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Nuclear Verdicts Avoided – A Guide to Corporate Witness Depositions

I. FEDERAL RULE 30(b)(6)

The identification and preparation of corporate Rule 30(b)(6) witnesses in trucking cases should keep industry members and defense counsel up at night. A Plaintiff cannot literally depose a corporation so these individuals "speak" for and bind the corporation at trial. It has been these authors' experience that seasoned Plaintiffs' attorneys will craft a notice that may have upwards of 50 separate topics. These depositions are also videotaped as a matter of course. The affirmative steps and litigation strategy the corporation and defense counsel take once they receive a 30(b)(6) notice can directly lead to a successful outcome for the corporation at trial. Tactical lawyering is needed to spend the time necessary to identify these key witnesses and then prepare them for a potential *Reptile Theory* attack by the Plaintiff's attorney.

Federal Rule of Civil Procedure 30(b)(6) provides that:

> A party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf, and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization.

II. NOTICE AND DEPOSITION

As a threshold matter, the defense must determine if the deposition notice is for a 30(b)(6) corporate witness or for a deposition of a particular individual who has knowledge. The deposition notice sometimes is not clear and is drafted poorly. The defense must clear this up immediately with Plaintiff's counsel and should not assume that a corporate designee is required to be produced for deposition.

Under FRCP 30(b)(6), a corporation can be examined through the deposition testimony of its officers, directors, or managing agents without the need for a FRCP 45 subpoena. *Phila. Indem. Ins. Co. v. Fed. Ins. Co.*, 215 FRD 492 (E.D. Pa. Apr. 30, 2003).

Courts regularly enforce the "reasonable particularity" requirement and hold that a generic notice of deposition is insufficient. *Kalis v. Colgate-Palmolive Co*., 231 F.3d 1049, 1058 (7th Cir. 2000); *Alexander v. Federal Bureau of Investigation*, 188 F.R.D. 111, 114 (D. D.C. 1998) (rejecting notice to depose on "any matters relevant to this case" as not meeting the "reasonable particularity" requirement).

As a practice pointer, defense counsel should object to any notice where the topics are not described with reasonable particularity and seek a protective order requiring Plaintiff to revise the notice. Of course, there may be other objections like being vague, overly broad and unduly burdensome or does not limit the request to a particular time frame. The notice can also seek discovery protected by the attorney-client privilege, work-product protection, as well as the insurer-insured privilege.

One of the primary purposes of Rule 30(b)(6) depositions is to "curb the bandying" by which officers or managing agents of a corporation are deposed but, in turn, each disclaims knowledge of the facts that are clearly known to the organization. *Paparelli v. Prudential Ins. Co*., 108 F.R.D. 727 (D. Mass. 1985). The defense cannot produce a witness who says "I know nothing", like Sergeant Schultz in the TV show, Hogan's Heroes.

III. CORPORATE REPRESENTATIVE IDENTIFICATION

Once a Rule 30(b)(6) deposition notice has been served, the corporation must designate the corporate representative(s) who will testify on behalf of the corporation. The corporation must designate a deponent who is knowledgeable on the subject matter identified in the notice. *U.S. ex rel Fago v. M & T Mort. Corp*., 235 F.R.D. 11, 22–23 (D. D.C. 2006). If necessary, a corporation is under a duty to designate more than one deponent if it would be necessary to do so in order to respond to relevant areas of inquiry that are specified with reasonable particularity by plaintiff. *Alexander v. FBI*, 186 FRD 137 (D.D.C. Dec. 23, 1998).The designated corporate representative(s) has an affirmative obligation to educate himself as to matters regarding the corporation. *Calzaturficio S.C.A.R.P.A., s.p.a. v Fabiano Shoe Co*., 201 FRD 33 (DC Mass 2001). Therefore, counsel for the corporation must prepare the deponent so that they can testify on matters not only within their personal knowledge, but also on matters reasonably known by the corporation. *Id.*

A properly drafted 30(b)(6) notice shifts the burden to the defense. It now has the obligation to identify a corporate representative for each of the separate subject matters, which could be 50 in number. The identification of which individuals a corporation "offers up" or discloses is one of the most strategic decisions a Defendant can make in a trucking case. This decision must be a team decision between the trucking company, insurer, defense counsel, and TPA. The defense can offer one deponent for all of the 50 subjects, or break them down into areas of inquiry and disclose a few deponents. For example, one deponent could be disclosed on all topics related to hiring, training, and retention. Another could be disclosed on maintenance issues or what electronic equipment is in the truck. Often, the Safety Director or in-house counsel will be disclosed on certain topics.

The 30(b)(6) witness is a powerful witness at trial as they are speaking for the corporation. They are the face of the corporation and, in effect, they are the corporation. Defense counsel should meet

with the potential witnesses early on in the case to prepare them and to ensure that they would be effective witnesses at trial.

It is crucial to note that the Rule does not require that the individual with the "most" knowledge be produced for deposition. The Rule only requires the Defendant to identify an individual or individuals who will be able to testify fully and will have "knowledge" of the subject. The defense must be certain that the individual or individuals disclosed obtains the readily available information by undertaking their own investigation into the subject matter. This could include conferring with current employees and securing documentation, as well as conferring with former employees if no one at the corporation currently has that knowledge or documentation. The deponent must make a reasonable or good faith effort to obtain the information. Further, defense counsel should assist and give to the deponent all investigation, discovery including document production, fact witness deposition testimony (with exhibits), that is relevant to the subject matter. This is crucial since sometimes the Plaintiff's attorney will probe into what the witness reviewed and investigated at the first part of their deposition. This is also important as the deponent may "throw another individual under the bus" and say that they conferred with another individual who has relevant knowledge. This may lead to further depositions. All of the individuals disclosed should be prepared at the outset of the case before the first 30(b)(6) witness deposition proceeds. This will help drive consistency in deposition testimony and in a strong defense trial theme.

A Rule 30(b)(6) corporate representative does not give his or her personal opinions. Instead, he or she presents the corporation's "position" on the topic. *U.S. v. Mass. Indus. Finance Agency*, 162 F.R.D. 410, 412 (D. Mass.1995). This may require a factual response or the Corporation's opinions and beliefs. Producing an unprepared witness for a Rule 30(b)(6) deposition is tantamount to a failure to appear for the deposition. *United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996). This is because the testimony of a Rule 30(b)(6) witness is binding on the corporation. *Sabre v. First Dominion Capital, LLC*, 2001 WL 1590544, at *1 (S.D. N.Y. Dec. 12, 2001). The witness can't say "I haven't seen the 30(b)(6) notice", "I didn't know I was designated for this subject" or "I don't have knowledge on this area and did not investigate it". However, the testimony given at a Rule 30(b)(6) deposition can be admissions and is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes. *Industrial Hard Chrome, Ltd. v. Hetran, Inc*., 92 F. Supp.2d 786, 791 (N.D. Ill.2000). It is not a judicial admission that decides an issue. Id.

If a witness states it has "no knowledge" or position on a designated area of inquiry at deposition, the party can't argue for a contrary position at trial without introducing evidence explaining the reasons for the change. Otherwise, it is the attorney giving evidence and not the party. *United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996).

Plaintiff's attorneys will use these admissions at the beginning of their case in chief at trial and the defense could lose the entire case before the defense puts on their first witness. The line between a witness having both personal and corporate knowledge can be blurred. This may require stipulations between the parties, a detailed deposition examination of the deponent in terms of the type of his or her knowledge or possibly a second deposition, which may require leave of court.

IV. CONDUCT IN A CORPORATE REPRESENTATIVE DEPOSITION

An instruction not to answer questions at a deposition is generally improper. *Paparelli v. Prudential Ins. Co.*, 108 F.R.D. 727 (D. Mass. 1985). In Federal Court, the witness must answer the question subject to defense counsel's objection unless necessary to preserve a privilege. Defense counsel are not permitted to coach the witness or make lengthy speaking objections. The party who instructs a witness not to answer should immediately seek a protective order. Id. Sanctions could be entered if this procedure is not followed.

There is very little defense counsel can do once a 30(b)(6) deposition has started. The key to a successful deposition is preparation of the witness prior to the deposition. This preparation is a value - added by defense counsel and should occur over multiple deposition sessions and should include mock cross-examination.

Coaching of a witness by defense counsel is not allowed as defense counsel is not entitled to assist his witness during the deposition. The deposition is meant to be a question and answer conversation between Plaintiff's attorney and the witness. Defense counsel is not permitted to act as an intermediary and interpret Plaintiff's questions. Defense counsel must simply object, cite to the rule, as lengthy speaking objections are disfavored and sanctionable.

FRCP 30(b)(6) does not set its own discovery standard. Therefore, the discovery standard provided in FRCP 26(b)(1) should be used to determine whether the information sought is relevant, and capable of leading to the discovery of relevant information. *Hooker v. Norfolk S. Ry*. 204 FRD 124 (S.D. Ind. Oct. 30, 2001). When the discovery sought appears to be relevant on its face, the burden is on the party resisting the discovery to establish that the requested discovery does not fall within the scope of relevance as defined under Rule 26(b)(1), or is of such marginal relevance that the potential harm, occasioned by the discovery, would outweigh the ordinary presumption in favor of broad disclosure. *McBride v. Medicalodges, Inc*., 250 F.R.D. 581, 586 (D. Kan. 2008).

V. LOCATION OF A CORPORATE REPRESENTATIVE DEPOSITION

The deposition of a corporation by its agents and officers is ordinarily taken at the corporation's principal place of business, especially when the corporation is a defendant and the plaintiff has not shown any peculiar circumstances that would justify the deposition elsewhere. *Salter v. Upjohn Co*., 593 F2d 649 (5th Cir. Ala. Apr. 23, 1979). Under FRCP 32, an adverse party may use the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) for any purpose.

Although the defense can force the deposition to proceed in the principal place of business of the corporation, careful consideration should be given to requesting that the deposition proceed outside of the actual trucking company's office. It can, for example, be taken at its local attorney's office. In this way, Plaintiff's counsel cannot simply ask the 30(b)(6) witness during the deposition to walk down to their office to obtain additional information or documentation or search their computer for more information.

Deposition preparation is also crucial for these 30(b)(6) witness depositions as often they span 2 or more days and last 7 hours per day. They often also encompass every aspect of the trucking company's business.

VI. REPTILE THEORY AND PRACTICE

A major and dangerous aspect of preparing a Corporate 30(b)(6) representative involves recognizing and neutralizing a *Reptile* claim.

The *Reptile* Theory, based upon the 2009 book "*Reptile*" published by David Ball (a jury consultant) and Don Keenan (a successful plaintiff's lawyer) is a powerful and effective technique used by plaintiffs.

The *Reptile* Theory relies on invoking fear and danger reactions in jurors. *Reptile* lawyers argue that the conduct of the defendant poses a needless danger to the jurors, their family and the community. When safety and societal rules have been broken, the entire community is put at risk and a jury verdict is the only way to prevent that.

The authors of the *Reptile* claim well over $7 Billion in settlements and verdicts. They have created an entire industry of books, seminars, publications, webinars, and other products. They rely upon testimonials and heavy marketing. The reader can access the claims made by Keenan & Ball at their website: https://reptilekeenanball.com.

To this day, there is a controversy regarding the effectiveness of the *Reptile*. Some say that it is a revolutionary scientific theory, based in Anatomy and Psychology (see below). Others scoff that the *Reptile* is simply a variation of the "Golden Rule" argument. As most readers know, the Golden Rule is almost universally disallowed in state and federal courts. The Golden Rule is basically "What would you do if this were your family/daughter/son/husband/wife?" Courts have pretty consistently held that such an emotional argument is improper and cannot be used. The beauty of the *Reptile* is that it appeals to that same fear and emotional sense in jurors without actually calling out the "Golden Rule".

There is no question that the *Reptile* seeks to tie huge compensation to the outrage the jurors feel about the defendant's conduct. The principle is that the emphasis in terms of fixing compensation should be on the defendant's conduct. Although *Reptile* lawyers of course argue the verdict value of catastrophic injuries, the idea is that those will take care of themselves.

This quote from the *Reptile* book sums it up:

"... our primary goal in trial: to show the immediate danger of the kind of thing the defendant did -- and how fair compensation can diminish the danger with the community."

The *Reptile* tries to convince jurors that no harm is acceptable, no risk is acceptable and all risk inevitably leads to catastrophic results. Jurors are persuaded that defendants must eliminate all risk and

follow all safety rules (no matter how unrealistic that is). The argument continues; the community suffers because the danger imposed by the defendants is imminent and ubiquitous. The conclusion is that if the community is at risk the jurors and their families are at risk.

VII. Physiology of the *Reptile* Theory

There is solid neuroscience which supports the *Reptile* theory. It focuses on the “subcortical” part of the brain which consists of the brain stem and amygdala which are on either side of one's brain. Simply stated, these portions of the brain are primitive; they respond and react to threats and fear. They invoke the fight or flight response. Reactions are involuntary, automatic and not reasoned. The *Reptile* theory seeks to tap into these primitive unevolved brain instincts. The *Reptile* brain senses danger or fear and goes into a survival mode, seeking a place of safety.

Reptile lawyers argue that the courtroom is a safe place where the jurors can be free to express themselves against the dangerous defendant. The jurors are further told that damages will increase safety and decrease danger to themselves, their family and the community.

The corollary or opposite of the *Reptile's* unevolved primitive brain is the idea that jurors should rely upon their “primate” evolved brain. Since we have evolved as a society we now resolve our differences not through violence or combat but rather in a civil courtroom setting with rules, words and documents.

The primate brain relies upon the frontal lobe and frontal cortex anatomy. These appeal to logical reasoning and cognitive judgments which we use in our civilized society. The anti-*Reptile* asks the juror to not be fooled by being scared or made afraid and to decide the case based upon civilized societal norms. After all, the nature of this case is a “civil” lawsuit.

The primate theory seeks to tap into the jurors’ better nature, evaluate all of the facts and apply the law. In addition to being a place of safety, the courtroom is a place of fairness and civility. Decision making should be based upon reason, not fear and damages must be fair and based on logic.

VIII. Strategies for Countering the *Reptile* and Effective Corporate Representative Preparation

It stands to reason that long before deposition preparation, the corporate representative’s cross and direct examination are fixed. By this, we mean that all of the pre- and post-accident documents have been generated. The safety program of the corporate representative’s company is well-known and published. These include driver manuals, safety manuals, safety policies and of course all of the required regulatory documents.

To counter the *Reptile* argument it is essential that the corporate records, especially those required by regulations, are well kept. In a trucking case, compliance with Federal Law (the Federal Motor Carrier Safety Regulations or FMCSRs), and particularly Parts 40, 393, and 391-396 must be carefully demonstrated. Additionally, the pre-employment investigation and post-employment training and recurrent training of drivers is important.

The jurors must be told that the corporate defendant has taken a great deal of care and safety prior to putting a driver on the road. If the company has a safety director (presumably the 30(b)(6) representative), it must be explained that even though an accident has happened the company has taken meaningful steps to meet or exceed federal and state safety regulations. It is an important way to counter the *Reptile*.

In addition to proper safety programs, it is important in the claim stage to recognize a *Reptile* claim. Often, a Reptilian lawyer will send a lengthy, onerous and sometimes incorrect preservation letter. It is important to research Reptilian counsel, look for similar cases handled by that lawyer and try and obtain previous pretrial and trial information.

Meetings With The Corporate Representative

It goes without saying that there must be multiple meetings with any corporate representative, whether a safety director, operations director, compliance officer, or anyone who will be representing the corporation. In fact, even the first post-accident meeting, if a Rapid Response is involved, should be considered the first deposition training and preparation exercise.

Even before counsel sits down with the corporate representative to prepare for a deposition (and there should be at least two or three preparations sessions, this is no time to scrimp on proper preparation. Counsel has an ethical and moral obligation to their client to resist foolish and shortsighted billing restrictions. Do not abdicate your independent judgment to satisfy some bean counter!) The responses to all paper discovery and document production have to be carefully planned. All producible documents must, of course, be produced but it is crucial for the defense lawyer and corporate representative to understand these documents and the philosophy behind them.

One pitfall that is often overlooked is the Response to Requests for Admissions. Review Federal Civil Rule 36 (or its state counterpart) and make sure that admissions receive proper response. There should never be a simple "denial"; rather per the specific dictates of the rule all denials must be fully explained less they be deemed admitted.

Deposition Preparation and Proper Response to *Reptile Questions*

As pointed out above, careful preparation includes multiple meetings, sometimes uncomfortable mock cross-examination, but most importantly careful consideration of proper responses.

The corporate representative should never admit open ended safety questions such as “no risk is acceptable”, “all harm must be eliminated”, and “violation of safety rules endangers the community.” The witness must force opposing counsel to be specific about the facts of this accident and not open ended generalizations. Plaintiff's counsel must be forced to define “safety” and of course the witness should never admit that trucks are “less safe”, that they are harder to maneuver, brake or steer, that they are dangerous and so forth.

The witness must keep bringing the focus of the deposition back to the facts of this accident. Instead of admitting that the actions of the driver and the company were inevitably unsafe, the witness should be prepared to distinguish between facts of the accident which are relevant and facts which are irrelevant. (See below regarding the "Dirty Five").

Instead of open ended yes or no responses, the witness should be encouraged to respond "not necessarily" to open ended questions about safety.

The "Dirty Five" and Recognizing Danger Areas

Plaintiff's trucking lawyers tend to emphasize five hot button issues which the public fears the most about trucks. There are :

1. Fatigue/Hours of Service;
2. Cell Phones and Distracted Driving;
3. Alcohol and Controlled Substances;
4. Improper Maintenance; and
5. Hiring, Training and Driver Retention.

Often, Plaintiff's lawyers point to completely irrelevant documents regarding these five issues, especially if there is divergence between the driver and company conduct and the black letter words in the regulations (or the CDL Manual, which is a favorite pressure point for plaintiff's lawyers). It is crucial for the company representative to recognize this and resist irrelevant questions and conclusions.

To summarize, the witness should not:

1. Admit duty questions;
2. Agree that trucks are less safe;
3. Agree that trucking companies and drivers have a higher standard of care than the general public;
4. Agree that professional truck drivers equate with other professions like doctors and lawyers.

Additionally, the witness should carefully listen for community, motoring public, danger, needlessly endanger, and catastrophic buzz words.

Although nothing can guarantee the elimination of dangerous deposition testimony or resulting high verdicts, the techniques described in this paper will help the defense lawyer and corporate representative recognize a *Reptile* claim and how to counter it.