CORPORATE DESIGNEE DEPOSITIONS

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1. The Law:
    a. ORCP 39C(6)
        i. ORCP 46 D.
    b. FRCP 30(b)(6)
        i. FRCP 37(a)(3)(B), and 37(b)(2)(A), 37(d)
        ii. Corp designee depositions subject to 10 deposition limit [FRCP 30(a)(2)(A)(i)], and 7 hour duration limit [FRCP 30(d)(1)].

2. Practical application of the rules:
    a. Need to be specific and clear in designating categories of examination in the notice of deposition.
        i. "Reasonable particularity" is required.
        ii. It may be advantageous to have a conversation with opposing counsel sufficiently before the deposition to enable the opposing attorney to adequately prepare the witness.
    b. Requesting party does not get to pick the witness.
    c. The witness may have no personal knowledge. Indeed, the witness need not be the person "most knowledgeable."
    d. Advisable to specifically state in deposition notice that the company has a duty to designate a witness and educate them to testify.
    e. Corporate designee depositions are not limited to parties. Can be used to simplify third-party discovery.
    f. Permissible to request that the designee bring documents to the deposition—send subpoena duces tecum.
    g. It's unclear whether you can go beyond the categories of the notice. If no objection is raised, is the testimony that of the company or the witness in their individual capacity? And do you risk the "one bite of the apple" objection?

3. Duty to prepare designee is significant.
    a. The witness is acting as the corporation and is presumed to have access to and knowledge of all information known by anyone in the corporation.
    b. The duty to prepare is not limited to the current knowledge of the corporation—the company may be required to query former employees to obtain information. *See US v Taylor*, 166 FRD 356 (MDNC 1996), *aff'd*, 166 FRD 367 (MDNC 1996).
    c. Substantial sanctions can be imposed if the witness is ill-prepared.
    d. It is not ok for the witness to say "**I** don't know" if someone within the company does know. Courts have struck summary judgment opposition affidavits attesting to facts that the corporation said it didn't know at a 30(b)(6) deposition.
    e. Permissible for the company to present multiple witnesses; one for each category and possibly multiple people for just one category.
    f. Case law suggests that objections to the scope of the categories should be made in writing before the deposition begins, not at the deposition when it may be too late to cure the objection.

4. When to take?
    a. Early?
        i. To learn basic facts, identity of witnesses (especially in state court cases), and find documents.
        ii. To catch the defendant unprepared.
    b. Mid-stream?
        i. To flush out the evidence and save time doing further depositions.
    c. Late?
        i. To nail down the company's position.

5. Where?
    a. In Oregon at counsel's office.
        i. May help reduce cost of case.
        ii. Might be able to require attendance in Oregon of out-of-state corp. designee
            1. No clear Oregon authority.
            2. More likely to require out-of-state plaintiff to produce witness in state than out-of-state defendant.
        iii. Federal courts more likely to order foreign defendant to produce corporate designee in US. *See Work v Bier*, 106 FRD 45, 52 (DDC 1985) "The bottom line is that a foreign corporation, subject to the in personam jurisdiction of this court, can be ordered under Rule 30(b)(6) to produce its officers, directors or managing agents in the United States to give deposition testimony."
    b. At corporate headquarters
        i. Demand production of documents on-site
        ii. Demand substitution of another witness if the initial designee is unprepared or inadequately prepared.

6. Why?
    a. Great to help find documents and witnesses.
    b. Helpful in nailing down company positions.
    c. Useful to ascertain the corporation's subjective beliefs and opinions, and its interpretation of documents and events. *See US v Taylor, supra.*
    d. Easy way to learn historical facts, e.g. how many times the company has been sued in similar situations, document retention practices, evolution of company policies, etc.

e. Beneficial when you are limited to ten depositions and there are many fact witnesses.

7. Be sure to query what the witness did to prepare for the deposition.
    a. Who did they talk to, what documents did they review, did they read the notice, etc?

8. Practice tip: Prepare, prepare, prepare.
    a. Search for prior depositions.
    b. Research company publications.
    c. Read press releases.
    d. Read advertisements.
    e. Read publicly filed documents (SEC, FCC, patent applications, etc.).
    f. Obtain and review organization chart.

9. Consider doing a videotaped deposition.
    a. Not necessary if simply looking for documents and witnesses, but it can be very valuable at trial if it's a substantive deposition (all statements are admissions of the company).

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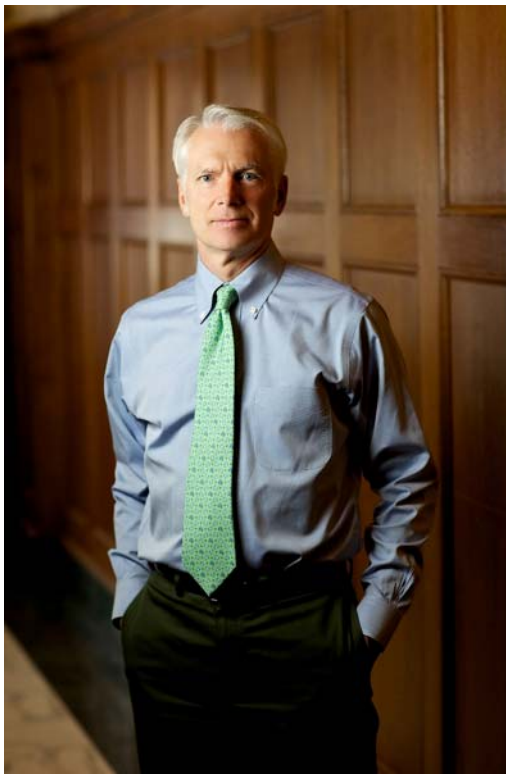

Keith Dubanevich is a trial lawyer with over 25 years of experience in more than a dozen different jurisdictions around the country. He focuses his practice on complex dispute resolution and has extensive experience handling multi-state and international antitrust cases, consumer litigation and securities disputes. He was recently Associate Attorney General and Chief of Staff at the Oregon Department of Justice where he led the creation of a civil rights unit, managed securities litigation including multiple cases against financial services companies, was co-author of amicus briefs in the U.S. Supreme Court regarding the Affordable Care Act, and supervised antitrust investigations and prosecutions.

Keith has represented small and large companies including foreign companies in arbitration and litigation in state and federal courts. During his time with the Oregon Department of Justice, Keith was integrally involved with the adoption of legislation that expanded the Unlawful Trade Practices Act and legislation that imposed a mediation requirement before a non-judicial foreclosure can take place.

Representative Cases:

Antitrust:
* Defended Japanese company in multi-district and multi-state litigation alleging price-fixing and market allocation violations in the international parcel tanker shipping market. Lawsuits were filed in numerous state courts, and in foreign countries. No indictments were returned against Keith's client and the civil cases all settled after multiple appeals including an appeal from an order requiring arbitration of the direct purchaser disputes. *See JLM Industries, Inc. v. Stolt-Nielsen S.A.*, 387 F.3d 163 (2d Cir. 2004); *Stolt-Nielsen S.A. v. AnimalFeeds Internat'l Corp.,* 130 S. Ct. 1758 (2010).
* Represented domestic shipping company against customer allocation allegations in multi-district litigation consolidated in Puerto Rico.
* Successfully defended national hospital chain at trial against exclusive dealing allegations
* Obtained multiple summary judgment victories in defense of antitrust allegations arising from hospital medical staff privileges disputes.

Securities Fraud/Misrepresentation:
* Argued *State of Oregon and Oregon Public Employees Retirement Fund vs. Marsh, Inc.* in Oregon Supreme Court in securities suit seeking to recover losses to the Fund due to fraud or material misstatements. Court ruled that reliance could be proven by fraud-on-the-market doctrine.
* Represented the Oregon State Treasurer and the Oregon College Savings Plan against Oppenheimer Funds for Oregon Securities Law violations causing severe and immediate losses to the college

savings accounts invested through the Plan. Oregon was the first state to sue for recovery of the losses and the first state to settle and return funds to the Plan. The Plan received over $20 million in settlement.
* Supervised outside law firms handling class action securities cases involving billions of dollars in losses.

Complex Business Litigation:
Represented product supplier in an exclusive long-term contract dispute. Case settled for over $20 million shortly before opening statements.

ERISA:
Represented senior executive who sought severance benefits in arbitration after a merger of two public companies resulted in a substantial change in her responsibilities. The executive obtained a favorable award of severance benefits.

Real Estate/Breach of Contract:
* Represented equity investors in ownership disputes pending in bankruptcy court. The case spawned multiple trials and dissolution of the corporate entity.
* Represented property developer in long-term lease/sale dispute.

Professional Experience:

- Stoll Berne; shareholder, 2012-present
- Oregon Department of Justice; Associate Attorney General and Chief of Staff, March 2012-September 2012; Chief of Staff and Special Counsel, October 2009-March 2012; Special Counsel, January 2009-October 2009
- Garvey Schubert Barer, Portland, Oregon; shareholder, 1998-2008
- Fulbright & Jaworski L.L.P., Houston, Texas; partner, 1992-1998; associate, 1983-1988, 1989-1992
- Hale & Dorr, Boston, Massachusetts; associate, 1988-1989

Education:

- Tulane University School of Law, J.D., *cum laude*, 1983
  - Moot Court Board
  - Louisiana Trial Lawyers Award for Outstanding Advocacy
  - Order of Barristers
- Northeastern University, B.S., Public Administration, with high honors, 1980
- A.A. White Dispute Resolution Center, Mediation Certificate, 1997

Admitted to Practice:

- Texas State Bar, 1983
- Massachusetts State Bar, 1990 (inactive)
- Oregon State Bar, 1998
- United States Supreme Court
- United States Courts of Appeal for the Second, Fifth and Ninth Circuits
- United States District Courts for the District of Oregon, Western District of Wisconsin, Southern District of Texas, Eastern District of Texas, Northern District of Florida, Southern District of New York, and the District of Connecticut

Professional Activities:

- Oregon State Bar
  - Business Litigation Section Executive Committee, 2002-2009; Chair, 2008; Chair-elect, 2007; Treasurer, 2007; Secretary, 2006
- American Bar Association
  - Antitrust and Litigation Sections, Member
- Owen M. Panner American Inn of Court, Master, 1998-present

Community Activities:

- Hoyt Arboretum Friends, Board of Directors, 2012

Rule 39 Depositions Upon Oral Examination

A When deposition may be taken. After the service of summons or the appearance of the defendant in any action, or in a special proceeding at any time after a question of fact has arisen, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C(2) of this Rule. The attendance of a witness may be compelled by subpoena as provided in Rule 55.

B Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition shall be taken on such terms as the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

C Notice of examination.

C(1) **General requirements.** A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

C(2) **Special notice.** Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when served with notice under this subsection, the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

C(3) **Shorter or longer time.** The court may for cause shown enlarge or shorten the time for taking the deposition.

C(4) **Non-stenographic recording.** The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C(5) **Production of documents and things.** The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

C(6) **Deposition of organization.** A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which such person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

C(7) **Deposition by telephone.** Parties may agree by stipulation or the court may order that testimony at a deposition be taken by telephone. If testimony at a deposition is taken by telephone pursuant to court order, the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If testimony at a deposition is taken by telephone other than pursuant to court order or stipulation made a part of the record, then objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless seasonable objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the party taking the deposition.

D Examination; record; oath; objections.

D(1) **Examination; cross-examination; oath.** Examination and cross-examination of deponents may proceed as permitted at trial. The person described in Rule 38 shall put the deponent on oath.

D(2) **Record of examination.** The testimony of the deponent shall be recorded either stenographically or as provided in subsection C(4) of this rule. If testimony is recorded pursuant to subsection C(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G(2) of this rule, until final disposition of the action. Upon request of a party or deponent and payment of the reasonable charges therefor, the testimony shall be transcribed.

D(3) **Objections.** All objections made at the time of the examination shall be noted on the record. A party or deponent shall state objections concisely and in a non-argumentative and non-suggestive manner. Evidence shall be taken subject to the objection, except that a party may instruct a deponent not to answer a question, and a deponent may decline to answer a question, only:

(a) when necessary to present or preserve a motion under section E of this rule;

(b) to enforce a limitation on examination ordered by the court; or

(c) to preserve a privilege or constitutional or statutory right.

D(4) **Written questions as alternative.** In lieu of participating in an oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the deponent on the record.

E Motion for court assistance; expenses.

E(1) **Motion for court assistance.** At any time during the taking of a deposition, upon motion and a showing by a party or a deponent that the deposition is being conducted or hindered in bad faith, or in a manner not consistent with these rules, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order the officer conducting the examination to cease

forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in section C of Rule 36. The motion shall be presented to the court in which the action is pending, except that non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only on order of the court in which the action is pending. Upon demand of the moving party or deponent, the parties shall suspend the taking of the deposition for the time necessary to make a motion under this subsection.

E(2) **Allowance of expenses.** Subsection A(4) of Rule 46 shall apply to the award of expenses incurred in relation to a motion under this section.

F Submission to witness; changes; statement.

F(1) **Necessity of submission to witness for examination.** When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C(4) of this rule, and if any party or the witness so requests at the time the deposition is taken, the recording or transcription shall be submitted to the witness for examination, changes, if any, and statement of correctness. With leave of court such request may be made by a party or witness at any time before trial.

F(2) **Procedure after examination.** Any changes which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D, the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

F(3) **No request for examination.** If no examination by the witness is requested, no statement by the witness as to the correctness of the transcription or recording is required.

G Certification; filing; exhibits; copies.

G(1) **Certification.** When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was duly sworn and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C(4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under oath, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

G(2) **Filing.** If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C(4) of this rule, the party taking the deposition shall enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action is pending or such other person as may by writing be agreed upon, and deliver or forward it accordingly by mail or other usual channel of conveyance. If a recording of a deposition has been filed with the court, it may be transcribed upon request of any party under such terms and conditions as the court may direct.

G(3) **Exhibits.** Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, such person may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. The person producing the materials shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

G(4) **Copies.** Upon payment of reasonable charges therefor, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C(4) of this rule, the party taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

H Payment of expenses upon failure to appear.

H(1) **Failure of party to attend.** If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

H(2) **Failure of witness to attend.** If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the attending party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

I Perpetuation of testimony after commencement of action.

I(1) After commencement of any action, any party wishing to perpetuate the testimony of a witness for the purpose of trial or hearing may do so by serving a perpetuation deposition notice.

I(2) The notice is subject to subsections C(1) through (7) of this rule and shall additionally state:

I(2)(a) A brief description of the subject areas of testimony of the witness; and

I(2)(b) The manner of recording the deposition.

I(3) Prior to the time set for the deposition, any other party may object to the perpetuation deposition. Such objection shall be governed by the standards of Rule 36 C. At any hearing on such an objection, the burden shall be on the party seeking perpetuation to show that: (a) the witness may be unavailable as

defined in ORS 40.465 (1)(d) or (e) or 45.250 (2)(a) through (c); or (b) it would be an undue hardship on the witness to appear at the trial or hearing; or (c) other good cause exists for allowing the perpetuation. If no objection is filed, or if perpetuation is allowed, the testimony taken shall be admissible at any subsequent trial or hearing in the action, subject to the Oregon Evidence Code.

I(4) Any perpetuation deposition shall be taken not less than seven days before the trial or hearing on not less than 14 days' notice. However, the court in which the action is pending may allow a shorter period for a perpetuation deposition before or during trial upon a showing of good cause.

I(5) To the extent that a discovery deposition is allowed by law, any party may conduct a discovery deposition of the witness prior to the perpetuation deposition.

I(6) The perpetuation examination shall proceed as set forth in section D of this rule. All objections to any testimony or evidence taken at the deposition shall be made at the time and noted upon the record. The court before which the testimony is offered shall rule on any objections before the testimony is offered. Any objections not made at the deposition shall be deemed waived. [CCP 12/2/78; Sec.F amended by 1979 c.284 Sec.25; Sec.F amended by CCP 12/13/80; amended by CCP 12/13/86; amended by 1987 c.275 Sec.2; Sec.I amended by 1989 c.980 Sec.5; Sec.C,E,G amended by CCP 12/12/92; Sec.I amended by CCP 12/14/96; Sec.D,E amended by CCP 12/12/98]

Rule 46 Failure To Make Discovery; Sanctions

A Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A(1) **Appropriate court.**

A(1)(a) **Parties.** An application for an order to a party may be made to the court in which the action is pending, and, on matters relating to a deponent's failure to answer questions at a deposition, such an application may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located.

A(1)(b) **Non-parties.** An application for an order to a deponent who is not a party shall be made to a court of competent jurisdiction in the political subdivision where the non-party deponent is located.

A(2) **Motion.** If a party fails to furnish a report under Rule 44 B or C, or if a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C(6) or Rule 40 A, or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. Any motion made under this subsection shall set out at the beginning of the motion the items that the moving party seeks to discover. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

A(3) **Evasive or incomplete answer.** For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

A(4) **Award of expenses of motion.** If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B Failure to comply with order.

B(1) **Sanctions by court in the county where the deponent is located.** If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit court judge in the county in which the deponent is located, the failure may be considered a contempt of court.

B(2) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent or a person designated under Rule 39 C(6) or 40 A to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A of this rule or Rule 44, the court in which the action is pending may make such orders in regard to the failure as are just, including among others, the following:

B(2)(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

B(2)(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

B(2)(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party;

B(2)(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

B(2)(e) Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination.

B(3) **Payment of expenses.** In lieu of any order listed in subsection (2) of this section or in addition thereto, the court shall require the party failing to obey the order or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

C Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter, as requested under Rule 45, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the party requesting the admissions the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 45 B or C, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that such party might prevail on the matter, or (4) there was other good reason for the failure to admit.

D Failure of party to attend at own deposition or respond to request for inspection or to inform of question regarding the existence of coverage of liability insurance policy. If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C(6) or 40 A to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition of that party or person, after being served with a proper notice, or (2) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, including among others it may take any action authorized under subsection B(2)(a), (b), and (c) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C. [CCP 12/2/78; Sec.A(2),D amended by CCP 12/13/80; Sec.A,B amended by CCP 12/12/92; Sec.B amended by 1999 c.59 Sec.4; Sec.A amended by CCP 12/11/04]

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) *Without Leave.* A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

(1) *Notice in General.* A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) *Producing Documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) *Method of Recording.*

(A) *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be

recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) *By Remote Means.* The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) *Officer's Duties.*

(A) *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, 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. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) *Examination and Cross-Examination.* The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) *Objections.* An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) *Participating Through Written Questions.* Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction.* The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to Terminate or Limit.*

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) *Review; Statement of Changes.* On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes Indicated in the Officer's Certificate.* The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) *Certification and Delivery.* The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and Tangible Things.*

(A) *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(B) *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) *Copies of the Transcript or Recording.* Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of Filing.* A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY.

(1) *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) *Appropriate Court.* A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) *Specific Motions.*

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) *Payment of Expenses; Protective Orders.*

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) FAILURE TO COMPLY WITH A COURT ORDER.

(1) *Sanctions in the District Where the Deposition Is Taken.* If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) *Sanctions in the District Where the Action Is Pending.*

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may

issue any of the orders listed in Rule 37(b)(2)(A)(i)–(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) FAILURE TO DISCLOSE, TO SUPPLEMENT AN EARLIER RESPONSE, OR TO ADMIT.

(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)–(vi).

(2) *Failure to Admit.* If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) PARTY'S FAILURE TO ATTEND ITS OWN DEPOSITION, SERVE ANSWERS TO INTERROGATORIES, OR RESPOND TO A REQUEST FOR INSPECTION.

(1) *In General.*

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) *Unacceptable Excuse for Failing to Act.* A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) *Types of Sanctions.* Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)–(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) FAILURE TO PARTICIPATE IN FRAMING A DISCOVERY PLAN. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Pub. L. 96–481, §205(a), Oct. 21, 1980, 94 Stat. 2330, eff. Oct. 1, 1981; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.)

TITLE VI. TRIALS

Rule 38. Right to a Jury Trial; Demand

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.

(b) DEMAND. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) SPECIFYING ISSUES. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may—within 14 days after being served with the demand or within a shorter time ordered by the court—serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) WAIVER; WITHDRAWAL. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

(e) ADMIRALTY AND MARITIME CLAIMS. These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h).

Deposition of an Organization:

What You Don't Know Can Hurt You

By Jeffrey J. Schick, Davis Wright Tremaine LLP

"If you don't know the answer, just say you don't know." It is one of the most fundamental – and seemingly obvious – preparatory instructions for a typical deposition. However, that generic instruction can cause headaches in the context of a deposition of an organizational deponent under ORCP 39 C(6) or FRCP 30(b)(6). Because those rules allow a designated individual to speak on behalf of an entire organization, the answer "I don't know" has potentially broad and unanticipated ramifications. At a Rule 39 C(6) or Rule 30(b)(6) deposition, "I don't know" does not simply mean that the designee cannot answer the question; it means that the organization itself does not know the answer. Some courts have held that an organization cannot later contradict an "I don't know" answer based on the knowledge of someone else in the organization. Therefore, counsel must use caution to ensure that the ignorance of a particular designee under Rule 39 C(6) or Rule 30(b)(6) is not confused with ignorance of the organization itself.

ORCP 39 C(6), and its federal counterpart, FRCP 30(b)(6), are underutilized procedural mechanisms that allow a party to take the deposition of an organization, such as a corporation, partnership, association, or government agency. Under both rules, a party may name the organization (by notice of deposition or subpoena) and "describe with reasonable particularity the matters on which examination is requested." The organization is then required to designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and must set forth, for each person designated, the matters on which that person will testify. Significantly, the designee testifies not only regarding that particular individual's knowledge, but as to "matters known or reasonably available to the organization."

Duty to Prepare

Courts have routinely held that the rules governing organizational depositions impose an affirmative obligation on the organization to prepare and educate the corporate designee. *See e.g., Starlight Intern. Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D.Kan. 1999) ("Corporations...have a duty to make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions *and to prepare them to fully and unevasively answer questions about the designated subject matter.*") (Emphasis added). That obligation can be particularly onerous if the organization does not have an individual who alone possesses personal knowledge of the matters on which examination is requested. In such a case, the organization has an obligation to effect a "brain dump" – i.e., the organization must transfer all of its organizational knowledge to its designee. *U.S. v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996) ("If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation."). What also comes as a surprise to many is that "matters known or reasonably available to the organization" includes facts known by the organization's attorney. Courts have required designees to testify to facts learned from the organization's attorney, despite the assertion of the attorney-client privilege. *See e.g., Protective Nat. Ins. Co. of Omaha v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 278 (D.Neb. 1989).

Given the duties imposed by courts, complete preparation of an organizational deponent is a nearly impossible

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Deposition of an Organization

continued from page 8

task. Regardless of how well-prepared an individual is with regard to a particular topic, it is likely that a question will be posed during the course of a deposition that will exceed the designee's knowledge or, in the case of a "brain dump," the designee's memory. A few "I don't know" answers, therefore, are to be expected from an organization's designee during the course of a deposition.

Regardless of how well-prepared an individual is with regard to a particular topic, it is likely that a question will be posed during the course of a deposition that will exceed the designee's knowledge or, in the case of a "brain dump," the designee's memory.

However, as a practical matter, organizational deponents typically offer more than a few "I don't knows." The reason for this is simple: many attorneys and organizations shirk their responsibilities to prepare the designee. The attorneys either do not understand the scope of their obligation, or they are willing to gamble that any damage that occurs during the deposition is outweighed by the cost of preparation (which can be significant). In certain circumstances, the gamble may pay off. A designee's "I don't know" answer can be harmless if the organization truly does not have any knowledge with regard to the question (and it is not a central question in the case), or if the attorney taking the deposition does not seize on the significance of the "I don't know" answer. But suppose that the question involves a key evidentiary issue that the organization needs to oppose. Can the organization later contradict its "I don't know" deposition answer on summary judgment or at trial by offering additional testimony?

Evidence that contradicts the testimony of an organizational deponent excluded

Oregon appellate courts have yet to address the evidentiary effect of testimony by an organizational deponent. This issue has been addressed by a number of courts from other jurisdictions, and the answer provided by some of those courts will surprise many practitioners: the designee's testimony is binding; if the designee doesn't know the answer, the organization doesn't know it either. Those courts that have excluded testimony inconsistent with prior answers have seized on the duty to prepare a designee. For example, in *Rainey v. American Forest and Paper Ass'n, Inc.*, 26 F.Supp.2d 82, 94 (D.D.C. 1998), the court relied on the fact that an organization has an obligation to prepare its designee to act as the "voice" of the organization. Accordingly, an organization cannot later offer new or different answers that could have been made at the time of the organizational deposition "[u]nless it can prove that the information was not known or was inaccessible." *Id. Rainey* also relied on the fact that the purpose of Rule 30(b)(6), as demonstrated by the advisory committee notes, was to "prevent a corporate defendant from thwarting inquiries during discovery, then staging an ambush during a later phase of the case." *Id.* at 95. District courts in Connecticut and Pennsylvania have similarly held that a designee who testifies that a corporation does not know an answer cannot effectively change that answer by introducing new evidence at trial or on summary judgment. In *Newport Electronics, Inc. v. Newport Corp.*, 157 F.Supp.2d 202, 219-220 (D.Conn. 2001), the court held that, because the corporation received notice of the topics on which the party wished to depose it, its designee "was not at liberty, therefore, to delay reviewing information on those topics until after the deposition and, thereby, submitting information in his affidavit which contradicts statements in his deposition regarding his lack of knowledge on various topics." Similarly, in *Ierardi v. Lorillard, Inc.*, 1991 WL 158911 (E.D.Pa. 1991), the court held that a corporation was barred from introducing evidence at trial with respect to an issue on which its corporate designee lacked knowledge during his deposition.

Evidence contradicting the testimony of an organizational deponent admitted

More recently, courts have declined to take such a hard stance on the testimony of organizational deponents. The Seventh Circuit has rejected the argument that the testimony of an organizational deponent is absolutely binding. In *A.I. Credit Corporation v. Legion Ins., Co.*, 265 F.3d 630, 637 (7th Cir. 2001), the court held that "[n]othing in the advisory committee notes indicates that the Rule goes so far[,]" and stated that "testimony given at [a deposition of an organization] is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes[.]" *Id.* (quoting *Industrial Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F.Supp.2d 786, 791 (N.D.Ill. 2000)). Other courts, recognizing the daunting task of preparing a designee, have similarly held that an organizational deponent is no more bound by deposition testimony than any other witness, and that the organization is simply subject to impeachment. *See R & B Appliance Parts, Inc. v. Amana Co., L.P.*, 258 F.3d 783, 786-87 (8th Cir. 2001) (corporate deponent is no more bound by deposition testimony than other witnesses, "albeit at the risk of having his or her credibility impeached by the introduction of the deposition"); *Interstate Narrow Fabrics, Inc. v. Century USA, Inc.*, 218 F.R.D. 455, 462 (M.D.N.C.

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2003) (company may supplement or contradict its designee's deposition testimony on summary judgment); *W.R. Grace & Co. v. Viskase Corp.*, 1991 WL 211647 (N.D.Ill. 1991) ("It is true that a corporation is 'bound' by its Rule 30(b)(6) testimony, in the same sense that any individual deposed under Rule 30(b)(1) would be 'bound' by his or her testimony. All this means is that the witness has committed to a position at a particular point in time. It does not mean that the witness has made a judicial admission that formally and finally decides an issue.").

Even assuming that the testimony of an organizational deponent is not binding as a judicial admission, repeated "I don't know" answers can run an organization into another problem: discovery sanctions.

Exclusion of contradictory testimony as a discovery sanction

Even assuming that the testimony of an organizational deponent is not binding as a judicial admission, repeated "I don't know" answers can run an organization into another problem: discovery sanctions. In Oregon and in federal court, the rules governing organizational depositions have teeth. ORCP 46 and FRCP 37 provide for sanctions in the event that an organization's designee fails "to appear" for the deposition. Courts have expanded the reach of those sanctions by liberally interpreting the term "appear," and have held that the failure to produce a *prepared* Rule 30(b)(6) designee is "tantamount to failing to appear and is sanctionable under [FRCP] 37(d)." *Casper v. Esteb Enterprises, Inc.*, 119 Wash. App. 759, 768, 82 P.3d 1223 (2004), citing *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3rd Cir. 2000).

In most cases, the logical remedy for failing to appear (either in the traditional sense or as that term has been expanded by courts) is to award expenses to the deposing party and to order the designee to adequately prepare and appear. But that is not the only remedy available under Rule 46 and Rule 37. Courts also have authority to enter orders "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence." ORCP 46 B(2)(b); FRCP 37(b)(2)(B). That is exactly how a trial court in Washington handled an organization's evasive answers, excluding any evidence at trial that contradicted answers by the organization's Rule 30(b)(6) designee.

In *Casper v. Esteb Enterprises, Inc.*, 119 Wash. App. 759, 767-68, 82 P.3d 1223 (2004), the Washington Court of Appeals upheld the trial court's exclusion of evidence contradicting the testimony of the organization's designee. The Court of Appeals noted the split of authority on the "binding" effect of Rule 30(b)(6) testimony, but ultimately declined to decide the issue. Rather, the court held that the trial judge acted within his discretion by imposing one of the harsher discovery sanctions based on the organization's designee's repeated "I don't know" answers.

Uncertainty in Oregon

While Oregon appellate courts have not yet addressed the evidentiary effect of testimony by an organization's designee, the issue was addressed last fall in Marion County Circuit Court in *Oregonians for Sound Economic Policy v. State Accident Insurance Fund Corporation*, Case No. 00C 15769. During the proceedings, the defendant's organizational designee took the stand to testify in his personal capacity. Plaintiff's counsel objected when it became apparent that the witness intended to contradict certain testimony that he had provided as the defendant's designee pursuant to an ORCP 39 C(6) deposition. The court indicated that it had never encountered the issue before, and invited briefing from the parties. After hearing argument on the issue, the court – which was sitting without a jury – elected to treat the issue of contradictory testimony as a matter of weight, not admissibility.

While the court in *Oregonians for Sound Economic Policy* followed the modern trend and allowed the introduction of contradictory evidence, there is no guarantee that other Oregon courts would decide the issue the same way. The exclusion of contradictory evidence is harsh, but there are persuasive arguments for requiring an organization to stick with its "I don't know" answers (particularly, in the context of a jury trial). Most notably, impeachment is an entirely inadequate remedy in the case of an ill-prepared organizational deponent. Although an individual's credibility may be successfully attacked if he or she later recalls information that was previously forgotten, an organization can easily explain away contradictory answers by asserting that the designee was not as informed as the individuals with personal knowledge of the matters at issue. In extreme circumstances, it is also possible that an Oregon court would follow the lead of the court in *Casper*, excluding contradictory testimony as a discovery sanction. Considering the uncertainty that surrounds testimony pursuant to ORCP 39 C(6) and Rule 30(b)(6), organizations and their counsel take serious risks by failing to adequately prepare their designees.

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Strategies for avoiding a motion to strike evidence contradicting Rule 39 C(6) and Rule 30(b)(6) testimony

While human fallibility will always add an element of uncertainty to the deposition of an organization, there are a number of things attorneys can do to eliminate or rectify many of the more dangerous "I don't know" answers:

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1. Narrow the field of inquiry

The first step in responding to an ORCP 39 C(6) or Rule 30(b)(6) designation is to narrow the field of potential testimony. Counsel should object to subjects of inquiry that are overly broad, and should carefully and specifically set forth the subjects on which each designee will testify. By winnowing the scope of the organizational deposition, counsel can (1) ensure that the designee understands the areas on which knowledge is required; and (2) provide a basis for objection to the scope of the questions if the examination begins to drift beyond the areas on which the designee has been prepared.

2. Find the persons "most knowledgeable"

Second, counsel should not hesitate to designate multiple deponents if the requests involve areas that are too diverse for preparation of a single designee. While there is a temptation to expose as few individuals as possible to deposition, a designee will perform better on topics on which the individual has personal knowledge. For example, a corporation's president may seem best equipped to withstand the pressure of a tense deposition, but a calm demeanor cannot cover up gaping holes in a deposition transcript with respect to issues with which the president has only passing knowledge. In addition to providing clear divisions among topic areas, multiple designees demonstrate an organization's willingness to provide its most knowledgeable individuals, and suggest to opposing counsel and the court that the organization is cooperating in good faith.

3. Adequately prepare the designee

The single best way to avoid problems with "I don't know" answers is to spend the resources to adequately prepare the designee. It is not only necessary to avoid surprise answers or incomplete testimony, it is an affirmative obligation on organizations and their counsel. At the very least, counsel must assure himself or herself that the designee's knowledge is as broad as counsel's knowledge. One of the first questions posed to a designee is "What did you do to prepare for this deposition?" If the designee answers "nothing," a motion for sanctions may not be far behind.

4. Be prepared to object

If counsel has properly narrowed the scope of examination and adequately prepared the witness, it will be much easier to identify questions that exceed the scope of the examination. If a question seeks information that is beyond the areas prepared by the designee, counsel should immediately object to the question and state that the designee's answers are not intended as the answers of the organization. The organization's counsel then faces a more difficult issue: should the designee be instructed not to answer the question?

Even if counsel is confident that a question is well beyond the scope of the examination, an instruction not to answer is risky business. Under FRCP 30(d)(1), an instruction not to answer a deposition question is appropriate only (1) to preserve a privilege; (2) to enforce a limitation on examination ordered by the court; or (3) to present or preserve a motion for a protective order.[1] There is no recognized privilege for questions that exceed the scope of examination of the organization. Thus, in federal court, counsel should not instruct a designee not to answer based on such an objection unless counsel is prepared to seek a protective order. *See Paparelli v. Prudential Ins. Co. of America*, 108 F.R.D. 727, 730 (D.Mass. 1985). However, there is no guarantee that a protective order will be granted. District courts are split as to whether a party may inquire into matters beyond the scope of a Rule 30(b)(6) deposition notice. Some courts have held that examination is limited to matters within the scope of the notice, *see e.g., Paparelli*, 108 F.R.D. at 730, but a number of courts have refused to similarly limit the scope of organizational depositions, citing the liberal discovery requirements of the Federal Rules of Civil Procedure. *See Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 366-67 (N.D.Cal. 2000) ("Limiting the scope of a 30(b)(6) deposition frustrates the objectives of Rule 26(b)(1) whenever the deposing party seeks information relevant to the subject matter of the pending litigation that was not specified."); *See also Cabot Corp. v. Yamulla Enterprises, Inc.*, 194 F.R.D. 499, 500 (M.D.Pa. 2000); *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995).

The uncertainty surrounding instructions not to answer makes it imperative

Please continue on next page

Deposition of an Organization
continued from page 11

that counsel adequately and clearly state on the record his or her objections to the scope of the examination, and indicate that the designee is not authorized to speak on behalf of the corporation with respect to questions outside the scope of the notice. Even if the court allows examination beyond the scope of the notice, proper objections will provide the framework for a motion in limine to exclude portions of the designee's testimony, or jury instructions to the effect that certain answers or omissions are those of individual witnesses and not the organization itself. *See Detoy*, 196 F.R.D. at 367 (suggesting that the proper course of action is to note on the record that answers to questions beyond the scope of the Rule 30(b)(6) designation are not binding on the organization, and then to seek "jury instructions that such answers were merely the answers or opinions of individual fact witnesses, not admissions of the party").

As in any deposition, counsel must be flexible. If (or, more aptly, when) a designee answers "I don't know" to a question that is clearly within the scope of the examination, counsel should immediately intervene.

5. *Offer another witness*

An equally challenging situation arises when a question is arguably within the scope of the examination but concerns a topic on which the designee is not prepared. In that case, counsel may be able to defuse the situation by objecting on the grounds that the subject matter is outside the scope of the examination, but, at the same time, offering to produce another witness or provide an answer at a later date. In most cases, an offer to provide an answer at a later date will eliminate a potential motion to compel.

6. *Change the language*

Counsel also should be cautious when instructing the witness on how to answer a question that exceeds the scope of that individual's knowledge. Rather than answering "I don't know" to such a question, the designee should state that the question seeks information beyond the scope of the designee's preparation. Such an answer will avoid any confusion as to whether the organization itself or only the designee lacks the requisite knowledge.

By stating that the information is beyond the scope of the designee's preparation, the burden falls on opposing counsel to press for an answer, request another designee, or seek a motion to compel. The organization then will have an opportunity to rectify the problem (either by providing another designee or more fully preparing the initial designee) before the "I don't know" answer is before the court.

7. *Be flexible*

As in any deposition, counsel must be flexible. If (or, more aptly, *when*) a designee answers "I don't know" to a question that is clearly within the scope of the examination, counsel should immediately intervene. At that point, counsel should interrupt the deposition and clarify that the designee does not know the answer, but that the organization will provide an answer, either through another designee or by other means. By responding quickly and assertively, counsel generally can avoid any future disputes about what an organization does or does not know.

8. *Correct the transcript*

Finally, counsel should be aware of the opportunity to make substantive changes to the testimony *after* the deposition. Both Oregon and federal rules of procedure allow a witness, upon request of the party at the time the deposition is taken, to examine the transcript and make changes to the testimony. ORCP 39 F; FRCP 30(e). If a witness desires to make changes to the form or substance of the testimony, the witness may submit a statement of such changes and the reasons for the changes. In a typical deposition, the prospect of impeachment limits the effectiveness of substantive changes to testimony. However, in the context of a deposition of an organizational deponent, the cited reason for the change in testimony simply can be that the information was not known to the organization's designee at the time of the deposition, despite the organization's good faith efforts to prepare the designee. Essentially, through the procedures authorized by ORCP 39 F and FRCP 30(e), an organization has an opportunity to correct any mistakes made by its designee, and can do so with little risk of impeachment. ■

(Endnotes)

1 The Oregon Rules of Civil Procedure provide potentially broader support for an instruction not to answer. ORCP 39 D(3) provides that, in addition to the grounds for an instruction not to answer provided in the Federal Rules, counsel may instruct a witness not to answer to preserve a "constitutional or statutory right." Arguably, the requirement set forth in ORCP 39 C(6) that a party "describe with reasonable particularity the matters on which examination is requested" creates a statutory right regarding the scope of examination. Oregon courts have yet to address the scope of an ORCP 39 C(6) deposition or the propriety of an instruction not to answer based on that Rule.

Form 27-4 Notice of Deposition of Organization

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF _____

_____,	)
	)
Plaintiff,	) Case No. _____
	)
v.	) PLAINTIFF'S NOTICE
	) OF DEPOSITION
_____,	) OF _____
	) ORCP 39 C(6)
Defendant.	)

TO: _____ Corporation, an Oregon corporation, and its lawyer, _____, [*address, city*], Oregon [*zip code*].

Pursuant to ORCP 39 C(6), please take notice that plaintiff will take the deposition of _____ Corporation on _____, 20___, commencing at _____ [a.m. / p.m.] in the law offices of _____, [*address, city*], Oregon. You are invited to attend and cross-examine. The oral examination will continue from day to day until completed.

The matters on which the examination is requested are _____.

The subpoena will advise _____ Corporation of its duty to designate the officers, directors, managing agents, or other persons who consent to testify on its behalf, and to set forth for each person designated the matters on which the person must testify.

[The testimony will be recorded by other than stenographic means. The manner of recording will be (audio / video) tape recording. Plaintiff's counsel, _____, will retain and preserve the original recording.]

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

TINA WILLIS AND GARY WILLIS, Plaintiffs, v. DEBT CARE, USA, INC.; NATIONWIDE DEBT SETTLEMENT GROUP, LLC; and GLOBAL CLIENT SOLUTIONS, LLC, Defendants.	Case No. 3:11-CV-430-BR **NOTICE OF 30(b)(6) DEPOSITION OF DEBT CARE, USA, INC.**

TO: DEFENDANT DEBT CARE, USA, INC. THROUGH ITS COUNSEL OF RECORD ROBERT B. MILLER, KILMER, VOORHEES & LAURICK, P.C., 732 NW 19TH AVENUE, PORTLAND, OR 97209

PLEASE TAKE NOTICE that plaintiffs, through undersigned counsel, will take the deposition of DEBT CARE, USA, INC., or another authorized representative of DEBT CARE,

USA, INC., pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, by telephone at GOLDEN STATE REPORTING & VIDEO, 1776 West March Lane, Suite 320, Stockton, CA 95207, on the 2nd day of March, 2012, at 1:00 p.m. PST and continuing until completed. The named deponent or one or more officers, directors, managing agents, or other persons should be designated who can testify on its behalf, and set forth for each person designated the matters on which he or she will testify. The person so designated shall testify as to the matters known or reasonably known or reasonably knowable to deponent. The examination will continue from day to day until completed and will be made pursuant to Federal Rule of Civil Procedure before a notary public or some other officer authorized by law to administer oaths. The deposition will be recorded by a certified court reporter and videotaped.

SUBJECT MATTER FOR TESTIMONY

In accordance with FRCP 30(b)(6), you are advised of your duty to designate, prepare, and produce for deposition one or more officers, directors, employees, managing agents, or other persons most qualified to testify on your behalf with respect to the following:

1. The relationship between Nationwide Debt Settlement Group and Debt Care, USA, Inc.

DATED this 28th day of December, 2012.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

By: _____
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