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**DEMYSTIFYING THE SURETY CORPORATE
REPRESENTATIVE DEPOSITION:
KNOWING HOW TO SELECT YOUR CORPORATE
REPRESENTATIVE**

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DEMYSTIFYING THE SURETY CORPORATE REPRESENTATIVE DEPOSITION: KNOWING HOW TO SELECT YOUR CORPORATE REPRESENTATIVE

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INTRODUCTION

A sign at a crossroads in a southwestern state reads: “Be careful which road you choose—you’ll be on it for the next 200 miles.”² Perhaps nothing better captures the dilemma facing a surety when selecting a corporate representative for deposition than that road sign, particularly given the increasing significance of depositions in the pre-trial process.³ As one leading commentator has observed:

Depositions are the factual battleground where the vast majority of litigation actually takes places. It may safely be said that Rule 30 has spawned a veritable cottage industry. The significance of depositions has grown geometrically over the years to the point where their pervasiveness now dwarfs both the time spent and the facts learned at the actual trial—assuming there is a trial, which there usually is not. The pretrial tail now wags the trial dog.⁴

Equally important is that depositions also provide attorneys on both sides of a case with the unique opportunity to assess the strengths and weaknesses of their respective cases based on the credibility of each sides’ witnesses as they testify at a deposition. Consequently, sureties need to carefully consider who should represent the surety when it receives a Rule 30(b)(6) notice of taking deposition by planning ahead. As any experience driver will tell you, before going on a long road trip, not only do you need to map out your destination for the best route, but you also should check your gas, oil, brakes and tires to ensure your car will be able to make the long trip. Similarly, by mapping out in advance what the surety’s goal is, where the surety intends to go with the case, what are the strengths and weaknesses of its case, and what is the end result it wants to accomplish, the surety will be able to better position itself during litigation, and thereby, increase the likelihood that the surety will be able to obtain the outcome it desires.

¹ The authors acknowledge with gratitude the assistance of Kathleen Reres and Edward J. Comey in preparing this manuscript.

² VERNON MCLELLAN, WISE WORDS AND QUOTES 35 (Tyndale House Publishers, Inc., 1998).

³ JAMES WM. MOORE ET AL., 7 MOORE’S FEDERAL PRACTICE §30.02[2] (3d ed. 2007).

⁴ *Id.*

FACTORS TO CONSIDER WHEN SELECTING A CORPORATE REPRESENTATIVE

When a surety is noticed for a corporate deposition, the person designated to be deposed on behalf of the surety must be an officer, director, or managing agent of the surety deponent.⁵ To determine whether the surety's designated representative qualifies as a "managing agent," the surety should primarily consider whether the individual:

- a. possesses general powers to exercise judgment and discretion in corporate matters;
- b. can be relied on to give testimony, at the employer's request, in response to the demand of the examining party; and,
- c. can be expected to identify with the interests of the corporation.⁶

Sureties should also consider: "(1) whether any persons are employed by the corporation in positions of higher authority than the individual designated in the area for which information is sought by the deposition, and (2) the general responsibilities of the individual respecting the matters involved in the litigation."⁷

Under Federal Rule of Civil Procedure 30(b)(6), a party seeking discovery from a surety may name the surety as the deponent in the notice and/or subpoena which it serves on the deponent. "A party seeking the deposition of a corporation has the choice either to designate an appropriate individual involved with the corporation or to describe the subject matter of the questions which it intends to ask and to allow the corporation to designate its own spokesperson who is familiar with the subject matter."⁸ The deposing party is required to describe with "reasonable particularity" the matters about which it plans to inquire during its deposition.⁹ However, "because Rule 30(b)(6) imposes on the organization the obligation to select the individual witness, the party seeking discovery is not permitted to insist that it choose a specific person to testify."¹⁰ Rather, it is the responsibility of the surety when served

⁵ *Contardo v. Merrill Lynch*, 119 F.R.D. 622, 623 (D. Mass. 1988) (holding that plaintiff could not merely notice the deposition of the deponent and subpoena would be required because witness was not an officer, director, or managing agent of the defendant).

⁶ JAMES WM. MOORE ET AL., 7 MOORE'S FEDERAL PRACTICE §30.03[2] (3d ed. 2007).

⁷ *Id*; *In re Honda Am. Motor Co., Inc.*, 168 F.R.D. 535, 535-540 (D. Md. 1996); *Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342, 350 (N.D. Ohio 1999).

⁸ *Manning v. MARS, Ltd.*, 1986 U.S. Dist. LEXIS 30609, at *3-4 (E.D. Pa. 1986).

⁹ Fed. R. Civ. P. 30(b)(6).

¹⁰ *Poseidon Oil Pipeline Co. v. Transocean Sedco Forex, Inc.*, 2002 U.S. Dist. LEXIS 15750, at *10-11, (E.D. La. 2002); see also *Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 943 (10th Cir. 2004) ("Under Federal Rule of Civil Procedure 30(b)(6), a party may issue a notice of intent to take a deposition to an organization, and then the organization shall designate 'one or more officers, directors or managing agents, or other persons who consent to testify on its behalf.' The corporate entity itself designates the representative. To the extent a party wants to subpoena an individual of its choice for a deposition, it must do so under Rule 30(a)(1), which states that a party

with a notice of taking deposition of its corporate representative to not only designate one or more witnesses, but also to prepare those witnesses to answer questions concerning topics identified in the notice served by the party seeking discovery.¹¹ “The corporation has an affirmative duty to produce a representative who can answer questions that are both within the scope of the matters described in the notice and are ‘known or reasonably available’ to the corporation.”¹² As the court in *Dey, LP v. Eon Labs, Inc.*, determined:

An entity designating a 30(b)(6) witness to testify on its behalf has an obligation to make a conscious good faith endeavor to designate the persons having knowledge of the matters sought by [the interrogator] and to prepare those persons in order that they can answer fully [and] completely. . .the questions posed by [the interrogator] as to the relevant subject matters.¹³

While the main responsibility of the surety is to prepare the designated deponent to answer questions concerning topics referenced in the notice, the deposition is not limited to inquiry concerning those topics.¹⁴ There is no special protection for the deponent against questions concerning topics not referenced.¹⁵ Inquiry is limited only to the general scope of discovery outlined in Rule 26(b)(1).¹⁶ This means that during the surety deposition, the deposing party may inquire as to any matter that is not privileged and is relevant to the claim or defense of any party.¹⁷

If the deponent has knowledge of a question posed that is outside the scope of the topics referenced in the notice, but which is still within the general scope of discovery, the deponent is required to answer. If the deponent does not know the answer to a question outside the scope of topics referenced in the notice, the surety is not liable for its representative’s lack of knowledge.¹⁸ Hence, Rule 30(b)(6) cannot be used as a limit on the testimony that may be solicited at a surety corporate representative deposition.¹⁹ Rather, the

‘may take the testimony of any person, including a party, by deposition upon oral examination without leave of court.’”)

¹¹ *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995).

¹² *Id.*

¹³ *Dey, LP v. Eon Labs, Inc.*, 2005 U.S. Dist. LEXIS 39475, at *20, (C.D. Cal. 2005) (citing *Protective Nat. Ins. Co. of Omaha v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 268 (D. Neb. 1989)).

¹⁴ *Overseas Private Inv. Corp. v. Mandelbaum*, 185 F.R.D. 67, 68 (D.C. Cir. 1999).

¹⁵ *King*, 161 F.R.D. at 476.

¹⁶ *Mandelbaum*, 185 F.R.D. at 478.

¹⁷ Fed. R. Civ. P. 26(b)(1).

¹⁸ *King*, 161 F.R.D. at 476.

¹⁹ *Id.*

rule defines a surety's obligations regarding who the surety is obligated to produce for a deposition and what the witness is obligated to answer.²⁰

If the designated deponent does not appear for the deposition or cannot answer questions concerning topics identified in the notice, the surety has failed to comply with its Rule 30(b)(6) obligations and may be subject to sanctions.²¹ Sanctions are not available, however, if the deposing party requests production of a particular employee of the surety who is not an officer or agent of the surety and who is not chosen as a representative by the surety.²² Such a request is outside the scope of Rule 30(b)(6).²³ The presence of such a deponent must be obtained via subpoena rather than notice and such a deponent is not considered as speaking for the surety.²⁴

Can You Have A Consultant Be Your Surety Corporate Representative?

Once served with notice of a Rule 30(b)(6) deposition, a surety can 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 each person will testify."²⁵ The surety is not limited to officers or employees for its representative.²⁶ "If no current employee has sufficient knowledge to provide the requested information, the party is obligated to 'prepare [one or more witnesses] so that they may give complete, knowledgeable and binding answers on behalf of the corporation.'"²⁷

However, the surety should keep in mind that its chosen representative must have knowledge to testify as to matters known or reasonably available to the surety.²⁸ The representative is not limited to giving information within his personal scope of knowledge.²⁹

²⁰ *Id.*

²¹ *Id.*

²² CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, 8A FEDERAL PRACTICE & PROCEDURE §2103 (2007).

²³ *Id.*

²⁴ *Cleveland v. Palmbly*, 75 F.R.D. 654, 656-57 (W.D. Okla. 1977).

²⁵ Fed. R. Civ. P. 30(b)(6). If the individual designated in a notice of taking deposition is not an officer, director, or managing agent, the deposition must proceed as for an ordinary nonparty witness, and the deponent cannot speak on behalf of the corporation. *Sugarhill Records, Ltd. v. Motown Record Corp.*, 105 F.R.D. 166, 169 (S.D.N.Y. 1985) (court permitted corporation to choose someone other than person designated in deposition notice to speak on its behalf).

²⁶ See, e.g., *United States v. Conservation Chemical Co.*, 1986 U.S. Dist. LEXIS 29163 (W.D. Mo. 1986) (there is no requirement in the rule that the designee be an employee of the corporation, and in many situations, the appropriate corporate representative may not be an employee).

²⁷ *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb. 1995) (citing *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989)).

²⁸ Fed. R. Civ. P. 30(b)(6).

²⁹ *PPM Fin., Inc. v. Norandal USA, Inc.* 297 F. Supp. 2d 1072, 1086 (N.D. Ill. 2004).

Once that person is designated as the corporate representative for the deposition, he may testify to any matter within corporate knowledge.³⁰ If a consultant is designated as the deponent to represent the surety, the surety must provide the consultant with sufficient knowledge so that the consultant can determine, from the information and/or documents provided, information such as “the ownership of the corporation, the corporation's assets, who contracts therewith, who the corporation corresponded with, what bids the company submitted, and other such information that a knowledgeable person ordinarily could glean from corporate records.”³¹

Special Privilege Considerations To Keep In Mind

The Fifth Amendment Privilege against self-incrimination can arise in the context of a Rule 30(b)(6) deposition—despite the fact that a corporation has no such privilege—because the surety’s officers, agents and employees do have such a privilege.³² However, if a corporation or surety’s designated deponent cannot or will not respond to matters identified in the Rule 30(b)(6) notice based on the privilege against self-incrimination, the corporation or surety has an obligation to designate a deponent who will not invoke the privilege.³³ This includes, if necessary, retaining a person not previously associated with the corporation so that that person can answer the questions.³⁴ Individuals who invoke their privilege cannot be compelled to divulge information to the designated deponent.³⁵ Therefore, the surety deponent must be prepared to use other sources for the deposition.³⁶

The attorney-client privilege and work product doctrine must also be considered in preparing a surety’s designated representative for a Rule 30(b)(6) deposition. If an officer, agent, or employee of the surety is designated as the deponent, prior communications with the surety’s attorney concerning confidential legal advice will likely be protected from discovery by the attorney-client privilege.³⁷ Communications by non-employees who merely worked with the surety will not be similarly protected.³⁸

³⁰ *Id.*

³¹ *City of Chicago, Ill. v. Wolf*, 1993 WL 177020 at *2 (N.D. Ill.1993).

³² *Id.* at *1.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at *2.

³⁶ *Id.*

³⁷ *See Miramar Const. Co. v. Home Depot, Inc.*, 167 F. Supp. 2d 182, 183-85 (D.P.R. 2001).

³⁸ *See id.* at 185 (holding that communications between counsel for defendant, Home Depot, and independent contractor were not protected even though contractor was charged with performing sensitive and confidential services for Home Depot).

The Attorney-Client Privilege

“Generally, based on history, principle, precedent and public policy, the attorney-client privilege in its broad sense is available to corporations.”³⁹ It is not always clear, however, when the surety has satisfied the legal standards necessary to find an that an attorney-client privilege exists.⁴⁰

In *Southern Bell Telephone & Telegraph. Co. v. Deason*, the Florida Supreme Court, citing *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 484 (E.D. Pa. 1962), noted that some courts had adopted a “control group test” to determine whether a specific representative was a “client” within the “attorney-client” privilege paradigm:

[I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.⁴¹

The consideration of this question has resulted in a split of authority with the majority of courts adopting the “control group” test, while others have applied the broader “scope of employment” test.⁴² In *Deason*, the Florida Supreme Court took the position that a corporate communication is confidential and, therefore, protected by the attorney-client privilege so long as the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.⁴³ In *Deason*, the telephone company petitioned for review of non-final administrative orders of the Public Service Commission directing it to disclose certain documents.⁴⁴ Although the Florida Supreme Court did not question the

³⁹ *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1380 (Fla. 1994).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² The modified subject matter test has been described as making the attorney-client privilege applicable to an employee’s communications under the following circumstances: 1) the communication was made for the purpose of securing legal advice; 2) the employee making the communication did so at the direction of his corporate superior; 3) the superior made the request so that the corporation could secure legal advice; 4) the subject matter of the communication is within the scope of the employee’s corporate duties; and 5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994) (citing *Diversified Ind., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977)). Although a limited release of information may be permissible in specific instances, the burden is on the corporation to show that the communication at issue meets all of the stated requirements. 9A FLETCHER CYCLOPEDIA OF PRIVATE CORP. §4670.

⁴³ 632 So. 2d at 1386 (determining that employees’ statements made directly to counsel are privileged; statements made to security personnel are not protected by the privilege; and counsel’s summaries of the employees’ statements, whether communicated to counsel, to security, or to any other personnel, are protected work product).

⁴⁴ *Id.* at 1380.

applicability of the attorney-client privilege, the court recognized the existence of an unresolved quandary in determining whether the elements of the attorney-client privilege in the corporate context have been satisfied.⁴⁵ The Florida Supreme Court also recognized that if employees or investigators making reports to an attorney for the corporation are in a position to control or take part in the decision made by the corporation as to the action to be taken in response to the attorney's recommendations, they are considered to personify the corporation and their communications are subject to the attorney-client privilege.⁴⁶ The court highlighted that one of the problems with the control group test is the failure to recognize the crucial role middle and lower level employees play in the corporation's activities.⁴⁷ As such, the court rejected the control group test, and set forth the following criteria to determine whether a corporation's communications were protected by the attorney-client privilege:

- a. the communication would not have been made but for the contemplation of legal services;
- b. the employee making the communication did so at the direction of his or her corporate superior;
- c. the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
- d. the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;
- e. the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.⁴⁸

Similarly, in *Upjohn Co. v. U.S.*, 44 U.S. 383 (1981), the United States Supreme Court rejected the "control group" test as too narrow, but declined "to draft a set of rules for prospective application to corporate discovery situations."⁴⁹ Rather, the Supreme Court in *Upjohn* emphasized that the attorney-client privilege was designed "to protect communications, not facts."⁵⁰ Consequently, "the attorney-client privilege is limited to communications made to attorneys solely for the purpose of the corporation seeking legal advice and its counsel

⁴⁵ *Id.*

⁴⁶ *Id.* at 1381 (citing *City of Philadelphia*, 210 F. Supp. at 484).

⁴⁷ *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)).

⁴⁸ *Id.* at 1383.

⁴⁹ 9A FLETCHER CYCLOPEDIA OF PRIVATE CORP. §4670.

⁵⁰ *Id.*

rendering it; a corporate decision to disclose the information for commercial purposes, no matter what the economic imperatives, waives the privilege.”⁵¹

The Work Product Doctrine

Although the attorney-client privilege and the work product doctrine serve separate purposes, the legal issues associated with these concepts overlap. In *Deason*, the Florida Supreme Court examined how information may not be covered by one privilege but may be covered by the other.⁵²

In *Bradley v. Melroe Co.*, a loader operator who was injured by a defective seat bar interlock mechanism brought a products liability action against the loader manufacturer.⁵³ During discovery, the plaintiff learned of seven other accidents resulting in personal injuries from a similar type of accident.⁵⁴ The operator moved to compel the manufacturer to produce in-house investigative files.⁵⁵ The manufacturer declined to voluntarily produce these records under the work product doctrine.⁵⁶ The court held that the manufacturer could be required to produce all factual data contained in the files, but could, under the work product doctrine, redact all mental impressions, opinions, evaluations, recommendations and theories.⁵⁷

In *Bradley*, the plaintiff’s argument that the work product doctrine did not apply hinged on the plaintiff’s claim that the investigations were prepared as part of the normal course of defendant’s business and were therefore discoverable.⁵⁸ Plaintiff further contended that all of defendant’s accident reports were directed to an engineer and product safety manager for purposes of promptly investigating an accident and that reports were furnished to the defendant’s chief engineer for the sole purpose of determining whether a design change was necessary.⁵⁹

The manufacturer stated that upon receipt of an accident report, the defendant’s engineer “directs an investigation to determine: 1) if one of the manufacturer’s products was involved, 2) if so, was the product altered, modified or substantially changed after the sale, and 3) the facts of the accident.”⁶⁰ The crux of defendant’s argument was that by getting involved

⁵¹ *Id.*

⁵² 632 So. 2d at 1384.

⁵³ 141 F.R.D. 1 (D.C. 1992).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 3

⁵⁸ *Id.* at 1.

⁵⁹ *Id.* at 2.

⁶⁰ *Id.*

early while the facts were fresh, the defendant would be in a better position to resolve or defend any future litigation that may arise out of the accident. Interestingly, the defendant did not contend that any of the investigations in the seven files at issue were conducted by or at the direction of an attorney in anticipation of litigation, but rather to uncover facts while still available before they may be lost.⁶¹ The court rejected the plaintiff's argument that the documents were prepared during the ordinary course of business, and recognized a self-critical analysis privilege because the benefit of correcting harmful product outweighs the benefit from disclosure. Accordingly, the court ordered the defendant to produce all factual data contained in its investigative files but allowed the defendant to redact all mental impressions, opinions, evaluations, recommendations and theories.⁶²

Consequently, it is important for the surety to keep in mind that where the relevant communications are between counsel for a surety and a designated deponent concerning preparation for the deposition, the communications "may be protected from disclosure by virtue of the work-product doctrine, which protects the mental impressions, conclusions, opinions or legal theories of an attorney concerning the litigation[,]" whether or not the deponent is an employee.⁶³ Unfortunately, case law is divided concerning whether a company's designated deponent can properly claim work product and attorney-client privileges in refusing to answer questions concerning facts and documents which the company contends support its claims and defenses.⁶⁴

When a surety chooses and prepares its designated deponent for a Rule 30(b)(6) deposition, it should be wary of inadvertently waiving the attorney-client privilege. The designated deponent, for purposes of the Rule 30(b)(6) deposition, is a representative of the surety and can waive the attorney-client privilege by testifying as to portions of the attorney-client communication,⁶⁵ or by placing the attorney client relationship directly at issue.⁶⁶

⁶¹ *Id.*

⁶² *Id.*; See also *Airocar, Inc. v. Dorothy Goldman*, 474 So. 2d 269 (Fla. 4th DCA 1985) (quashing trial court order requiring the production of all investigative witness statements, memoranda, documents, and files maintained by defendant bus company, because statements bus driver made and any investigation conducted, after the defendant owner of a chartered bus received driver's initial incident reports, were gathered in contemplation of litigation and, as such, were not discoverable, even though the initial report was made by the driver pursuant to a requirement to report every incident); *ICI Explosives USA, Inc. v. Venlin E. Douglas, et. al.*, 643 So. 2d 707 (Fla. 4th DCA 1994) (quashing orders requiring answers from witnesses who have investigated an accident in anticipation of litigation, because questions required them to identify the information they gathered, their evaluation of it, and their conclusions based on it).

⁶³ *Id.* at 186.

⁶⁴ See *Am. Nat. Red Cross v. Travelers Indem. Co. of R.I.*, 896 F. Supp. 8 (D.D.C. 1995) (holding that information concerning a company's affirmative defenses is protected by work product and attorney-client privilege from discovery in a Rule 30(b)(6) deposition, and the company is not subject to sanctions for failure to answer questions concerning matters noticed by the deposing party on such topics). But See *U.S. E.E.O.C. v. Caesars Entm't, Inc.*, 237 F.R.D. 428 (D. Nev. 2006) (holding that as long as counsel does not ask questions of a Rule 30(b)(6) deponent which probe the mental impressions or thought processes of counsel or inquire into clearly privileged communications, counsel is permitted to examine a rule 30(b)(6) deponent concerning facts underlying a party's contentions and affirmative defenses).

⁶⁵ *Adler v. Wallace Computer Servs., Inc.*, 202 F.R.D. 666 (N.D. Ga. 2001).

⁶⁶ *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1414 (11th Cir. 1994).

The surety should take special care where it designates its counsel as deponent. While courts generally hold that the mere designation of an attorney pursuant to Rule 30(b)(6), without more, does not waive any privilege, it is easier for the attorney to inadvertently waive privilege by straying into privileged areas.⁶⁷ Because in-house counsel relays both legal and business advice in the corporate context, courts have often displayed a bias against in-house counsel when applying the attorney-client privilege to their communications.⁶⁸ Thus, the attorney-deponent must be even more careful to avoid inadvertent waiver of privileged subject matter.

PREPARING FOR THE DEPOSITION

How Do You Prepare For The Deposition?

In preparing its witness, the surety should keep in mind that it can be bound by the testimony given in the deposition. Case law is divided on this issue. In *Rainey v. American Forest & Paper Association, Inc.*, the court held that the defendant could not submit an affidavit in opposition to the plaintiff's motion for summary judgment when that affidavit contradicted what the corporation's designated deponents had testified to during their depositions.⁶⁹ The court reasoned that the corporation was obligated to prepare its witness to give binding answers.⁷⁰ Unless the corporation could prove that the new, contrary information was unknown or unavailable at the time of the deposition, the corporation could not submit a new or contrary version of the facts.⁷¹

In *A.I. Credit Corp. v. Legion Ins. Co.*, the Seventh Circuit rejected this reasoning.⁷² Noting the lack of any intent in the advisory committee notes to bind a corporation to the testimony given by its designated deponent, the court found that such testimony is merely evidence and not absolutely binding.⁷³ "The testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes."⁷⁴ The court in *Taylor* agreed that the testimony given by the

⁶⁷ Ken McKay & Mark Chavez, *Does Membership Have Its Privileges? Attorney-Client Privilege Issues Unique to In-House Counsel*, HOUSTON LAWYER, March/April 2007, at 22 [hereinafter *Houston Lawyer*] (referencing *Motley v. Marathon Oil Co.*, 71 F.3d 1179, 1192 (10th Cir. 1995)); see *Adler*, 202 F.D.R. at 675 (holding that attorney for the corporation who served as representative of the corporation for purposes of discovery waived the attorney-client privilege by disclosing statements made by other corporate representatives who sought his advice even though attorney claimed privilege as to the advice).

⁶⁸ *Houston Lawyer* at 32.

⁶⁹ 26 F. Supp. 2d 82, 94 (D.D.C. 1998).

⁷⁰ *Id.*

⁷¹ *Id.*; see also *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 993 (D. La. 2000) (holding that company could not contradict deponent's testimony absent a showing that deponent was confused or made an honest mistake).

⁷² 265 F.3d 630, 637 (7th Cir. 2001).

⁷³ *Id.*; see also *United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996) (holding that the testimony of a Rule 30(b)(6) designee does not bind a corporation in the sense of a judicial admission).

⁷⁴ *A.I. Credit Corp* 265 F.3d at 637 (citing *Taylor*, 166 F.R.D. at 362).

designated deponent should be used only as evidence to be explained and explored through cross examination.⁷⁵ The *Taylor* court, however, pointed out that the designee can make admissions against interest that are binding on the corporation under Rule 804(b)(3), Federal Rules of Evidence.⁷⁶ Therefore, when choosing a representative to be deposed, the surety should be careful in determining the stance it wishes the representative to take on relevant issues.

Furthermore, the surety should be sure that the representative is fully prepared. The designated deponent is required to make a good faith effort to find out relevant facts.⁷⁷ This can include reviewing documents, interviewing employees with personal knowledge, and collecting information.⁷⁸ The deponent is not, however, required to know every single fact, but rather only those that are relevant to the incidents that underlie the suit.⁷⁹ Nor is the deponent required to have personal knowledge of the facts to which he testifies.⁸⁰ The deponent must be educated on matters which are known, should be known, or are reasonably available to the surety.⁸¹

If the matter noticed by the deposing party has long passed and there are no individuals or employees who remember the matter, the surety must still prepare a designated deponent to the extent matters are reasonably available, whether from documents, past employees or other sources.⁸² “Even if the documents regarding the matters known to the corporation are voluminous, and review would be burdensome, a deponent designated to testify on behalf of the corporation is required to review them in order to prepare for the deposition.”⁸³ If the surety can or is willing to produce all the documents relating to the underlying incidents, the surety must still produce knowledgeable witnesses who will testify about the noticed topics for the deposition.⁸⁴

If the notice issued by the deposing party is vague, the surety should ask for clarification prior to the scheduled deposition; otherwise, the surety may face sanctions if its designated deponent is unprepared to answer questions on matters referenced in the notice.⁸⁵ If the

⁷⁵ 166 F.R.D. at 362 n6.

⁷⁶ *Id.*; but see *R&B Appliance Parts, Inc. v. Amana Co.*, 258 F.3d 783 (8th Cir. 2001) (holding that plaintiff was not bound by the legal conclusion of its designated deponent that the agreement involved in the case had been terminated).

⁷⁷ *Wilson v. Lakner*, 228 F.R.D. 524, 528-29 (D. Md. 2005).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *PPM Fin., Inc.*, 297 F. Supp. 2d at 1086.

⁸¹ *Wilson*, 228 F.R.D. at 528.

⁸² *Taylor*, 166 F.R.D. at 360-62.

⁸³ *Concerned Citizens of Bell Haven v. Belle Haven Club*, 223 F.R.D. 39, 43 (D. Conn. 2004).

⁸⁴ *In re Vitamins Antitrust Litig.*, 217 F.R.D. 229, 233-34 (D.D.C. 2002).

⁸⁵ *Arctic Cat, Inc. v. Injection Research Specialists, Inc.*, 210 F.R.D. 680, 682-83 (D. Minn. 2002).

surety is aware of potential limitations in the designated deponent's testimony, it should give notice to the deposing party well in advance of the deposition so that if the deposing party objects, the deposing party can require the surety to prepare another designated deponent with knowledge on the limited matter.⁸⁶ If it becomes obvious during or before the deposition that the designated deponent is deficient, the surety is obligated to provide a substitute.⁸⁷

What Happens When The Surety Is Winding Up Its Affairs?

When a company enters liquidation or is placed in a receivership, Rule 30(b)(6) depositions may become more difficult to satisfy. As the company's working officers, agents or employees are no longer in control, it may be more difficult to employ a designated deponent with knowledge of the relevant underlying facts. Case law differs on how to treat Rule 30(b)(6) depositions for companies in liquidation or receivership.

In *Resolution Trust Corp. v. Kazimour*, Resolution Trust Company ("RTC") was appointed as receiver for Banc Iowa and brought suit against Banc Iowa's directors for negligence concerning loans and investments.⁸⁸ At issue was the defendants' Rule 30(b)(6) deposition notice.⁸⁹ RTC filed a motion to quash defendants' notice, claiming there was no witness available for it to designate and claiming defendants had all pertinent information requested in the notice.⁹⁰ The *Kazimour* court reasoned that "[n]othing in Rule 30(b)(6) requires a party to 'create' a witness in response to a 30(b)(6) notice."⁹¹ The *Kazimour* court recognized that some courts have obligated parties to adequately prepare such witnesses, but the court drew a distinction between preparing a witness already known to the company and finding a witness who must be completely educated of the facts.⁹² The *Kazimour* court found that if counsel for RTC were required to find a witness and educate them from scratch, counsel would be forced to disclose privileged opinion work product.⁹³

Similarly, in *Koken, v. Lederman*, the *Koken* court found that plaintiff, as liquidator of a defunct insurance company, had no firsthand knowledge of the affairs of the company.⁹⁴ Thus, requiring counsel to prepare a witness who also lacked firsthand knowledge would violate the

⁸⁶ See *Dwelly v. Yamaha Motor Corp.*, 214 F.R.D. 537, 540 (D. Minn. 2003).

⁸⁷ *Sony Elec., Inc. v. Soundview Technologies, Inc.*, 217 F.R.D. 104, 112 (D. Conn. 2002) (holding that initial representative's testimony revealed gaps in his knowledge as well as evasive answers so that defendant had to designate another witness).

⁸⁸ No. C92-0188, 1993 WL 13009325, at *1 (N.D. Iowa Nov. 16, 1993).

⁸⁹ *Id.*

⁹⁰ *Id.* at 2.

⁹¹ *Id.* at 3.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ No. Civ. A. 00-755, 2001 WL 34368781, at *1 (E.D. Pa. Oct. 25, 2001).

work product privilege.⁹⁵ Consequently, the *Koken* court refused to force plaintiff to comply with the Rule 30(b)(6) notice.⁹⁶

In a similar case, *Resolution Trust Corporation v. Sands*, the *Sands* court took a different stance.⁹⁷ In that case, Plaintiff (RTC) was appointed as receiver for Southwest Savings Association, and claimed that it lacked any individuals with personal knowledge concerning the loan transaction that formed the basis of the lawsuit.⁹⁸ RTC argued that it should not be forced to produce a witness who could testify regarding the transaction.⁹⁹ The court rejected “the contention that Rule 30(b)(6) is only intended to apply ‘to actions in which a governmental agency or someone in its employ has participated in the transactions or events in controversy or has actual knowledge of facts or information relevant to the action.’”¹⁰⁰ The court held that there was no basis in law for denying the 30(b)(6) deposition¹⁰¹ because the plaintiff had not proved that the defendant had access to the information through other means, nor did the plaintiff establish that its work product privilege would be disturbed.¹⁰² Accordingly, unless a defendant can obtain the information it seeks through other means, a company in receivership or liquidation has no guarantee that it can avoid compliance with a Rule 30(b)(6) deposition notice.

CONCLUSION

Sometimes the choices we make have longer lasting effects than we realize at the time we made them. That can be particularly true when it comes to choosing your surety corporate representative. A surety should take the decision of who should be its corporate representative for a Rule 30(b)(6) deposition seriously by thinking about the end result it is trying to achieve, rather than what appears to be most convenient, simply because the representative the surety chooses will bind the surety by the testimony he or she gives during the surety’s deposition. Like any trip that you plan, the surety should take the notice of taking deposition it receives and map out what its different options are, and who is best suited to testify on the subject matter areas of inquiry. Although generally not fatal to its case, it is easier (and less costly) for the surety to plan ahead and choose the correct road, then to attempt to a U-turn after having been on the wrong road for 200 miles.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 151 F.R.D. 616 (N.D. Tex. 1993).

⁹⁸ *Id.* at 618.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 619 (citing *FDIC v. Butcher*, 116 F.R.D. 196, 201 (E.D. Tenn. 1986)).

¹⁰¹ *Id.*

¹⁰² *Id.*

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APPENDIX A:

CHECKLIST FOR CORPORATE REPRESENTATIVE DEPONENT

1. The Plaintiff may not take a deposition without leave of court until thirty (30) days after service of the process and initial pleading upon a defendant unless a defendant has already sought discovery.
2. A notice of taking deposition must 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 the person or the particular class or group to which the person belongs. This notice should also designate with reasonable particularity the matters on which examination is requested. If a notice is defective, a party may be precluded from taking a deposition.
3. The company should ask for clarification on any vague issues referenced in the notice from the deposing party and determine whether the deposing party is entitled to such information.
4. The company then has a duty to select an appropriate person to give the testimony described in the notice.
5. If possible, the company should choose a representative who has general knowledge of the company's structure, ownership, assets, and general business history. If no such witness is available, the company should provide the witness with such information.
6. The designated deponent should become familiar with the matter underlying the lawsuit and with the matters referenced in the notice.
7. If the designated deponent does not have sufficient personal knowledge of the matter underlying the lawsuit or the matters referenced in the notice, the deponent should:
 - a. review all relevant documents;
 - b. interview officers, agents, employees and associates with personal knowledge, and
 - c. gather all information concerning the underlying suit and the matters referenced in the notice which is known or should reasonably be known by the company.
8. The company should educate the deponent as to what matters are privileged and, therefore, should not be discussed. If necessary, the company should have counsel consult with the designated deponent to determine what is and is not privileged.

9. The company should decide what stance it wishes to take on all important issues relevant to the lawsuit and educate the deponent concerning those stances so as to avoid being bound by unfavorable testimony.
10. The company should consider whether to designate one or more officers, directors, or managing agents, or other [consenting] persons to testify on its behalf. Although not required, the company may also state the matters on which each designated representative will testify. The witnesses have a duty to give information that is reasonably available to the organization as well as information that is directly within their knowledge.