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ORGANIZATIONAL AVATARS: PREPARING CRCP 30(B)(6) DEPOSITION WITNESSES

Properly preparing an organizations designee for a deposition requires familiarity with the obligations imposed by the civil rules, and involves unique obligations and challenges. This article discusses the requirements of Rule 30(b)(6) and possible sanctions for noncompliance with that rule. It also provides guidelines for dealing with organizational depositions.

Corporations and other legally recognized organizations are frequently involved in litigation and, as a result, can be required to testify as witnesses to the organization's "knowledge." What an entity knows is often a conglomeration of information learned by its officers, directors, agents, employees, or others, as well as other knowledge residing in the company's records. Assembling this organizational knowledge becomes necessary if the organization receives a Notice that it will be deposed. The Colorado Rules of Civil Procedure include a process, spelled out in Rule 30(b)(6), to make this possible.

Civil litigators who receive Rule 30(b)(6) deposition Notices for their organizational clients are required to help them prepare to testify. Doing so under the Rule 30(b)(6) process involves unique challenges, because courts have held that "a corporation is expected to *create* an appropriate witness or witnesses from information reasonably available to it if necessary." [1] This organizational avatar--a designee who embodies the organization--is someone who has been educated

on the topics in the Notice and is charged with knowing more than just the cumulative understanding of events held by other organizational employees. The designee speaks for the organization and gives its views and understanding of events. Thus, properly preparing the Rule 30(b)(6) designee requires familiarity with the obligations imposed by the text and interpretations of that rule.

This article provides an overview of the text and relevant case law interpreting Rule 30(b)(6) so that practitioners can assist their organizational clients in creating and preparing the designee(s) who will appear. The article discusses the extent and limits of such preparations, and covers sanctions that might be imposed on an organization for failing to meet its obligations under the rule. It concludes with a checklist of guidelines to help attorneys assist their clients in creating the organizational avatar who will embody the organization during the deposition.

The Colorado and Federal Versions of the Rule

Colorado's version of Rule 30(b)(6) provides:

> A party may, in his notice, name as the deponent, a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This sub-section (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules. [2]

The federal rule is similarly worded, with only a couple of substantive differences worth noting. [3] First, the federal rule includes the phrase "other entity" within the list of organizations that may be named as deponents. This addition was intended to avoid wrangling over what types of entities are covered, to clarify that "more exotic common-law creations, or forms developed in other countries[,]" also fall within the rule's scope. [4] Second, the federal rule ***40** uniquely requires that the subpoena advise a non-party organization of its duty to make the witness designation.

The Purposes Behind the Rule

Two key purposes of Rule 30(b)(6) are to assist the party deposing an organization by

> avoid[ing] the "bandying" by corporations where individual officers disclaim knowledge of facts clearly known to the corporation, and to assist corporations which found an unnecessarily large number of their officers and agents were being deposed. [5]

As one court has said, the rule "allows an entire corporation to speak through one agent." [6] The rule also aids the organization called to testify, because it gives the entity more control, allowing it to designate and prepare as few or as many witnesses to testify on its behalf as it elects. [7]

Requirements on the Party Preparing the Notice

The Rule obligates the party taking the organizational deposition to prepare the topics "with reasonable particularity[.]" [8] Courts have interpreted this language to require the deposing party to identify specific subjects "with painstaking specificity," and confine the topics to those "that are relevant to the issues in dispute." [9] This heightened specificity level exists because if the organization "cannot identify the outer limits of the areas of inquiry noticed, com-pliant designation is not feasible." [10] The demand for reasonable particularity aids the organization in identifying persons with knowledge and relevant documents so the designee can be prepared with responsive knowledge. Particularity is also important because the designee "is not expected to be clairvoyant, so as to divine the specific questions that could require the assist of a demonstrative aid[.]" [11] Thus, where appropriate, attorneys preparing Rule 30(b)(6) Notices should consider combining them with Rule 30 Requests for Production (or with a subpoena *duces tecum* to a non-party) so the designee comes with documents relevant to the topics that the designee cannot be expected to have committed to memory. [12]

Further, the rule also implicitly requires that the party seeking the deposition provide the organization being deposed sufficient time to get its witness(es) ready,

as appropriate, based on the number and/or subjects of the topics.[13] The deposing party's failure to satisfy the rule's requirements can result in a protective order that delays or even prevents that party from obtaining the requested information.

Although many attorneys will include in their Rule 30(b)(6) Notices the statement that the organization must produce the "person most knowledgeable" about the listed topics, the rule does not expressly require that such persons be produced. In fact, some courts believe such requests are "fundamentally inconsistent with the purpose and dynamics of the rule."[14] These courts hold that the deposing party cannot include a requirement in the topics that the witness have personal knowledge.[15] It has also been held improper to preface the areas of inquiry with language that the topics "include, without limitation" areas specifically enumerated. This practice is disapproved because it "subjects the noticed party to an impossible task" to prepare its designee.[16]

The rule gives the organization, not the deposing party, the right to select the person(s) who will appear. The organization can designate anyone to testify on its behalf, "but only with their consent."[17] As long as the person produced has the requisite knowledge, the organization may elect not to produce the person most knowledgeable on the topics. As one magistrate judge has cautioned, "permitting a requesting party to insist on the production of the most knowledgeable witness could lead to time-wasting disputes over the comparative level of the witness' knowledge."[18] Thus, requests to produce the most knowledgeable person in a Rule 30(b)(6) Notice are problematic because they may be objectionable and/or unenforceable.

Requirements on the Organization Receiving the Notice

To date, there is very little published Colorado authority construing an organization's obligations under Rule 30(b)(6). The Colorado Supreme Court has yet to interpret the rule. The Colorado Court of Appeals has directly addressed the obligations of a designee in just two published cases to date: *D.R. Horton, Inc.--Denver v. D & S Landscaping, LLC* and *Camp Bird Colorado, Inc. v. Board of County Commissioners of County of Ouray*.[19]

The D.R. Horton *Case*

In *D.R. Horton*, a development company (D.R. Horton) brought claims against its subcontractors for breach of contract and warranty, indemnification, contribution, and negligence. D.R. Horton was served with a Rule 30(b)(6) Notice, which required designation of a witness to testify to, among other things, "any other errors D.R. Horton claims were made by the subcontractors." [20]

The company did not seek a protective order, but elected instead to advise the deposing parties that it had only one employee left who was there at the time the subcontractors' work was done and that she worked in sales and marketing, but that she could identify former employees who may have knowledge of the topics. The deposition proceeded, and although the designee identified former employees with knowledge of the topics, she had no knowledge about D.R. Horton's claims that the subcontractors were negligent, made errors, or breached their contracts or warranties. [21] When asked whether other witnesses would be designated, D.R. Horton's counsel stated that the designee "had identified the individuals, no longer employed by D.R. Horton, who would be the ones to testify regarding the topics" in the Notice, and stated that if the case went to trial, "we will likely call some or all of them as fact witnesses." [22]

The subcontractors moved for summary judgment, tendering the Rule 30(b)(6) transcript to show that D.R. Horton lacked evidence to support its claims. D.R. Horton responded with an expert report, but did not present any additional evidence. The trial court granted the subcontractors' motion.

On appeal, D.R. Horton argued that the transcript was insufficient to support summary judgment. The appellate court disagreed, holding that "[n]othing in the rule or its interpretation suggests to us that persons who are designated and testify under Rule 30(b)(6) will not bind their corporate principal." [23] The court held that "the testimony of the designee is ... admissible against the party that designates the representative." [24]

Because application of the rule was central to its holding that the district court properly relied on the designee's testimony, the court of appeals discussed the general obligations of the rule. The court noted that when choosing a Rule 30(b)(6) designee, organizations "have a duty to make a conscientious, good-faith effort to ***42** designate knowledgeable persons and to prepare them to fully and unevasively answer questions about the designated subject matter." [25] The court indicated that the designee must review relevant documents and consult other sources of information (including principal depositions and exhibits) before the

deposition begins. The court recognized that the rule implicitly requires designees to review all matters known or reasonably available to the entity, and that personal knowledge of the designee is not required.[26] The court stated that allowing an entity to designate a witness who is unprepared or not knowledgeable "would simply defeat the purpose of the rule and 'sandbag' the opposition."[27] The court also acknowledged that:

> [a]lthough the necessity of producing a prepared and knowledgeable witness may be burdensome ..., the burden is not unreasonable because it is the natural result of the privilege of using the corporate form to conduct business.[28]

The Camp Bird *Case*

In *Camp Bird*, a quiet title action by a mining company (Camp Bird) against a county board, Camp Bird appealed the trial court's decision allowing the county to present witnesses at trial who were different from the county's Rule 30(b)(6) designee. As in *D.R. Horton*, the Colorado Court of Appeals in *Camp Bird* noted that:

> [u]nder C.R.C.P. 30(b)(6), persons designated must be knowledgeable as to the matters at issue and as to facts pertinent to the organization regarding the issue, and they must testify as to the specifically requested information.[29]

The court advised that the rule "mandates that the witness's testimony include certain subject matter and knowledge."[30]

However, in rejecting the mining company's objection to the county's use of different witnesses and testimony at trial from that obtained in the Rule 30(b)(6) deposition, the *Camp Bird court* stated that the rule does not "preclud[e] an organization from offering either contrary or clarifying evidence where a designated deponent has no knowledge of a particular matter" and the organization "is allowed to call non-designated persons as fact witnesses."[31] The court noted that the rule's burden is "to produce witnesses who are knowledgeable,

not to produce an exhaustive list of witnesses to testify as to each and every factual assertion made by the organization." [32]

Federal Law Interpreting the Rule

As observed in *D.R. Horton*, because there is a paucity of Colorado case law on the subject, federal cases interpreting the rule's requirements "are highly persuasive." [33] The federal courts treat Rule 30(b)(6) as allowing for a "specialized form of deposition." [34] The organization's designee does not provide that person's personal knowledge or personal opinions; rather, the designee presents the organizations positions on the listed topics. The testimony "represents the knowledge of the corporation; not of the individual deponents," because "[t]he corporation appears vicariously through its designee." [35] In a Rule 30(b)(6) deposition, "there is no distinction between the corporate representative and the corporation" as to the listed topics. [36] The deponent must be "thoroughly educated" on the assigned topics, and told or provided "facts known to the corporation or its counsel" relevant to the topics. [37] That the organization no longer employs any people with personal knowledge of the topics is irrelevant, and such circumstance "does not relieve the organization of the duty to prepare a Rule 30(b)(6) designee." [38]

Federal courts have recognized four general duties created by the rule: (1) to produce a witness knowledgeable on the topics; (2) if necessary to cover all the topics, to designate more than one witness; (3) to prepare the witness to testify on matters not only known by that person, but those that should reasonably be known by the designating party; and (4) to substitute an appropriate deponent if it becomes apparent that the current deponent is unable to respond to the relevant areas of inquiry. [39]

Significantly, because personal knowledge is not required, [40] the designee could be (at the organization's option) someone who was not involved in the factual situation sparking the underlying dispute. The rule even allows an organization to select a nonemployee as its designee, but it retains the burden to adequately prepare that person. [41] Some federal courts have imposed the additional requirement that "the designee must not only testify about facts within the corporation's knowledge, but also its subjective beliefs and opinions," and "must provide its interpretation of documents and events." [42] The information or matters known or

reasonably available to an organization might include information acquired by the organization through its membership on the board of another organization, [43] or as an affiliate of another organization. [44]

Although some organizations have argued that their written discovery responses or documents produced adequately stated the organizations positions for the Rule's purposes, such arguments have been repeatedly rejected. The organization may not insist that "its documents state the company's position." [45] As one court recently stated, discovery responses are

> not a substitute for a Rule 30(b)(6) deposition, and a corporation cannot choose to submit answers to the party's Rule 30(b)(6) deposition questions at some later date in a form it prefers. [46]

According to such courts, the production of documents alone is not enough to meet the organization's Rule 30(b)(6) obligations because

> a witness may still be useful to testify as to the interpretation of papers, and any underlying factual qualifiers of those documents (i.e. information which the defendant knows but is not apparent on the face of the documents). [47]

Producing documents and responding to written discovery is not a substitute for providing a thoroughly educated witness because "the two forms of discovery are not equivalent ... and depositions provide a more complete means to provide information and are, therefore, favored." [48] Further, a questioner should not be prevented from deposing a live witness in the deposition setting merely because the topics are similar to those covered by documents that have been produced or interrogatories that have been answered. [49]

Many courts are unsympathetic to arguments that preparing a witness would require review of a vast number of documents:

> Even if the documents are voluminous and the review of those documents would be burdensome, the deponents are still required to review them in order to prepare themselves to be deposed. [50]

Further, courts have not allowed an organization to argue that designees need not review voluminous records it has produced because the designee would have no more knowledge about the records than anyone who read them. [51] While the federal rule does not define information "reasonably available" to which the designee must testify, some courts take a broad view, equating this phrase to the FRCP 34 requirement that parties must produce documents "in their control," and requiring the designee to be familiar with a ***43** wide range of documents in the organization's control. [52] Thus, in some cases, designees may be required to review records in the pos-session of the organization's accountants and attorneys, which are often deemed to be under the organizations control. [53]

Topics touching on privilege and work product also raise difficult preparation issues. No Colorado reported opinions address the interplay between such protections and the opposing party's right to have a knowledgeable Rule 30(b)(6) witness. However, because Colorado law provides that facts communicated to or learned from an attorney are not privileged. [54] attorneys who are versed in the facts of a case may be called on directly to educate the designee if no one else can. [55] There is no bar to a Rule 30(b)(6) deposition merely because in-house counsel are the only people with personal knowledge of the noticed topics. [56]

There is some division between federal courts on how far a designee must investigate information responsive to the topics. One court has declared it is unaware of a requirement

> that a Rule 30(b)(6) deponent must undertake an investigation, outside of the party he represents, in order to respond to questions that, properly, should be directed to a different party, or entity. [57]

On the other hand, in another case, the rule was interpreted to require that the designee prepare by conducting an independent investigation so the designee could answer factual questions about the underlying event, even though the underlying event had been internally investigated already and the results of the earlier

investigation were not discoverable. This court required that: "If that preparation means tracking much the same investigative ground that counsel and the risk management/peer review committee have already traversed, but independently of that investigation, so be it." [58]

The burdens of preparation can be particularly heavy in certain types of cases. For example, where the party being deposed is an insurance carrier whose own employees were not involved in the accident or incident for which coverage is sought, the carrier may be completely dependent on its insured to cooperate by agreeing to serve as a designee or by providing the designee the necessary education to address the topics. [59] Yet carriers and their clients might also be at odds. Insurance company designees may be required to review incident reports or other documents about the underlying circumstances, and it seems logical that a carrier faced with topics requiring knowledge of the underlying accident or incident be required to use any insurance policy provisions requiring the insured to cooperate to try to get the insured's assistance.

Although getting a witness prepared can be burdensome, the rule does not require that the witness and counsel work alone. An organizations designee need not personally conduct interviews or personally review records to become educated:

> So long as the designee is prepared to provide binding answers under oath, then the corporation may prepare the designee in whatever way it deems appropriate--as long as *someone* acting for the corporation reviews the available documents and information. [60]

Thus, a designee might become educated on a topic by reviewing summaries of documents prepared by other organizational employees, or by speaking to other organizational employees who did the interviews. [61] In addition, if the deponent knows that he or she will likely need documents in the organization's possession to meaningfully respond to reasonably expected questions, some courts hold that the deponent may bring those documents to the deposition to assist in answering questions. [62]

The obligations imposed by Rule 30(b)(6) are "not infinite," and if the designee reviews all available documentation and consults all reasonably available sources

and would still not be able to give complete answers on a specified topic or topics, the "obligations under Rule 30(b)(6) cease, since the rule requires testimony only as to 'matters known *or reasonably available* to the organization.'" [63] The rule "is not designed to be a memory contest[.]" [64] Further, if the deposing party strays from the topics during the deposition, a designee's lack of knowledge on such questions is not sanctionable: "[I]f the deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party's problem." [65] Although there are no apparent limits on the number of topics that can be listed in a Rule 30(b)(6) Notice, counsel can certainly object where irrelevant topics are listed and obtain a protective order on a Notice that ignores the relevancy requirement. [66]

If relevant documents to prepare or refresh the designee do not exist, the organization may rely on a designee's memory, even if that memory is faint or incomplete. For example, in one case, an organization did not have to produce another witness merely because its designee could not remember details due to the passage of time. The court stated both parties should have expected that the passage of time would make certain information unavailable because the witness forgot. [67]

An organization must prepare a Rule 30 witness to testify, but if the organization truly does not possess the knowledge or information ***44** needed to prepare the witness on the topics, its Rule 30 obligations end. [68] If, after reviewing all available documents and information on the topics, and after interviewing any persons who might reasonably have knowledge of those topics, the organization concludes that it would not be able to produce a witness prepared to speak as to some of the topics, the organization should inform the deposing party that no witness will speak to those topics, doing so well in advance of the deposition. [69]

Further, in contrast to cases that require an organization to provide a witness to give opinions and interpretations, some courts hold that the recipient of a Rule 30(b)(6) Notice may resist the deposition on grounds the information sought is more properly discoverable through contention interrogatories. [70] Such courts have been persuaded that topics that call for an organization to take a legal position impose an undue burden on the organization because it needs counsel's assistance to prepare its answers and pre-serve its privileges. [71]

Protective Orders and Rule 30(b)(6)

A protective order can be sought for abuse of the rule: "Like other forms of discovery, a Rule 30(b)(6) Notice is subject to limitations under Rule 26[.]" [72] Furthermore, if the organization can show it has no means of preparing a designee, it may move for a protective order and should be excused from sanctions. [73] Such a motion may also "object to the timing and/or extent of the 30(b)(6) depositions[.]" [74] One court has noted that Rule 30(b)(6) depositions

> can be used to test theories, challenge facts and fill in information gaps, but they cannot be used to reinvent the wheel by asking questions that have already been completely answered. [75]

If the Notice seeks information on a topic that could be more easily obtained from another, more direct source, the court may disallow that topic. [76]

The importance of seeking a protective order before the deposition cannot be stressed enough. [77] Where counsel for the parties are unable to agree to narrowing the scope of topics, the failure to seek court clarification before the deposition begins could result in a waiver of scope objections. By contrast, courts have stricken topics that were overbroad or not specific enough when presented the issue before the deposition began. [78] It is also important to note that there is a split of authority in the federal district courts about how many hours of deposition are permitted when the organization nominates multiple designees to testify. Although there are courts that afford the presumptive seven hours of deposition time for each designee, [79] another court concluded that a blanket rule permitting seven hours of deposition time for each designated deponent was unfair and unduly burdensome because it rewards broad deposition notices, penalizes organizational defendants who maintain their business information in silos, and because of the manifest increased cost and disruption of preparing multiple people to respond to a single deposition notice. [80] Therefore, it is essential to present issues of scope, specificity, and duration to the court early on to avoid disputes at or after the deposition.

Sanctions for Failure to Comply

The deposing party can move for sanctions if an organization fails to provide adequately prepared witnesses. As held in the *D.R. Norton* case, where an entity

designates a deponent who appears but is unable to answer all the questions specified in the Notice,

> a court may issue sanctions for failure to appear under C.R.C.P. 37 .... Indeed, when the [entity] fails to designate the proper person, the appearance is, for all practical purposes, no appearance at all. [81]

The rule applies to non-party organizations, as well, and they are likewise subject to sanctions if they do not comply. [82]

When Rule 30(b)(6) is violated, Rule 37 "provides a panoply of sanctions, from the imposition of costs to entry of default." [83] Sanctions have included one or more of the following: (1) costs and fees incurred in filing a motion to compel; (2) monetary sanctions against the non-complying party and its counsel; (3) an order compelling compliance with the rule and requiring production of an educated deponent; (4) requiring an organization to re-designate an adequately prepared witness for a new deposition taken at the non-complying party's expense; and (5) precluding witnesses from testifying on subject matters for which the designee was unable to provide knowledgeable and specific responses (in instances of fla-grant discovery abuse). [84] Among the other remedies, a court can require an offending organization to answer additional written discovery propounded by the deposing party. [85] A court may also grant the deposing party additional hours of deposition time as a remedy for the deponent's unpreparedness. [86]

Rule 37 permits a court to sanction a party for the failure to obey an order entered for not complying with Rule 30(b)(6) by, among other things, "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence [.]" [87] In this regard, it has been said that:

> [d]epending on the nature and extent of the obfuscation, the testimony given by the non-responsive deponent (*e.g.* "I don't know") may be deemed "binding on the corporation" so as to prohibit it from offering contrary evidence at trial. [88]

It remains to be decided, however, how far Colorado's courts will go in binding an organization to the words of its designee, or whether an organization can be sanctioned for presenting testimony at trial that contradicts its designee directly. In the *D.C. Concrete* case, the Colorado Court of Appeals held it was not error to allow a corporation to call witnesses who testified differently than the designee in its deposition, but the court noted that the opposing party had not shown surprise or unfair prejudice because it had deposed the employees who testified.[89] The *Camp Bird* court, however, said only that an organization is not prevented from offering contrary or clarifying evidence if its designee had ***45** "no knowledge of a particular matter," implying that contrary or clarifying evidence may not always be allowed.[90] Both discussions appear to be *dicta* and neither involved instances where the testimony at trial came without notice, leaving the door open for potential sanctions.

Checklist for Preparation of the Rule 30(b)(6) Designee

The cases addressing Rule 30's obligations suggest that the following guidelines will be helpful to practitioners in assisting organizations in preparing for Rule 30(b)(6) depositions.

• The Notice should be reviewed carefully. If it contains matters prohibited by CRCP 26(c), or seeks legal conclusions or expert opinions, counsel should confer to see if appropriate limits can be reached in advance of the deposition. Where no agreement is reached, counsel should consider filing a timely motion for protective order.

• If the Notice contains a large number of topics or otherwise imposes on the organization a significant burden to get one or more witnesses ready to testify, counsel for the organization should make sure it is given adequate time to prepare. In some circumstances, it may make sense to seek to postpone the Rule 30(b)(6) deposition until after percipient or expert witnesses have been deposed.

• If the organization determines, after reviewing all information reasonably available to it (including information within its control but held by others), that it cannot produce a witness properly prepared to speak to one or more of the topics, counsel for the organization should inform the deposing party no witness can be produced on those topics, and should do so well in advance of the scheduled deposition date.

• The witness should be told that he or she will be speaking for the organization at the deposition on the topics for which the witness has been designated, and should refrain from giving personal opinions on off-topic matters.

• The witness should be given the Notice or the text of the specific Notice topics to which the witness is being designated to speak. The witness should review the topics to be clear on the areas on which the witness will testify.

• Counsel should let the witness know if other witnesses will also be designated as part of the same organizational deposition, to help the witness understand what topics will be covered by others. At the same time, counsel should prepare all witnesses in multiple designee situations so that they do not "bandy" the deposing party by mutually pointing to other designees as being the ones who can answer questions.

• The witness should be advised that the organization must produce a witness who is educated on the topics, and that the organization can be sanctioned if it produces a witness who does not adequately prepare.

• The witness should be told that becoming educated requires reviewing or learning the content of all records that are reasonably available to the organization that are relevant to the topic(s), and interviewing or otherwise becoming acquainted with the non-documentary knowledge that other persons available to the organization have about the topic(s). This includes the knowledge of cur-rent and former employees of the organization, if available.

• Where the witness anticipates the need to consult documents to testify to reasonably expected questions on dates, numbers, or other details difficult to commit to memory, the witness should be asked to obtain those documents so the organization's counsel may review them and determine whether they should be brought to the deposition for use in answering questions.

• The witness should be encouraged to ask questions about interpreting key documents so he or she is clear on the organization's understanding of them.

• The witness should be provided and tasked with reviewing prior fact witness deposition testimony taken in the case that bears on the topics (or summaries of same).

• The witness should be provided and tasked with reviewing previously marked deposition exhibits that bear on the topics (or summaries of same).

• A few days before the deposition, the organization's counsel should check in and discuss the designee's preparation, to confirm that the organization is meeting its duties.

• If, despite good faith efforts by the organization to get the witness ready, it appears during the deposition that the designee has failed to prepare adequately, counsel should inform the organization immediately and offer the deposing party another witness who is or will be properly prepared.

• The witness should keep track of the amount of time spent, the tasks performed, the persons consulted, and the materials reviewed to prepare to testify. Such a record will assist if there are questions about whether the witness adequately prepared.

Conclusion

The privilege of using the corporate form to conduct business in Colorado creates unique burdens on organizational clients that require special preparation by an organization's deponents and its counsel Unlike a percipient witness, an organization being deposed must become educated on topics disclosed before the deposition. The organization must use information known or reasonably available to it to educate its designee--the organizational “avatar” through which it will provide binding testimony. Inadequate preparation by the attorney and/or witness involved can result in serious sanctions against the organization due to the specialized form of deposition established by Rule 30(b)(6). The process of preparing and producing knowledgeable designees empowers organizations to determine who will speak for them at the organization's deposition, while protecting the deposing party from a game of “keep-away” between bandying corporate deponents.

Footnotes

a1 **The Civil Litigator articles address issues of importance and interest to litigators and trial lawyers practicing in Colorado courts. The Civil Litigator is published six times a year.**

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1 *QBE Ins. Corp. v. Jorda Enters., Inc.*, ___ F.R.D. ___, 2012 WL 266431 at *11 (S.D.Fla. 2012) (slip op.) (emphasis in original). *See also Wilson v. Lakner*, 228 F.R.D. 524, 528 (D.Md. 2005) (same).

2 CRCP 30(b)(6).

3 *Compare* CRCP 30(b)(6) *with* FRCP 30(b)(6).

4 *See* FRCP 30(b)(6), Advisory Committee Notes to the 2007 amendment.

5 *United States v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996).

6 *Barron v. Caterpillar*, 68 F.R.D. 175, 176 (E.D.Pa. 1996).

7 *Taylor*, 166 F.R.D. at 360.

8 *Id.*

9 *U.S. E.E.O.C. v. Thorman & Wright Corp.*, 243 P.R.D. 421, 426 (D.Kan. 2007).

10 *Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 442, 444 (D.Kan. 2000).

11 *Arctic Cat, Inc. v. Injection Research Specialists, Inc.*, 210 F.R.D. 680, 686 (D.Minn. 2002).

12 *See Breatheable Baby LLC v. Crown Crafts, Inc.*, 2013 WL 3350594 at *8 (D.Minn. 2013) (slip op.) (noting "would have ensured the deposition was fruitful"). *See also Artic Cat*, 210 F.R.D. at 686 (assigning part responsibility for not serving document request with Notice).

13 *See generally U.S. E.E.O.C. v. Source One Staffing, Inc.*, 2013 WL 25033 at *3-4 (N.D.Ill. 2013) (slip op.) (deposition premature as information being analyzed by expert).

14 *QBE*, 2012 WL 266431 at *10.

15 *Reed v. Bennett*, 193 F.R.D. 689, 692 (D.Kan. 2000).

16 *Id. See also Dongguk Univ. v. Yale Univ.*, 270 F.R.D. 70, 74 (D.Conn. 2010) (language of "including but not limited to" is overbroad).

17 FRCP 30(b)(b), Advisory Committee Notes to 1970 Amendments.

18 *QBE*, 2012 WL 266431 at *10.

19 *See D.R. Horton, Inc.--Denver v. D & S Landscaping, LLC,* 215 P.3d 1163 (Colo.App. 2008); *Camp Bird Colorado, Inc. v. Bd. of County Comm'rs of County of Ouray*, 215 P.3d 1277 (Colo.App. 2009). The rule was also mentioned in *D.C. Concrete Mgmt., Inc. v. Mid-Century Ins. Co.*, 39 P.3d 1205 (Colo.App. 2001) (discussed later), but there was no discussion of designee obligations in that case.

20 *D.R. Norton*, 215 P.3d at 1165.

21 *Id.* at 1165.

22 *Id.* at 1168-69.

23 *Id.* at 1168.

24 *Id.* at 1170.

25 *Id.* at 1167 (quotations and citations omitted).

26 *Id.* at 1167-68.

27 *Id.* at 1168.

28 *Id.*

29 *Camp Bird*, 215 P.3d at 1291.

30 *Id.*

31 *Id.*

32 *Id.* at 1290.

33 *D.R. Horton*, 215 P.3d at 1167.

34 *Great American Ins. Co. of New York v. Vegas Constr., Co., Inc.*, 251 F.R.D. 534, 538 (D.Nev. 2008).

35 *Taylor*, 166 F.R.D. at 361.

36 *Sprint Comm. Co., L.P., v. TheGlobe.Com, Inc.*, 236 F.R.D. 524, 527 (D.Kan. 2006).

37 *Great American*, 251 F.R.D. at 540.

38 *Id.* at 539.

39 *Alexander v. F.B.I.*, 186 F.R.D. 137, 141 (D.D.C. 1998) (citing cases).

40 *D.R. Horton*, 215 P.3d at 1168.

41 *ACE USA v. Union Pac. R.R. Co. Inc.*, 2011 WL 3101808 at *3 (D.Kan. 2011) (unreported).

42 *Taylor*, 166 F.R.D. at 361.

43 *Soroof Trading Dev. Co., Ltd. v. GE Fuel Cell Sys., LLC*, 2013 WL 1286078 at *3 (S.D.N.Y. 2013) (slip op.).

44 *Citgo Petroleum Corp. v. Odfjell Seachem*, 2013 WL 2289951 at *13 (S.D.Tex. 2013) (slip op.).

45 *Great American*, 251 F.R.D. at 538.

46 *Citimortgage, Inc. v. Chicago Bancorp, Inc.*, 2013 WL 3946116 at *2 (E.D.Mo. 2013) (slip op.).

47 *Dongguk*, 270 F.R.D. at 74 (quotation omitted).

48 *Great American*, 251 F.R.D. at 541 (citation omitted).

49 *Dongguk*, 270 F.R.D. at 74.

50 *Calzaturficio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 37 (D.Mass. 2001).

51 *See id.* at 37 (describing argument as "disingenuous" at best because designees "were obligated to review all corporate documentation that might have had a bearing" on the topics).

52 *Id.* 38-39.

53 *Id.* at 38-40.

54 *See Wesp v. Everson*, 33 P.3d 191, 199 n.12 (Colo. 2001) (facts not privileged merely because they are in communication to/from attorney).

55 *ACE USA*, 2011 WL 3101808 at *9.

56 *Sprint*, 236 F.R.D. at 528-29.

57 *Artic Cat*, 210 F.R.D. at 685.

58 *Wilson*, 228 F.R.D. at 529.

59 *See generally QBE*, 2012 WL 266431 (extensive discussion of rule in suit by insurance company whose insured refused to cooperate).

60 *Id.* at *13 (emphasis in original).

61 Some courts indicate a designee may bring documents to deposition and review them while testifying. *See, e. g., Breatheable Baby*, 2013 WL 3350594 at *8.

62 *See, e.g., Artic Cat*, 210 F.R.D. at 685-86 (deponent should have brought documents).

63 *Fabiano*, 201 F.R.D. at 38 (emphasis in original).

64 *Anderson v. Domino's Pizza, Inc.*, 2012 WL 1684620 at *4 (W.D.Wash. 2012) (unreported).

65 *Starlight Int'l, Inc. v. Herliby*, 186 F.R.D. 626, 639 (D.Kan. 1999).

66 *See Bowers v. Mortg. Elec. Registration Sys.*, 2011 WL 6013092 at *6-7 (D.Kan. 2011) (unreported) (prohibiting deposition on topics lacking reasonable particularity).

67 *Barron*, 68 F.R.D. at 177.

68 *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75-76 (D.Neb. 1995).

69 *See Fabiano*, 201 F.R.D. at 38.

70 *See Taylor*, 166 F.R.D. at 363, n.7.

71 *See Exxon Research & Eng'g Co. v. United States*, 44 Fed.Cl. 597, 601 (Fed.Cl. 1999); *In re Indep. Serv. Org. Antitrust Litig.*, 168 F.R.D. 651, 654 (D.Kan. 1996).

72 *Dongguk*, 270 F.R.D. at 72.

73 *D.R. Horton*, 215 P.3d at 1169-70 (citing *Barron*, 68 F.R.D. 175).

74 *Wilson*, 228 F.R.D. 1 at 530.

75 *Dongguk*, 270 F.R.D. at 80.

76 *Id.* at 74.

77 *Int'l Brotherhood of Teamsters, Airline Div. v. Frontier Airlines, Inc.*, 2013 WL 627149 at *6 (D.Colo. 2013) ("Because of the unique prerequisite that Rule 30(b)(6) deposition topics must be identified in advance, disputes about the topics are most effectively addressed in advance of the deposition.") (unreported).

78 *See, e.g., Stransky v. HealthOne of Denver, Inc.*, 2013 WL 140632 at **2-3 (D.Colo. 2013) (unreported) (striking topics due to deposing party's inability to define scope of inquiry and based on overbreadth and undue burden); *E.E.O.C. v. Original Honeybaked Ham Co. of Georgia, Inc.*, 2013 WL 435511 at **1-2 (D.Colo. 2013) (limiting topics asking for witness to provide all information supporting pleading or statements to filling in gaps not covered by disclosures or other depositions because deponent's counsel not required to marshal all facts for designee's preparation).

79 *See, e.g., Radian Asset Assur., Inc. v. College of the Christian Bros. of New Mexico*, 2010 WL 5476782 at *4 (D.N.M. 2010) (declining to grant "more than seven hours for each" designee) (unreported); *Mitchusson v. Sheridan Prod. Co., LLC*, 2010 WL 5462585 at *1 (W.D.Okla. 2010) (unreported) (commenting that seven-hour time limits "apply per person designated").

80 *In re Rembrandt Tech., L.P.*, 2009 WL 1258761 at *14 (D.Colo. 2009) (unreported).

81 *D.R. Horton*, 215 P.3d at 1168 (quotations and citations omitted).

82 *See In re App. of Michael Wilson & Partners*, 2009 WL 113874 at **3-5 (D.Colo. 2009) (unreported) (sanctions granted to foreign law firm taking custodial deposition of non-party organization).

83 *Taylor*, 166 F.R.D. at 363.

84 *Great American*, 251 F.R.D. 542-43 (collecting cases); *Marker v. Union Fid. Life Ins. Co*, 125 F.R.D. 121, 126-27 (M.D.N.C. 1989).

85 *Alexander*, 186 F.R.D. at 142-43.

86 *Arctic Cat*, 210 F.R.D. at 686.

87 CRCP 37(b)(2)(B).

88 *Wilson*, 228 F.R.D. at 530.

89 *D.C. Concrete*, 39 P.3d at 1209.

90 *Camp Bird*, 215 P.3d at 1291.

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