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THE ROLE AND FUNCTION OF CORPORATE REPRESENTATIVES AT TRIAL

Introduction

Where a corporate or other legal entity is involved in litigation, the defense will typically choose an individual from the company to appear at the trial as a representative for the company. This person, commonly known as the "appearance" corporate representative, will often sit at the defense table for the duration of the trial. The main intention behind designating a corporate representative for appearance purposes only is to allow the jury to associate a "face" with a corporation or legal entity and assist the defense throughout trial. Additionally, the appearance corporate representative is exempt from the sequestration of witnesses, thus enabling him or her to listen to all witness testimony.

In some instances, the appearance corporate representative also serves as the corporate representative under Federal Rule of Civil Procedure 30(b)(6). Under this rule, a party may seek to depose a corporation, and thereafter, the organization must designate a corporate representative to appear and testify on behalf of the organization with respect to matters known or reasonably available to the organization.

The question becomes: Should there be a distinction between a corporate representative who appears just for trial purposes as an appearance corporate representative, and a corporate representative who is designated to testify under Federal Rule of Civil Procedure 30(b)(6)? Under the former, the corporate representative will not be considered a party for all purposes of trial. Meaning, the plaintiff's ability to admit the prior testimony of that individual will have boundaries. Under the latter, the person will be considered a party for *all* purposes of trial, and thus, prior testimony made by that individual on behalf of the corporation will come in for *any* purpose.

Further issues arise when the person who served as the corporate representative for appearance purposes — and who also serves as the 30(b)(6) corporate representative — is called to testify at trial. In this situation the question becomes, does this person testify in his or her capacity as an appearance corporate representative or as a 30(b)(6) corporate representative? And, more importantly, why does this matter? There are many implications. The main issue is whether this corporate representative is considered a party or a non-party to the litigation, depending on when the individual was designated as a corporate representative. This designation ultimately drives the scope of any examination at trial and additionally determines whether that corporate representative's prior testimony — usually deposition testimony — is admissible at trial, regardless of the scope of any direct examination conducted of that witness.

Background of Rule 30(b)(6)

In 1970, Federal Rule of Civil Procedure 30(b)(6) was promulgated in an effort to streamline the discovery process by offering a specialized form of deposition. Under this rule, when a party seeks to depose a corporation, the organization must designate a person with knowledge of the corporate matters designated for examination to testify on its behalf. Thus the corporation "appears" vicariously

through its designee, who is often referred to as the corporate representative. The corporate representative acts as the voice of the corporation and "represents the corporation just as an individual represents himself." As such, the corporation is bound by the testimony of its corporate representative, because the testimony represents the knowledge of the corporation, not of the individual deponent.

Procedurally, a party must notice the deposition of a corporation by designating the subject matter on which testimony is sought. "Notice," according to the court in *Marker v. Union Fidelity Life Insurance Co.*, "requires the corporation to produce one or more officers to testify with respect to matters set out in the deposition notice or subpoena… The corporation then must not only produce such number of persons as will satisfy the request, *but more importantly, prepare them so that they may give complete, knowledgeable, and binding answers on behalf of the corporation.*" If the organization wishes to designate persons other than officers, directors, and managing agents within the corporation, it can do so only with that person's consent. "Obviously, [because] it is not literally possible to take the deposition of a corporation; instead, … the information sought must be obtained from natural persons who can speak for the corporation."

For a deposition of this sort to operate in the most effective way possible, parties on both sides have certain responsibilities. The deposing party must designate the areas of inquiry with reasonable particularity, and the corporation or other organization must designate and adequately prepare the witness to handle the topics. If the corporate designee is not informed of the relevant facts underlying the deposition topics, the corporation "has failed to designate an available, knowledgeable and readily identifiable witness." Providing a designee who is not prepared to answer questions within the scope of the noticed topics is tantamount to a failure to appear and may result in sanctions.

This rule presents advantages to both sides. For the corporate defendant being deposed, the rule "gives [it] more control by allowing it to designate and prepare a witness to testify on the corporation's behalf." For plaintiffs, the discovery device helps "to avoid the 'bandying' by corporations where individual officers disclaim knowledge of facts clearly known to the corporation." Furthermore, the rule protects the deposing party because, "[t]he designee, in essence, represents the corporation just as an individual represents himself. Were it otherwise, a corporation would be able to deceitfully select at trial the most convenient answer presented by a number of finger-pointing witnesses at the depositions" and "truth would suffer."

Defendants often claim that proper preparation of a 30(b)(6) designee is burdensome. Any claimed "burden," however, "is merely the result of the concomitant obligation from the privilege of being able to use the corporate (or other organizational) form in order to conduct business."

Nonetheless, Rule 30(b)(6) is designed to make a corporate party more like an individual. Just as an individual is allowed an opportunity to revise earlier testimony, a corporation is entitled to the same opportunity to revise its designee's earlier testimony. Just as an individual is bound by earlier testimony, so too is a corporation.

When the same individual who was deposed under 30(b)(6), appears at trial on behalf of the corporation, and that person is called as a witness, the question becomes whether that individual testifies in his or her capacity as an appearance corporate representative or as a 30(b)(6) corporate representative. To uncover the importance of this distinction, it is necessary to understand the difference between a party and a non-party witness and how this affects testimony at trial.

Party v. Non-Party Witness

a. *Party Witness*

To understand why a corporate representative — either in an appearance or a 30(b)(6) capacity — should be treated as a party versus a non-party witness to the litigation, it is important to first look at the distinction between the two.

Federal Rule of Civil Procedure 32 is designed to render admissible testimony which would otherwise be hearsay. Deposition testimony is considered hearsay. In the absence of Rule 32, it would be difficult to use that testimony at trial. Rule 32, however, allows for the use of "*all or part of a deposition*" against a party at trial if: "the party was present or represented at the taking of the deposition or had reasonable notice of it," and one of several other circumstances apply.

The scope and extent of the use of deposition testimony at trial depends on whether the deposition was taken of a party or non-party (witness) to the litigation. If the deposition taken was of a non-party (witness) it generally may not be used except to contradict or impeach testimony given by the deponent, or for another purpose as set out in the Federal Rules of Evidence (for example, to refresh a witness's recollection).

If the deponent was a party, however, Rule 32(a)(3) grants the opposing party the right to use the deposition of either (1) the company's officer, director or managing agent or (2) the representative designated by the company pursuant to Rule 30(b)(6) for any purpose. Thus, if your adversary's 30(b)(6) deposition testimony is relevant and admissible, it may be used for any purpose at trial, without limitation.

b. Non-Party Witness

Under Rule 32(a)(4), the deposition testimony of non-party witnesses may only be used at trial if the witness is unavailable because the court finds:

> (A) that the witness is dead;
>
> (B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;
>
> (C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;
>
> (D) that the party offering the deposition could not procure the witness's attendance by subpoena; or
>
> (E) on motion and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the important of live testimony in open court — to permit the deposition to be used.

Because of this distinction in the Federal Rules, determining whether a 30(b)(6) corporate representative is considered a party or a non-party witness for trial

purposes is of crucial practical and strategic importance. As mentioned above, under Rule 32(a)(3), a party will have the right to use the deposition testimony of a 30(b)(6) corporate representative for any purpose at trial. However, if this person is first designated as an appearance corporate representative, and then later designated as a 30(b)(6) corporate representative, it is unclear whether he or she is considered a party or a non-party to the litigation. As one can see, numerous implications arise from this designation — most notably whether the defendant corporation can control the scope of the plaintiffs inquiry into the deposition on cross examination by narrowing the scope of its direct of the representative.

The Role & Function of the Appearance or "Mascot" Corporate Representative at Trial

A. *The "Appearance" Corporate Representative Acting as a Party for Examination Purposes*

As discussed above, the defense will designate a very important witness in the litigation as the corporate representative for appearance purposes at trial. This person is referred to as the "appearance corporate representative" and often sits at the defense table during the course of the trial to appear as the face of the corporation. Because a party is not subject to sequestration, he or she gains the advantage of listening to all of the testimony of the plaintiffs' witnesses (since the plaintiff typically presents his or her case first).

B. *Deposing the Appearance Corporate Representative Prior to Examination at Trial*

Ultimately, there are two scenarios to consider when dealing with corporate representatives at trial — a decision that is complicated by whether the appearance corporate representative is deposed prior to examination at trial. In the first instance, the corporate representative is deposed in his or her capacity as a fact witness prior to being designated as the "appearance" corporate representative for purposes of trial. Or, conversely, the corporate representative is designated as the "appearance" representative and then subsequently deposed under 30(b)(6).

In the first scenario, when an individual is given an *ex post facto* designation as an appearance corporate representative, this designation should not transform his or her prior fact witness deposition testimony into party admissions. However, if called as a witness at trial and the individual testifies in a contradictory manner on behalf of the company, his or her prior deposition testimony could and should be used to impeach this prior inconsistent testimony.

In the second scenario, when a person designated as an "appearance corporate representative" is subsequently deposed under 30(b)(6), there is no reason why this prior testimony should not be considered "party" testimony at trial. Otherwise, if the testimony is not considered "party" testimony, the plaintiff cannot cross-examine beyond the scope of the defendant's direct examination. Thus, the use an appearance corporate representative's prior 30(b)(6) deposition testimony should be permitted during the trial, even if the testimony sought in cross examination would exceed the scope of direct. Indeed, to contend otherwise gives the corporate defendant a "free pass," so to speak, affording that defendant the luxury of seeing how the deposition goes and then deciding, post-deposition, whether to engage in a full trial examination, or limit the examination. In this sense, the defendant is given an unfair advantage at trial over the plaintiff, because the plaintiff cannot cross-examine the corporate representative regarding his or her prior deposition testimony unless and until the defendant opens the door to that line of inquiry on direct examination. The more likely scenario will be that the defense will strategically avoid direct examination on any issues that it finds would be in its best interest to shield from cross-examination.

Courts, however, have rejected similar tactical machinations as contravening the purpose and intent of Rule 30(b)(6). For example, in *Brazos River Authority v. GE Ionics, Inc.*, the Fifth Circuit vacated the district court's judgment and ordered a new trial based, in large part, on the trial court's erroneous ruling that a Rule 30(b)(6) corporate representative could not be questioned at trial about matters within the scope of the deposition notice. In that case, the 30(b)(6) deponent was not designated as the appearance corporate representative, but was made available as a witness by the defendant. At trial, the defendants successfully argued that the representative could not be questioned regarding matters within the scope of the Rule 30(b)(6) notice, and even some information to which the representative had addressed in his deposition, because the individual representative lacked personal knowledge. The Fifth Circuit disagreed and held that a person designated as a Rule 30(b)(6) corporate representative who is made available at trial is deemed to have personal knowledge of all matters within the scope of the Rule 30(b)(6) notice. Otherwise, the court noted, the corporation would have failed in its duty to provide a sufficiently prepared and informed representative under the rule. Thus, under *Brazos*, a Rule 30(b)(6) corporate designee is deemed to have personal knowledge of any matter within the scope of the deposition notice.

The fact that the corporate representative has personal knowledge of all matters within the scope of the Rule 30(b)(6) notice, however, does not necessarily mean that plaintiffs' counsel may exceed the scope of the direct examination. Also, because the representative is also the appearance representative, he or she has the advantage of hearing the plaintiffs' case and all the witnesses' testimony prior to testifying. So what options does plaintiffs' counsel have to avoid these unfair advantages at trial? One option is that plaintiffs' counsel can call the "appearance" corporate representative as an adverse witness during the plaintiffs' case in chief. In this respect, plaintiffs' counsel could control the scope of examination, without being constrained by the defendant's scope of examination. While this might seem like a savvy solution on its face, there are many procedural and substantive underpinnings plaintiffs' counsel must consider before doing so.

C. *Procedural Underpinnings of Plaintiffs' Counsel Calling the Appearance Corporate Representative as an Adverse Witness during the Case in Chief*

A plaintiffs' counsel considering calling a defendant's "appearance" corporate representative as an adverse witness at trial must be aware of various procedural issues that may arise that may enable defense counsel to avoid or limit the availability of this option. First, the trial judge has the discretion to prohibit plaintiffs' counsel from calling the appearance representative if that person is not listed on the plaintiffs'

witness list. Thus, plaintiffs' counsel should be sure to include any Rule 30(b)(6) corporate representatives on its witness list and, for the greatest amount of flexibility, consider including a generic label such as the "Appearance Corporate Representative." Defendants' counsel, however, may move to strike the generic reference nonetheless.

Second, defense counsel may object to the calling of the appearance representative on the grounds that the appearance representative represents the corporation "for trial only" and that only the corporation, and not the plaintiffs, has the authority to designate a Rule 30(b)(6) corporate representative. Essentially, the argument is that the corporation has the sole authority to designate a representative to speak on its behalf. At first glance, if the appearance representative is not the same person designated by the corporation in response to the prior Rule 30(b)(6) deposition notice, this argument may have some merit. However, because Rule 32 grants either party the right to use the deposition of the representative designated by the company pursuant to Rule 30(b)(6) *for any purpose*, plaintiffs' counsel should be able to overcome this hurdle. Of course, if the appearance representative and the 30(b)(6) representative are the same person, it would appear that the Fifth Circuit, in Brazos, foreclosed the defendants' argument in this respect.

A final procedural hurdle is related to the substantive issues discussed below. It is possible that a corporate defendant, anticipating that the plaintiffs will call the appearance representative as an adverse witness, may select an appearance representative whose job entails little or no involvement in the area that is the subject of the litigation. This selection allows the defense to argue, and the judge may agree, that because the appearance representative has no knowledge of the matters relevant to the litigation, any questioning of him or her would be either unduly prejudicial, misleading, or amount to a waste of time and therefore excludable under Rule 403 of the Federal Rules of Evidence.

This argument, of course, likely is moot in a situation where the appearance representative also was designated as a corporate representative for a Rule 30(b)(6) deposition — as the corporation is required to produce a competent and informed deponent.

D. *Substantive Underpinnings of Plaintiffs' Counsel Calling the Appearance Corporate Representative as an Adverse Witness during the Case in Chief*

Plaintiffs' counsel should also be aware of two substantive issues that could render calling the defendant's appearance representative as an adverse witness less effective. First, under the Federal Rules of Civil Procedure the sequestration rule does not apply to pre-trial depositions absent a special order. Also, most jurisdictions agree that the sequestration rule does not apply to deposition witnesses in pretrial proceedings. Thus, even if a plaintiff calls the appearance representative before calling other key witnesses during the case in chief, a savvy corporate defendant is able to ensure that its appearance representative is aware of the potential testimony of other witnesses by having him or her attend all depositions and other pretrial proceedings.

Second, a corporate defendant may choose to designate an appearance representative who had little or no involvement in the matters and events underlying the litigation. In this situation, not only should plaintiffs' counsel expect objections under Federal Rule of Evidence 403 (as discussed above), but they should also expect that any testimony from that representative likely will have little substance, due to that demonstrated lack of involvement. However, it may be beneficial to the plaintiffs' case to demonstrate ignorance on behalf the corporation, as represented by the appearance representative. In such a case, plaintiffs' counsel could exploit the defense's decision to designate an uninformed appearance corporate representative. Of course, the possibility of using this tactic bolsters the defense's "unfair prejudice" argument in this context.

Conclusion

Despite the procedural and substantive underpinnings, one thing is clear: the Rule 30(b)(6) corporate representative — in any capacity — speaks on behalf of the corporation. A corporate defendant should never be allowed to shield a Rule 30(b)(6) deponent's testimony at trial by designating that person the "appearance corporate representative." Indeed, "[w]hen a corporation produces an employee pursuant to a Rule 30(b)(6) notice, it represents that the employee has the authority to speak on behalf of the corporation with respect to the areas within the deposition notice. This extends not only to facts, but also to subjective beliefs and opinions." Thus, regardless of her designation for trial purposes, the 30(b)(6) deponent should be treated as a party witness and the deposition testimony should be available for use for any purpose under Rule 32(a)(2). Otherwise, the defense stands to gain an unfair advantage if its appearance representative is "able to refuse to testify to matters as to which he testified at the deposition on grounds that he had only corporate knowledge of the issues, not personal knowledge." Justice requires that courts refuse to allow a corporate defendant to abuse its right to designate an appearance corporate representative for the purposes of limiting access to 30(b)(6) deposition testimony based on the fiction of corporate versus personal knowledge.