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

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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

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[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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