> , 251 F.R.D. 534, 542(D. Nevada 2008)	31
<i>GTE Products Corporation v. Gee</i> , 115 F. R.D. 67 (D. Mass. 1987).....	8
<i>Harris v. New Jersey</i> , 250 F.R.D. 89, 94 (D. N.J. 2007).....	32
<i>HCA v. Farrar</i> , 733 S.W.2d 393 (Tex. App. – Fort Worth 1987)	16
<i>HCA v. Farrar</i> , 733 S.W.2d 393 (Tex. App. – Fort Worth 1987, no writ).....	16
Hittner, Schwarzer, Tashima & Wagstaffe, <i>RUTTER GROUP PRAC. GUIDE: FED. CIV. PRO. BEFORE TRIAL—5th CIR. ED.</i> (The Rutter Group 2014), Chapter 11 [11:1417]	24
<i>Hoffman v. L& M Arts</i> , 2015 WL 1000864 (N.D. Tex. 2015)	32
<i>ICE Corp. v. Hamilton Sundstrand Corp.</i> , 2007 WL 1732369, at *4 (D. Kan. June 11, 2007)	36
<i>Ilerardi v. Lorillard</i> , 1991 WL 158911 (E.D. Pa. 1991) (unreported).....	18
<i>Ilerardi v. Lorillard, Inc.</i> , Civ. A. No. 90-7049, 1991 WL 158911, at *3 (E.D.Pa. Aug. 13, 1991)	36
<i>In re Arpin America Moving Systems, LLC</i> , 416 S.W.3d 927 (Tex. App.- Dallas 2013)	23
<i>In re Arpin America Moving Systems, LLC</i> , 416 S.W.3d 927 (Tex. App.- Dallas 2013, orig. proceeding)	19
<i>In re Boxer Property Management Corp.</i> , Not Reported in S.W.3d, 2009 WL 4250123 (Tex.App.-Hous.[14 Dist.] 2009)	22
<i>In re Boxer Property Management Corp.</i> , Not Reported in S.W.3d, 2009 WL 4250123 at 6	23
<i>In re Campbell</i> , Not Reported in S.W.3d, 2010 WL 3431712 (Tex. App. – Austin 2010)	31
<i>In re Continental Airlines, Inc.</i> , 305 S.W.3d 849, 859 (Tex.App.-Houston [14th Dist.] 2010, orig. proceeding)	9
<i>In re Exxon Corp.</i> , 208 S.W.3d 70 (Tex.App.-Beaumont 2006, orig. proceeding)	23
<i>In re Fina Oil and Chemical Company</i> , 1999 WL 33589153 (Tex.App.-Corpus Christi, unreported).....	17
<i>In re Garza</i> , 2007 WL 1481897 (Tex.App.-San Antonio) (unreported)	26
<i>In re Garza</i> , Not Reported in S.W.3d, 2007 WL 1481897 (Tex. App. – San Antonio 2007)	31
<i>In re Turner</i> , 243 S.W.3d 843 (Tex.App.- Eastland 2008, orig. proceeding)	8
<i>In re Univar USA, Inc.</i> , 311 S.W.3d 183 (Tex.App.-Beaumont 2010)	19

JPMorgan Chase Bank v. Liberty Mut. Ins. Co. , 209 F.R.D. 361, 362 (S.D.N.Y. 2002)	19
K Mart Corp. v. Sanderson , 937 S.W.2d 429, 431 (Tex. 1996) (per curiam)	19
King v. Pratt & Whitney case, 161 F.R.D.475 (S.D. Fla.1995), aff'd, 213 F.3d 646(11 th Cir.2000)(unpublished table decision).	33
King v. Pratt & Whitney , 161 F.R.D.475 (S.D. Fla.1995), aff'd, 213 F.3d 646(11 th Cir.2000)(unpublished table decision)	33
Lapenna v. The Upjohn Co. , 110 F.R.D.15, 20 (E.D.Pa.1986)	20
Lee v. Nucor-Yamato Steel Company LLP , 2008 WL 4014141 (E.D. Ark. 2008)	14
Lending Tree, Inc. v. LowerMyBill, Inc. , 2006 WL 2443685, at *2 (W.D.N.C. Aug. 22, 2006)	35
Loops, LLC v. Phoenix Trading, Inc. , No. C08-1064, 2010 WL 786030 (W.D. Wash. March 4, 2010)	25
Marker v. Union Fidelity Life Ins. Co , 125 F.R.D.121 (D. N.C. 1989)	11
Marker v. Union Fidelity Life Ins. Co. , 125 F.R.D.121 (D. N.C. 1989)	11
Martin v. Allstate Insurance Company , 292 F.R.D. 361 (N.D. Tex. 2013)	7
Martin v. Allstate Insurance Company , 292 F.R.D.361 (N.D. Tex. 2013)	22
McCormick-Morgan, Inc. v. Teledyne Industries, Inc. , 134 F.R.D. 275, at 286 (N.D.Cal.1991)	21
McKesson Corp. v. Islamic Republic of Iran , 185 F.R.D. 70 at 79 (D.D.C 1999)	1
Mitsui & Co. v. Puerto Rico Water Resources Authority , 93 F.R.D. 62, 67 (D.P.R.1981)	17
Mulvey v. Chrysler Corp. , 106 F.R.D. 364 (D. R.I. 1985)	10
Murphy v. Kmart Corporation , 255 F.R.D. 497, 506 (D. S. D. 2009)	12
Nester v. Textron, Inc. , 2015 WL 1020673 (W.D. Tex. 2015)	9
New World Network, Ltd. v. M/V Norwegian Sea , 2007 WL 1068124 (S.D.Fla.)	34
Orchestrate HR, Inc. v. Trombetta , 2015 WL 1565716 (N.D. Tex. 2015)	29
Overseas Private Investment Corporation v. Mandelbaum , 185 F.R.D. 67 (D.C.D.C. 1999)	34
Paparelli v. Prudential Insurance Co. of America , 108 F.R.D. 727(D. Mass 1985)	33
Procaps S.A. v. Patheon Inc. , 2015 WL 2090401 (S.D. Fla. [Miami Div.] 2015)	24
Prokosch v. Catalina Lighting , 193 F.R.D. 633, 638 (D. Minn. 2000)	12, 14
Promega Corp. v. Applera Corp. , No. 01-C-244-C, 2002 WL 32340866, at *4 (W.D. Wis. Nov. 27, 2002)	18
Provide Commerce, Inc. v. Preferred Commerce, Inc. , 2008 WL 360488, at *3 (S.D. Fla., Feb. 8, 2008)	35
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Resolution Trust Corp. v. Southern Union Co. 985 F.2d 196 (5 th Cir. 1993)	27
Resolution Trust Corp. v. Southern Union Co. , 985 F.2d 196 (5 th Cir. 1993)	27, 31
Resolution Trust Corp. v. Southern Union Co. , 985 F.2d 196, 197 (5 th Cir. 1993)	2, 31

Resolution Trust Corp. v. Worlwide Ins. Mgmt. Corp. , 147 F.R.D. 125, 127 (N.D. Tex. 1992)	7
RTC , 985 F.2d at 197.....	30
S.E.C. v. Morelli , 143 F.R.D. 42, 45 (S.D.N.Y.1992)	17
SEC v. Buntrock , 217 F.R.D. 441, 444-446 (N.D. Ill. 2003).....	22
SEC v. Buntrock , 217 F.R.D. 441, 444-446) (N.D. Ill. 2003).....	22
SEC v. Goldstone , 2014 WL 4349507 (D. N.M. 2014).....	20
SEC v. Morelli , 143 F.R.D. 42 46, at fn. 1 (S.D.N.Y 1992)	24
Shelton v. American Motors Corp. , 805 F.2d 1323 (8th Cir.1986).....	21, 22
Southwestern Bell Telephone L.P. v. UTex Communications Corp. , 2009 WL 8541000 (W.D. Tex. 2009)	35
Stambler v. Amazon.com, Inc. , 2011 WL 10538668 at *1-2 (E.D. Tex. 2011).....	25
State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc. , 254 F.R.D. 227, 234-235 (E.D. Pa. 2008).....	25
State of New York v. Solvent Chemical Co. , 214 F.R.D. 106, 112 (W.D.N.Y. 2003). 21	
State of W. Va. v. Bedell , 484 S.E.2d 199 (W.Va. 1997).....	23
Talon Transaction Technologies, Inc. v. StoneEagle Servs., Inc. , No. 3:13-dv-902P, 2014 WL 6819846, at * (N.D. Tex. Dec. 4, 2014).....	29
Thomas v. Hoffman-Laroche, Inc. , 126 F.R.D. 522, 524 (N.D.Miss.1989).....	30
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Tri-State Hospital Supply Corp. v. U.S. , 226 F.R.D. 118, (D.C.D.C. 2005).....	11, 12
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U.S. ex. rel. Fago v. M and T Mortgage Corporation , 235 F.R.D. 11 at 24 (D.D.C. 2011)	1, 17
U.S. v. Taylor , 166 F.R.D.356 (M.D.N.C.1996)	18, 20, 27
Veritas – Scalable Investment Products Fund v. FB Foods, Inc. , 2006 WL 1102757 (D.Conn.) (unreported)	23
W.R. Grace & Co. v. Viskase Corp. , No. 90C5383, 1991 WL 211647 (N.D. Ill. Oct. 15, 1991) (unreported)	36
W.R. Grace & Co. v. Viskase Corp. , No. 90C5383, 1991 WL 211647) N.D. Ill. Oct. 15, 1991) (unreported)	36
W.R. Grace & Co. v. Viskase Corporation , No. 90C5383, 1991 WL 211647 (N.D.Ill. Oct. 15, 1991).....	36
Webb v. Ethicon Endo-Surgery, Inc. , 2014 WL 7685527 (D. Minn. 2014).....	11
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Williams v. Spring/United Mgmt., Co. , 2008 WL 334643, at *1 (D. Kan. Feb. 8, 2006)	35
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DEPOSING THE VENTRILOQUIST'S DUMMY

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1. OVERVIEW:

The deposition of the organization representative (FED. R. CIV. P. 30(b)(6)) is a relatively unused, but potentially very effective, tool in making the discovery process more efficient and more effective.¹ It allows the party seeking the discovery to obtain the composite knowledge of the organization on specific topics, while having the testimony bind the corporation. Its primary goal is to avoid the wasteful exercise of a party having to take serial depositions of corporate employees and officers, while at the same time sparing the corporate entity from having its business disrupted by having to produce multiple employees and officers for depositions. The focus of the paper will be on practice in Texas. However, most state rules, including those of Texas, regarding the taking of depositions are patterned after FED. R. CIV. P. 30, so many of the authorities will be federal cases interpreting the federal rule.

FED. R. CIV. P. 30(b)(6) up to a few years ago was referred to as the “forgotten rule.”² There was a dearth of cases interpreting the rule because it was infrequently used and less frequently the source of controversy. The use of FED. R. CIV. P. 30(b)(6) has escalated exponentially over the last 25 years and a clear body of law regarding its application has developed concomitantly.

The primary purpose of the rule is set out in the Committee Advisory Notes:

One of the primary purposes of Rule 30(b)(6) is to “curb the ‘bandying’ by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of the facts that are clearly known to the organization and thereby to it.” Fed. R. Civ. P. 30(b)(6) advisory committee notes. *See also McKesson Corp. v. Islamic Republic of Iran*, 185 F.R.D. 70 at 79 (D.D.C. 1999) and *Alexander v. Fed. Bureau of Investigation*, 186 F.R.D. 137, 141 (D.D.C. 1998), cited in *U.S. ex. rel. Fago v. M and T Mortgage Corporation*, 235 F.R.D. 11 at 24 (D.D.C. 2011).

While the U.S. Supreme Court has recognized that corporations are people under the Bill of Rights,³ corporations remain a legal fiction. They are designed to

¹ The corporate representative deposition throughout this paper will be referred to as a 30(b)(6) deposition, even when referring to Texas practice under Tex. R. Civ. P. 199.

² See, Mark A. Cymrot, *The Forgotten Rule*, Litig. Spring 1992, at 6. Cited in James C. Winton, *Corporate Representative Deposition in Texas—Often Used But Rarely Understood*, 55 Baylor L. Rev. 651 (2003), which is an excellent secondary source on this topic.

³ *Citizens United v. Federal Elections Commission*, 130 S.Ct. 836 (2009).

protect equity owners from liability. Corporations may be sued and bring lawsuits. However, the question remains what is the voice of the corporation that binds it as a party. How do you examine a corporation, and more particularly, how do you get testimony that binds the corporation? The corporate/organization representative rule provides the answers to these questions. However, there is an important paradigm shift with respect to how evidence is obtained from a corporation or organization through this discovery tool.

We, as trial lawyers, know that a witness must have **personal knowledge** of a fact (as opposed to opinion testimony) in order for testimony about that fact to be admissible. Similarly, in order for testimony of a corporate employee to be admissible against the corporation, the witness must either be authorized by the corporation to give the statement or the testimony must pertain to a matter within the scope of the agency or employment and made during the existence of the relationship. These testimonial rules **do not apply** to a corporate representative deposition.

The deposition of a corporate representative is the deposition of the corporation itself. The corporation appears vicariously through its designee. ***Resolution Trust Corp. v. Southern Union Co.***, 985 F.2d 196, 197 (5th Cir. 1993). There are two key considerations: The party seeking the deposition must set out the topics with reasonable particularity. The party producing the representative must educate the representative on the particular topics for which the representative is designated to be able to answer questions on the topics based upon what is known or reasonably knowable by the corporation.

The corporation selects the representative, not the party seeking the deposition. The representative does not have to have personal knowledge of the facts about which the representative is giving testimony. It is a fallacy to think that you are obtaining the individual with the most factual knowledge or the person with the most personal knowledge on a particular topic. Indeed, much confusion can arise from seeking the individual with the most knowledge about a particular issue. What you are and should be requesting is for the corporation to select one or more individuals and for the corporation to impart to those individuals all of the knowledge known or reasonably available to the corporation. To that extent, the individual may be the most knowledgeable individual on the topic, but not necessarily because of the individual's own experience and observations. The witness need not have any factual knowledge at all. The representative is merely the voice of the corporation on the particular topic(s) for which the representative is designated. The representative is virtually the ventriloquist's dummy.

The party seeking the deposition may, under FED. R. CIV. P. 30(b)(1), depose a manager or director whose testimony will bind the corporation,⁴ but the downside is that the particular manager or director may not have all of the knowledge known or available to the corporation. You are taking this witness "as is" so to speak. There is no duty on

⁴ Texas does not provide a similar provision in its rule.

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