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CORPORATE REPRESENTATIVE DEPOSITIONS: IN SEARCH OF A COHESIVE & WELL-DEFINED BODY OF LAW

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I. INTRODUCTION

Although corporate representative depositions[1] are a common discovery tool in litigation, there are surprisingly few reported decisions discussing

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1. Both the federal and state rules are equally applicable to other organizations, including partnerships, governmental entities, and associations. *See, e.g.*, Anderson Invs. Co. v.

their scope and parameters, especially from Florida's state courts. Most of these reported decisions involve the location of such depositions[2] rather than the scope of permissible inquiry. Therefore, while the use of corporate representative depositions gives rise to many important legal questions, there are very few reported answers. This article will focus on some of the more important issues presented by these depositions, the manner in which they have been treated, and the proposed answers to those issues which are presently unresolved.

II. SCOPE OF PERMISSIBLE INQUIRY

Although differing slightly in their wording, the substance of both Federal Rule of Civil Procedure 30(b)(6)[3] and Florida Rule of Civil Procedure 1.310(b)(6)[4] are the same. Both rules essentially provide that a party wanting to depose a corporation or other organization may do so through the use of a notice, which designates the proposed areas of inquiry with reasonable parti-

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Lynch, 540 So. 2d 832, 833 (Fla. 4th Dist. Ct. App. 1988) (per curiam). Nevertheless, for grammatical ease, this article will generally refer to depositions under these rules as corporate representative depositions.

2. *See, e.g.*, Prevost Car, Inc. v. Vehicles-R-Us, Inc., 658 So. 2d 668, 668 (Fla. 5th Dist. Ct. App. 1995) (holding that absent extraordinary circumstances, a non-resident employee of a foreign corporation, which is not seeking affirmative relief, cannot be compelled to come to Florida for deposition). In one case, the court became so flabbergasted over the parties' protracted dispute over the location of a Rule 30(b)(6) deposition that it ordered the parties to engage in a "game of 'rock, paper, scissors.'" Avista Mgmt., Inc. v. Wausau Underwriters Ins. Co., No. 6:05-CV1430ORL31JGG, 2006 WL 1562246, at *1 (M.D. Fla. June 6, 2006).

3. *Federal Rule of Civil Procedure* 30(b)(6) provides:

> 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.

FED. R. CIV. P. 30(b)(6).

4. Florida Rule of Civil Procedure 1.310(b)(6) provides:

> In the notice a party may name as the deponent a public or private corporation, a partnership or association, or a governmental agency, and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to do so, to testify on its behalf and may state the matters on which each person designated will testify. The persons so designated shall testify about matters known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized in these rules.

FLA. R. CIV. P. 1.310(b)(6).

cularity.[5] In response, the corporation or organization selects one or more individuals with knowledge of the matters listed who will testify on behalf of the corporate entity.[6] Since the Florida rule was patterned after the then-existing federal rule, Florida courts have often relied on interpretations of the corresponding federal rule.[7]

A. *Is Inquiry Limited to the Specific Identified Areas on the Notice?*

One of the first issues, which regularly arises during the taking of many corporate representative depositions, is whether the questioning party is limited in its interrogation of the witness to the specific matters identified in the notice or whether it can go beyond these areas. Surprisingly, there are no Florida state appellate opinions which even address this issue and only a handful of reported federal district court cases.[8]

The first reported decision to consider this issue was the 1985 Massachusetts' federal district court opinion in *Paparelli v. Prudential Insurance Co. of America*,[9] which involved a products liability claim for injuries allegedly sustained as a result of the defective operation of an elevator.[10] In *Paparelli*, plaintiff's counsel admittedly questioned defendant's corporate representative on matters outside of the areas designated on the deposition notice.[11] Defense counsel responded by instructing his "witness not to answer the questions," which in turn prompted a motion for sanctions.[12]

The court began its inquiry by observing that there was nothing in either the wording of Federal Rule of Civil Procedure 30(b) or the accompanying

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5. *Compare* FED. R. CIV. P. 30(b)(6), *with* FLA. R. CIV. P. 1.310(b)(6).

6. United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C. 1996).

> "Obviously it is not literally possible to take the deposition of a corporation; instead, when a corporation is involved, the information sought must be obtained from natural persons who can speak for the corporation." The corporation appears vicariously through it designee. . . . [The] designee does not give his personal opinions. Rather, he presents the corporation's "position" on the topic.

Id. (citations omitted).

7. *See, e.g.*, Plantation-Simon, Inc. v. Bahloul, 596 So. 2d 1159, 1160 (Fla. 4th Dist. Ct. App. 1992).

8. *See, e.g.*, Harris v. N.J. Dep't of Law & Pub. Safety, Civ. No. 03-2002 (RBK), 2007 U.S. Dist. LEXIS 61457, at *13 (D.N.J. Aug. 21, 2007).

9. 108 F.R.D. 727 (D. Mass. 1985).

10. *See id.* at 728.

11. *Id.* at 729.

12. *Id.* at 728–29. Although concluding that the questioning was not appropriate, the court nevertheless further held that defense counsel had improperly instructed his client not to answer the questions, since they did not involve a claim of privilege. *Id.* at 731. The court, however, ultimately declined to impose sanctions concluding that both counsel had been at fault. *Paparelli*, 108 F.R.D. at 731.

Advisory Committee notes, which expressly limited inquiry to the designated areas.[13] Despite this lack of express restrictions, the court reasoned that inquiry was nevertheless limited to the stated areas for a number of reasons.[14] It began its analysis with the conclusion that:

> It makes no sense for a party to state in a notice that it wishes to examine a representative of a corporation on certain matters, have the corporation designate the person most knowledgeable with respect to those matters, and then to ask the representative about matters totally different from the ones listed in the notice.[15]

The court then went on to note that prior to the adoption of the rule, a corporation often had no idea of the potential areas of inquiry when a specific named corporate employee or officer was noticed.[16] Often, the specifically named individual had no relevant knowledge regarding the matter.[17] Accordingly, one of the purposes behind the adoption of the rule was to allow the corporation to determine which of its employees or officers had knowledge of the matters sought to be discovered, to select someone with such knowledge, and to prepare them for the deposition.[18] Therefore, the court expressed concern that the:

> [P]urpose of the rule would be effectively thwarted if a party could ask a representative of a corporation produced pursuant to a Rule 30(b)(6) deposition notice to testify as to matters which [were] totally unrelated to the matters listed in the notice and upon which the representative is prepared to testify.[19]

Finally, although noting the absence of an express limitation upon questioning in the rule itself, the court nevertheless concluded that the language of the rule implicitly supported such a restriction by stating:

> [T]he fact that the notice must list the matters upon which examination is requested "with reasonable particularity" also lends weight to the notion that a limitation on the scope of the deposition to the matters specified in the notice is implied in the rule. If a party were free to ask any questions, even if "relevant" to the law-

13. *Id.* at 729; *see* FED. R. CIV. P. 30(b).
14. *Paparelli*, 108 F.R.D. at 729–30.
15. *Id.*
16. *Id.* at 730.
17. *Id.*
18. *Id.* at 729–30.
19. *Paparelli*, 108 F.R.D. at 730.

> suit, which were completely outside the scope of the "matters on which examination is requested," the requirement that the matters be listed "with reasonable particularity" would make no sense. With this in mind, the sentence which reads that "[t]he persons so designated shall testify as to matters known or reasonably available to the organization" can be read in harmony with the rest of the rule if the word "matters" has the same meaning as it does when used earlier in the rule, i.e. "matters upon which examination is requested." As to "matters upon which examination is requested," the representative has the duty to answer questions on behalf of the organization to the extent that the information sought is "known to the organization or reasonably available to it."[20]

The opposite conclusion was reached ten years later, however, by the United States District Court for the Southern District of Florida in *King v. Pratt & Whitney* (*King I*).[21] Looking at the rule as being designed to provide an additional discovery tool, this court concluded that while it imposed an affirmative duty on the corporation to select an individual with knowledge of the designated areas, it did not "confer some special privilege on a corporate deponent," which would allow it to avoid answering questions of which it had knowledge, just because they were outside the scope of the deposition notice.[22] The court further reasoned that, even if the inquiry had been intended to be limited by Rule 30(b)(6) to the designated areas, the party taking the deposition could simply re-notice the witness' deposition as an individual and cover the new areas.[23] Accordingly, the court concluded that the party seeking the deposition "should not be forced to jump through that extra hoop absent some compelling reason."[24]

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20. *Id.* *But cf.* Reed v. Bennett, 193 F.R.D. 689, 692 (D. Kan. 2000) (holding that a 30(b)(6) notice may not contain topics broadened by the phrase including but not limited to); Tri-State Hosp. Supply Corp. v. United States, 226 F.R.D. 118, 125 (D.D.C. 2005) (striking "including but not limited to" from the categories in the 30(b)(6) notice).

21. 161 F.R.D. 475, 476–77 (S.D. Fla. 1995).

> The decision of the court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. The Eleventh Circuit provides by rule that unpublished opinions are not considered binding precedent [but] may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition or motion.

King v. Pratt & Whitney (*King II*), 213 F.3d 647, 647 (11th Cir. 2000) (unpublished table decision) (citing 11TH CIR. R. 36–2).

22. *King I*, 161 F.R.D. at 476.

23. *Id.*

24. *Id.*

The district court's decision was subsequently affirmed by the Eleventh Circuit Court of Appeals in an unpublished memorandum decision,[25] which under the court's rules constitutes only persuasive and not binding authority.[26] This case has since been followed by several other more recent district court decisions.[27]

Therefore, one line of federal cases views Rule 30(b)(6) as designed to provide additional protection to corporations having to select representatives and accordingly limits the inquiry to the designated areas.[28] The other line, however, looks at Rule 30(b)(6) as providing parties with additional discovery tools and as a result does not limit the inquiry.[29] Although more federal district court decisions follow the latter approach, the minuscule number of total cases coupled with the lack of binding circuit court authority clearly fails to constitute a definitive federal rule.[30]

The rule limiting the inquiry to the designated matters makes more sense from both a legal and logical standpoint, although the *Paparelli* court fails to address many of the reasons supporting this conclusion.[31] As discussed in more detail below, there are distinct differences between the permitted uses of corporate representative depositions as opposed to those involving normal witnesses.[32]

A corporate representative deposition is a party deposition and accordingly, is not limited by the normal rules regarding witness depositions.[33] As

25. *King II*, 213 F.3d at 647.

26. Under Eleventh Circuit Rule 36-2, a decision of the court referenced in a Table of Decisions Without Reported Opinions appearing in the Federal Reporter is "not considered binding precedent, but . . . may be cited as persuasive authority, . . . [provided that] a copy of the unpublished opinion [is] attached to or incorporated within the" pleading. 11TH CIR. R. 36-2.

27. *See, e.g.*, Cabot Corp. v. Yamulla Enters., Inc., 194 F.R.D. 499, 499 (M.D. Pa. 2000); Detoy v. City & County of S.F., 196 F.R.D. 362, 367 (N.D. Cal. 2000); Overseas Private Inv. Corp. v. Mandelbaum, 185 F.R.D. 67, 68 (D.D.C. 1999); *see also* Teknowledge Corp. v. Akamai Techs., Inc., No. C 02-5741-SI, 2004 WL 2480707, at *1 (N.D. Cal. Aug. 10, 2004).

28. *See, e.g.*, Paparelli v. Prudential Ins. Co. of Am., 108 F.R.D. 727, 730 (D. Mass. 1985).

29. *See, e.g.*, *Cabot Corp.*, 194 F.R.D. at 499; *Detoy*, 196 F.R.D. at 367; *Mandelbaum*, 185 F.R.D. at 68.

30. *See* Wylie v. Inv. Mgmt. & Resource, Inc., 629 So. 2d 898, 900 (Fla. 4th Dist. Ct. App. 1993) (en banc). "When a state appellate court is asked to decide a federal question as to which there is no Supreme Court authority directly on point, and the Circuit Courts of Appeal are divided, there is no [definitive] rule to guide such a state court." *Id.* In such cases, state courts engage in a reverse *Erie* analysis and "guess how the highest court is likely to decide the issue." *Id.*

31. *See Paparelli*, 108 F.R.D. at 729–30.

32. *See* FLA. R. CIV. P. 1.330(a)(1)–(2).

33. *See id.* 1.330(a)(2).

such, under both the federal and state rules the deposition may be used at trial "for any purpose,"[34] which means it may be read at trial regardless of the availability of the witness and offered as substantive evidence.[35] The witness may also be led on direct examination[36] and admissions made by a corporate representative are binding on the corporation,[37] while the same statements made by a normal employee, even if a high-ranking one, are not binding.[38] As discussed in more detail below, while most courts have not considered such admissions "conclusive" in the same sense as "judicial admissions," they are nevertheless given tremendous weight when compared to the testimony of a normal witness.[39]

Courts have also been more liberal in allowing the questioning of party witnesses as opposed to independent ones, especially where the party has some special expertise, such as a physician.[40] In such cases, opinion testimony has often been allowed.[41]

Although the testimony of the corporate representative in a deposition as to designated matters is binding on the corporation, the deponent's knowledge as to other matters outside the designations in the deposition is not.[42] Therefore, if a court is going to permit a corporate representative to be questioned on outside matters, at the very least, it must weigh the different portions of the deposition testimony separately to determine each one's admissibility and weight.[43] If the testimony outside of the designated areas is still admissible so that it may be read or shown to the jury, this will present a very confusing situation for the jury, which is unlikely to be cured by a jury instruction. Essentially, the jury would be required to give different parts of the same deposition different weight or consideration, which presents a highly technical and unrealistic situation for the jury.[44]

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34. *Compare* FED. R. CIV. P. 32(a)(3), *with* FLA. R. CIV. P. 1.330(a)(2).

35. W.R. Grace & Co. v. Viskase Corp., No. 90-C-5383, 1991 WL 211647, at *2 (N.D. Ill. Oct. 15, 1991) (citing Fey v. Walston & Co., 493 F.2d 1036, 1046 (7th Cir. 1974)); LaTorre v. First Baptist Church of Ojus, Inc., 498 So. 2d 455, 458 (Fla. 3d Dist. Ct. App. 1986).

36. *See* FLA. STAT. § 90.612(3) (2008).

37. Marker v. Union Fid. Life Ins. Co., 125 F.R.D. 121, 126 (M.D.N.C. 1989).

38. *See* Mitsui & Co. v. P.R. Water Res. Auth., 93 F.R.D. 62, 65 (D.P.R. 1981).

39. *See* discussion *infra* Section V.B.

40. *See, e.g.*, Weyant v. Rawlings, 389 So. 2d 710, 711–12 (Fla. 2d Dist. Ct. App. 1980); Myers v. St. Francis Hosp., 220 A.2d 693, 698–99 (N.J. Super. Ct. App. Div. 1966).

41. *See, e.g.*, *Weyant*, 389 So. 2d at 712.

42. *See, e.g.*, McLellan Highway Corp. v. United States, 95 F. Supp. 2d 1, 9–10 (D. Mass. 2000) (excluding testimony outside of the designated areas).

43. *See, e.g.*, *id.*; *see also* United States v. Taylor, 166 F.R.D. 356, 359 (M.D.N.C. 1996) (recognizing that not all discoverable matters are "necessarily admissible at trial" in dealing with the scope of corporate representative depositions).

44. *See McLellan*, 95 F. Supp. 2d at 10.

Therefore, while a party could simply re-notice the deposition of the corporate representative in order to take a subsequent deposition as a fact witness with reference to matters outside the notice, this is not a mere technicality as suggested by the court in *King I*, because of the differences between the uses and permissible manner of inquiry between the two types of depositions.[45]

B. *When Does Inquiry Violate a Corporation's Work Product Privilege?*

Another common issue, which has surprisingly received no attention by the Florida state courts, is the question of when inquiry of a corporate representative violates the work product privilege. A notice of corporate representative deposition will often contain designations such as "all of the issues raised by plaintiff's complaint" or "the facts of the accident," which implicate several work product issues.

First, designations like "all of the issues raised by plaintiff's complaint" require the corporation's counsel to exercise its legal discretion in defining the relevant issues in the case in order to even identify the appropriate representative. Such designations are conceptually no different than requests "to produce 'all documents that relate to or otherwise support' each essential allegation in the . . . complaint," or to designate all documents selected by counsel and given to his client to review in preparation for deposition, which have been held to constitute work product.[46] At least one federal court has found that while "the *facts* of a relevant incident . . . are proper for a 30(b)(6) inquiry, the *contentions*, *i.e.* [the] theories and legal positions, of an organizational party may be more suitably explored by way of interrogatories."[47]

Another work product issue arises when the designated witness does not have actual knowledge of the areas of inquiry, but instead only has information supplied by the corporation's legal counsel. An example of this type of problem typically occurs in a personal injury case, where the notice delineates issues relating to the occurrence of the underlying accident, such as "how the accident occurred," "the facts giving rise to the plaintiff's comparative negligence," and so on. If the corporate employees actually involved in the accident are not available for deposition, reside outside the jurisdiction, are no longer employed, or did not personally witness the facts underlying

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

46. Gabriel v. N. Trust Bank of Fla., N.A., 890 So. 2d 517, 517 (Fla. 4th Dist. Ct. App. 2005), *overruled by* Grinnell Corp. v. Palms 2100 Ocean Blvd., Ltd., 924 So. 2d 887 (Fla. 4th Dist. Ct. App. 2006); *see also* Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985).

47. Wilson v. Lakner, 228 F.R.D. 524, 529 n.8 (D. Md. 2005).

the designated issues, the corporation will be forced to select a representative without actual first hand knowledge, such as an adjuster, whose information was provided by the company's counsel as a result of discovery and its case investigation.[48]

This situation presents a potential clash between the application of the work product doctrine and the provisions of both the state and federal rules, which require the representative to testify as to the matters that are known or reasonably available to the corporation.[49] Normally, information developed by a party's attorney in preparation of the case would be privileged as work product.[50] Under Florida law, this protection cannot be circumvented by asking a recipient of the information to set forth his or her "observations" regarding the subject matter of the privileged information, when the observations are based upon privileged information.[51] Such an inquiry is also not so different from the type prohibited in *ICI Explosives USA Inc. v. Douglas*,[52] where the court held that plaintiffs' counsel could not ask the defendant corporation's safety director the content of witnesses' statements told to him during the course of his work product investigation or to set forth the corporation's contentions regarding the cause of the accident giving rise to the suit.[53] Some federal courts have reached the same conclusion, holding that the work product privilege applies to prevent the questioning of corporate employees as to *privileged matters* relayed to them by the corporation's attorneys.[54]

At least one federal court has held that the work product doctrine cannot be used as a shield from preparing witnesses for their 30(b)(6) depositions:

> While counsel's own investigation into the facts of the case is substantially protected by the [work product] doctrine, and while the proceedings of any investigation conducted for purposes of risk assessment or peer review may be privileged by reason of the Maryland statute, the fact remains that a designated witness or witnesses must still be prepared to respond to the 30(b)(6) notice. If that

48. *See, e.g., id.* at 530.

49. *See id.* at 528–29.

50. Huet v. Tromp, 912 So. 2d 336, 338 (Fla. 5th Dist. Ct. App. 2005) (finding that information provided to an adjuster by the defendant's attorneys is normally protected from disclosure as work product); Alachua Gen. Hosp. v. Zimmer USA, Inc., 403 So. 2d 1087, 1088 (Fla. 1st Dist. Ct. App. 1981) (per curiam).

51. *Huet*, 912 So. 2d at 341.

52. 643 So. 2d 707 (Fla. 4th Dist. Ct. App. 1994) (per curiam).

53. *See id.* at 708.

54. *See* SEC v. Buntrock, 217 F.R.D. 441, 444 (N.D. Ill. 2003); SEC v. Rosenfeld, No. 97 CIV. 1467 (RPP), 1997 WL 576021, at *3 (S.D.N.Y. Sept. 16, 1997); SEC v. Morelli, 143 F.R.D. 42, 47 (S.D.N.Y. 1992).

> preparation means tracking much the same investigative ground that counsel and the risk management/peer review committee have already traversed, but independently of that investigation, so be it. Defense counsel may wish to exercise caution in preparing the witness or witnesses with privileged documents—otherwise the privilege may be waived as to those documents—but it is simply no answer to a 30(b)(6) deposition notice to claim that relevant documents or investigations are privileged and that therefore no knowledgeable witness can be produced.[55]

On the other hand, the federal decisions in particular have made it clear that the corporation has a duty to provide a representative with information that is "known or reasonably available" to it.[56] As subsequently discussed in more detail,[57] the corporation is therefore charged with the responsibility of preparing the witness to fully and completely answer questions reasonably related to the designated areas.[58] Some have gone so far as to say the representative must be prepared to testify about not only the corporation's knowledge, but "its subjective beliefs and opinions."[59]

A number of federal cases have tried to draw the line between the obligation to prepare the corporate representative and the right to avoid disclosing privileged matters.[60] These courts have concluded that where "the notice seeks, if not the deposition of opposing counsel, then the practical equivalent thereof. Courts . . . have generally taken a critical view of such a tactic."[61]

Accordingly, in *SEC v. Morelli*,[62] the court quashed the defendant's notice of deposition and directed it to instead propound contention interrogatories:

> [T]he Court finds that the proposed Rule 30(b)(6) deposition constitutes an impermissible attempt by defendant to inquire into the mental processes and strategies of the SEC. Given plaintiff's

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55. Wilson v. Lakner, 228 F.R.D. 524, 529 (D. Md. 2005) (footnotes omitted).

56. *See* FED. R. CIV. P. 30(b)(6); FLA. R. CIV. P. 1.310(b)(E)(6); *see also* United States v. Taylor, 166 F.R.D. 356, 360 (M.D.N.C. 1996); Dravo Corp. v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 75 (D. Neb. 1995).

57. *See infra* Section IV.B., *"The Knowledge Base of the Representative(s)."*

58. *Taylor*, 166 F.R.D. at 360; *Dravo*, 164 F.R.D. at 75.

59. *Taylor*, 166 F.R.D. at 361. For further discussion *see infra* note 120 and accompanying text.

60. *See generally* SEC v. Buntrock, 217 F.R.D. 441 (N.D. Ill. 2003); SEC v. Rosenfeld, No. 97 CIV. 1467 (RPP), 1997 WL 576021, at *1 (S.D.N.Y. Sept. 16, 1997); SEC v. Morelli, 143 F.R.D. 42 (S.D.N.Y. 1992).

61. *Buntrock*, 217 F.R.D. at 445.

62. 143 F.R.D. at 42.

> sworn, uncontroverted statement that all relevant, non-privileged evidence has been disclosed to the defendants, the Court is drawn inexorably to the conclusion that [defendant's] Notice of Deposition is intended to ascertain how the SEC intends to marshall the facts, documents and testimony in its possession, and to discover the inferences that plaintiff believes properly can be drawn from the evidence it has accumulated.
>
> . . . .
>
> Despite this result, [defendant] is not precluded from all inquiri[es] into the contentions of the SEC. . . . [Contention interrogatories] represent[] an appropriate method for [defendant] to inquire into the SEC's contentions.[63]

In *SEC v. Buntrock*,[64] the court noted the potential for conflict between the case law requiring a party to properly prepare a witness to answer questions outside its own personal knowledge and the party's work product privilege:

> Buntrock claims that it does not seek to depose opposing counsel, arguing that the SEC may designate any person under the rule. While this contention may be technically true, from a practical standpoint it is an unconvincing argument. The rule requires that the responding party make a conscientious good faith effort to designate the persons having knowledge of the matters sought by the [discovering party] and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed by the [discovering party] as to the relevant subject matters. The investigation in this matter was conducted by SEC attorneys and by SEC employees working under the direction of attorneys. Thus, the 30(b)(6) notice would necessarily involve the testimony of attorneys assigned to this case, or require those attorneys to prepare other witnesses to testify. In *SEC v. Rosenfeld*, 1997 WL 576021, No. 97 Civ. 1467 (S.D.N.Y. Sept. 16, 1997), the court found that this amounted to an attempt to depose the attorney for the other side, because even if a non-attorney witness were designated, they would have to have been prepared by those who conducted the investigation, and that preparation would include disclosure of SEC attorneys' legal and factual theories. The court's comments in *Rosenfeld* are applicable here: "Although defendant is correct that a

63. *Id.* at 47–48.
64. 217 F.R.D. at 441.

> Rule 30(b)(6) witness is not required to have firsthand knowledge, and that discovery should be conducted as efficiently as possible, the notice of deposition clearly calls for the revealing of information gathered by the SEC attorneys in anticipation of bringing the instant enforcement proceedings, and if forced to designate witnesses to testify fully and completely concerning the matters described in the notice of deposition, testimony of SEC attorneys or examiners working under the direction of the SEC attorneys conducting the investigation would be necessary."[65]

As a result, designations which seek to inquire into one party's responses to the others' interrogatories and requests for production have been found to be not only overbroad, but violative of the corporation's work product privilege, especially since "answering requests for production and interrogatories customarily is performed with the assistance of counsel."[66]

In an effort to balance one party's right to permissible discovery with another's work product protections, many federal courts have focused on the subject matter of the proposed inquiry, trying to draw the line between "facts" and the "significance" of those facts:

> There is simply nothing wrong with asking for facts from a deponent even though those facts may have been communicated to the deponent by the deponent's counsel. But, depending upon how questions are phrased to the witness, deposition questions may tend to elicit the impressions of counsel about the relative significance of the facts; opposing counsel is not entitled to his adversaries' thought processes. Here the effort must be to protect against indirect disclosure of an attorney's mental impressions or theories of the case.
>
> The problem in this type of situation is determining the degree to which a particular deposition question elicits the mental impressions of the attorney who communicated a fact to the deponent.[67]

Where the courts have found that the designations improperly impinge on the corporation's work product and attorney client privileges, they have

65. *Id.* at 444 (quoting *Rosenfeld*, 1997 WL 576021, at *2) (citation omitted).

66. SmithKline Beecham Corp. v. Apotex Corp., No. 98C3952, 2000 WL 116082, at *9 (N.D. Ill. Jan. 24, 2000) (mem.).

67. *Buntrock*, 217 F.R.D. at 446 (quoting Protective Nat'l Ins. Co. of Omaha v. Commonwealth Ins. Co., 137 F.R.D. 267, 280 (D. Neb. 1989)).

often struck the notice and instead directed the party to propound contention interrogatories.[68]

In the same vein, it seems incongruous that a designee can be compelled to testify about the corporation's subjective beliefs and opinions but that the same questions could not be asked to a lay witness.[69] There is no overriding policy reason or legal rationale for treating corporate representative depositions different from individual party depositions. Therefore, to the extent possible, corporate representative's depositions should be governed by the same rules and limitations as individual party depositions.

III. DESIGNATION OF AREAS

A. *The "Reasonable Particularity" Requirement*

Both the federal and state rules require that the areas of inquiry be designated in the notice with "reasonable particularity"[70] but do not otherwise provide guidance as to the degree of specificity required.[71] Unfortunately, the cases construing the rules fail to offer any meaningful general rule and instead are limited to their specific facts.

In one case, a Rule 30(b)(6) notice, which stated "that the areas of inquiry will 'includ[e] but not [be] limited to' the areas specifically enumerated," was held to be overbroad and therefore failed to meet the reasonable particularity standard.[72] In another case, the district court held that a notice which sought "to examine 'such other officers and employees of said plain-

68. *See, e.g., id.*; *Smithkline*, 2000 WL 116082, at *9; Exxon Res. & Eng'g Co. v. United States, 44 Fed. Cl. 597, 602–03 (Fed. Cl. 1999); *Rosenfeld*, 1997 WL 576021, at *3–4.

69. *See Exxon Research & Eng'g Co.*, 44 Fed. Cl. at 602–03.

70. FED. R. CIV. P. 30(b)(6); FLA. R. CIV. P. 1.310(b)(6). The reason for the particularity requirement "is to give the opposing party notice of the areas of inquiry that will be pursued so that it can identify appropriate deponents and ensure they are prepared for the deposition." Tri-State Hosp. Supply Corp. v. United States, 226 F.R.D. 118, 125 (D.D.C. 2005).

71. The ABA's Civil Discovery Standards provide that the notice "should accurately and concisely identify the designated area(s) of requested testimony, giving due regard to the nature, business, size, and complexity of the entity being asked to testify." ABA SECTION OF LITIG., CIVIL DISCOVERY STANDARDS, § 19a (2004) *available at* http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf [hereinafter CIVIL DISCOVERY STANDARDS]. The ABA also suggests that if a party is in doubt as to "the meaning and intent of any designated area of inquiry [it] should communicate in a timely manner with the requesting party to clarify the matter so that the deposition may go forward as scheduled." *Id.* § 19e.

72. Reed v. Bennett, 193 F.R.D. 689, 692 (D. Kan. 2000); *accord Tri-State Hosp. Supply Corp.*, 226 F.R.D. at 125 (striking the phrase "including but not limited to" from six categories in a 30(b)(6) notice because "[l]isting several categories and stating that the inquiry may extend beyond the enumerated topics defeats the purpose of having any topics at all").

tiff as have knowledge of the matters involved in this action'" was too general.[73] Similarly, a designation regarding Plaintiff's "'responses to Defendants' Interrogatories and requests for production, along with the subject[] [matters] identified therein,'" was held to be not only overbroad and burdensome, but violative of the corporation's work product privilege as well.[74]

In contrast, another federal district court held that a 30(b)(6) notice identifying the subject matter as "[t]he Group Health Insurance Plan issued to plaintiff through his employment with Xerox, Inc., believed to be numbered E9387," was stated with reasonable particularity.[75] Likewise, an insured's 30(b)(6) notice, seeking "a person knowledgeable about the claims processing and claims records, and persons familiar with general file keeping, storage and retrieval systems of [the] defendant" insurer, was held to be sufficiently particular.[76] Most cases have held, however, that designations which are overly broad or general, such as "all of the issues raised in plaintiff's complaint," may raise work product issues as well.[77]

B. *What Constitutes Sufficient Compliance with the Notice?*

Sanctions for failure to comply with both the state and federal rules are dependent in the first instance upon the discovering party's compliance with the procedures set forth in the rules.[78] Where the party seeking the discovery does not properly comply with the provisions of the rules, such as by naming a specific individual,[79] or by inadequately delineating the areas of inquiry,[80] or by failing to serve a formal notice,[81] sanctions for failing to produce a

73. Morrison Exp. Co. v. Goldstone, 12 F.R.D. 258, 260 (S.D.N.Y. 1952).

74. SmithKline Beecham Corp. v. Apotex Corp., No. 98C3952, 2000 WL 116082, at *9–10 (N.D. Ill. Jan. 24, 2000) (mem.).

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

76. Marker v. Union Fid. Life Ins. Co., 125 F.R.D. 121, 125–26 (M.D.N.C. 1989); *see also* Alexander v. FBI, 186 F.R.D. 137, 140 (D.D.C. 1998) (holding that a Rule 30(b)(6) notice which stated "that the subject matter of [the] inquiry will be 'the computer systems commonly known as or referred to as "Big Brother" and/or "WHODB,"'" was stated with "reasonable particularity").

77. *See supra* Section II.B.

78. CIVIL DISCOVERY STANDARDS, *supra* note 71, § 3.

79. *See* Anderson Invs. Co. v. Lynch, 540 So. 2d 832, 833 (Fla. 4th Dist. Ct. App. 1988) (per curiam) (holding that a corporation is not subject to sanctions for failing to produce a specifically named employee in response to notice under Florida rule).

80. *See* King v. Pratt & Whitney (*King I*), 161 F.R.D. 475, 476 (S.D. Fla. 1995) (finding that a corporate party may not be sanctioned for a representative's inability to answer questions outside the designated areas).

81. Bank of N.Y. v. Meridien BIAO Bank Tanzania Ltd., 171 F.R.D. 135, 145–46 (S.D.N.Y. 1997) (finding that plaintiff could not be sanctioned for violating Rule 30(b)(6) by

knowledgeable corporate representative are generally not appropriate.[82] As stated rather unceremoniously by the court in *King I*, "if the deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party's problem."[83]

Where the proper procedures are followed, however, the failure to produce individuals with sufficient knowledge of the matters asserted[84] can lead to a variety of sanctions, which normally become progressively more severe as noncompliance continues.[85] Typically, the court's first reaction to the failure to provide a witness with sufficient knowledge of the designated matters is to enter an order compelling production,[86] sometimes even identifying the specific individual(s) to appear.[87] The types of escalating sanctions that can follow are documented in *Precision Tune Auto Care, Inc. v. Radcliffe*.[88]

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producing purportedly inadequate witnesses when defendants' informal requests for deposition witnesses did not constitute "notice" under the rule).

82. *See, e.g., id.*; *King I*, 161 F.R.D. at 476; *Lynch*, 540 So. 2d at 833. A party must be careful though not to sit on its rights and then try to justify its designation of a plainly unqualified deponent. For example, in *Arctic Cat, Inc. v. Injection Research Specialists, Inc.*, the district court sanctioned the plaintiff for designating an unqualified deponent even though plaintiff contended that its faulty designation was caused "by the vagueness of the [defendant's] Deposition Notice." 210 F.R.D. 680, 682–84 (D. Minn. 2002). The court disagreed with the plaintiff since it "voiced no uncertainty to [the defendant], after [it] amended its Deposition Notice, about the intended scope of inquiry, nor did it seek the assistance of the Court in bringing further clarity to [the] scope of [the] questioning." *Id.* at 683; *see also* Cont'l Cas. Co. v. Compass Bank, No. CA04-0766-KD-C, 2006 WL 533510, at *19 (S.D. Ala. Mar. 3, 2006) (suggesting that objections to the areas of inquiry must be made *and* ruled upon prior to the commencement of the deposition).

83. *King I*, 161 F.R.D. at 476.

84. The inadequate designation of a corporate employee for deposition, or even the failure to appear for the deposition, is sometimes considered tantamount "to a refusal or failure to answer a deposition question." Marker v. Union Fid. Life Ins. Co., 125 F.R.D. 121, 126 (M.D.N.C. 1989); *see also* Barron v. Caterpillar, Inc., 168 F.R.D. 175, 177 (E.D. Pa. 1996). *But see* Alexander v. FBI, 186 F.R.D. 137, 142–43 (D.D.C. 1998) (finding that designee's inability to answer all deposition questions was not "tantamount to a failure to appear" because designee "testified adequately in numerous respects" and "generally provided the name of the person that could answer" the questions).

85. *See, e.g.*, Precision Tune Auto Care, Inc. v. Radcliffe, 804 So. 2d 1287, 1288 (Fla. 4th Dist. Ct. App. 2002). There is some authority supporting the proposition that "[b]oth in preparing and in responding to a notice," the corporation or designated "witness is expected to interpret the designated area(s) of inquiry in a reasonable manner consistent with the entity's business and operations." CIVIL DISCOVERY STANDARDS, *supra* note 71, at § 19d.

86. *See, e.g.*, Chiquita Int'l Ltd. v. Fresh Del Monte Produce, N.V., 705 So. 2d 112, 113 (Fla. 3d Dist. Ct. App. 1998) (per curiam); Medero v. FPL, 658 So. 2d 566, 567–68 (Fla. 3d Dist. Ct. App. 1995) (per curiam).

87. *See Precision Tune*, 804 So. 2d at 1288.

88. *Id.* at 1287, 1290–91.

In *Precision Tune*, the plaintiff noticed the deposition of the foreign defendant's corporate representative in Florida.[89] Although the defendant filed a motion for protective order, it never set it down for a hearing.[90] Subsequently, the court granted the plaintiff's ensuing motion for sanctions and required the corporate defendant to produce an employee for deposition in Florida.[91] Although the corporation produced an employee in response to the order, the witness had only "very limited knowledge of the case, but identified three others with knowledge in the requested areas."[92] The plaintiff "again moved for sanctions, which the court granted" and ordered the defendant to produce the three named individuals for deposition in Florida, in addition to various specific documents by a specified date or its pleadings would be stricken.[93] The corporate defendant subsequently provided two of the three employees, but failed to produce the documents or the third witness.[94] Following a hearing, the court concluded that the corporation's conduct had demonstrated "'deliberate and contumacious disregard of the Court's previous orders,'" and struck the defendant's pleadings.[95] The trial court's action was subsequently affirmed on appeal.[96]

The federal courts have taken a much stricter approach with respect to compliance with the corporate representative rule than their Florida state counterparts. In *Resolution Trust Corp. v. Southern Union Co.*,[97] the Fifth Circuit Court of Appeals concluded that a corporation's failure to produce a sufficiently knowledgeable representative was the equivalent of producing no representative; in upholding an award of fees and costs in the absence of a prior court order, the court stated:

> When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent.

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89. *Id.* at 1289.

90. *Id.* The defendant's initial objection appears to have been well taken, since the general rule recognized in Florida is that absent extraordinary circumstances, a non-resident employee of a foreign corporation, which is not seeking affirmative relief, cannot be compelled to come to Florida for deposition. *See, e.g.*, Prevost Car, Inc. v. Vehicles-R-Us, Inc., 658 So. 2d 668, 668 (Fla. 5th Dist. Ct. App. 1995). Although not discussed by the appellate court, it appears as if the defendant's failure to notice its own motion for hearing was treated by the trial court as a waiver of its right to insist upon requiring the plaintiff to come to its principal place of business. *See Precision Tune*, 804 So. 2d at 1289.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Precision Tune*, 804 So. 2d at 1290.

96. *Id.* at 1293.

97. 985 F.2d 196 (5th Cir. 1993).

> If that agent is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all.[98]

The next logical question is what happens when the corporate representative does not know the answer to a question or series of questions.

> Rule 30(b)(6) implicitly requires the designated representative "to review all matters known or reasonably available to it in preparation for the Rule 30(b)(6) deposition. This interpretation is necessary in order to make the deposition a meaningful one and to prevent the sandbagging of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial. . . .
>
> [A party] does not fulfill its obligations at the Rule 30(b)(6) deposition by stating it has no knowledge or position with respect to a set of facts or area of inquiry within its knowledge or reasonably available."[99]

But the question then becomes to what lengths must a corporate representative conduct research in order to competently testify as to the designated areas. Courts appear to apply a reasonableness standard, requiring the corporation to "'prepare the designee to the extent matters are *reasonably* available, whether from documents, past employees, or other sources.'"[100] "Reasonably available" has been defined to mean those documents that are in a party's control.[101] "[I]t need not make extreme efforts to obtain all information possibly relevant to the requests."[102] Courts have enforced this interpretation "in order to make the deposition a meaningful one and to prevent the 'sandbagging' of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before . . . trial."[103]

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98. *Id.* at 197.

99. Starlight Int'l, Inc. v. Herlihy, 186 F.R.D. 626, 638 (D. Kan. 1999) (quoting United States v. Taylor, 166 F.R.D. 356, 362 (M.D.N.C. 1996)).

100. Cont'l Cas. Co. v. Compass Bank, No. CA04-0766-KD-C, 2006 WL 533510, at *18–19 (S.D. Ala. Mar. 3, 2006) (emphasis added) (quoting Bank of N.Y. v. Meridien BIAO Bank Tanzania, Ltd., 171 F.R.D. 135, 150–51 (S.D.N.Y. 1997)).

101. *See* Calzaturficio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co., 201 F.R.D. 33, 38–39 (D. Mass. 2001). For example, a corporate representative was held obligated to review tax-related documents in the possession of a non-employee accountant. *See id.* at 39.

102. *In re* JDS Uniphase Corp. Sec. Litig., No. C-02-1486 CW, 2007 WL 219857, at *1 (N.D. Cal. Jan. 29, 2007). Likewise, "the rule may not require absolute perfection in preparation." Wilson v. Lakner, 228 F.R.D. 524, 528 (D. Md. 2005).

103. *Taylor*, 166 F.R.D. at 362.

At the bare minimum, a corporation must prepare its representatives "by having them review prior fact witness deposition testimony as well as documents and deposition exhibits, . . . [so it] can state its corporate position at the Rule 30(b)(6) deposition [about] . . . prior deposition testimony."[104] At least one case has gone so far as to hold that the corporate representative must also review *all* corporate documentation that might have a bearing on the 30(b)(6) deposition topics, "[e]ven if the documents are voluminous and the review of those documents would be burdensome."[105] In short,

> [w]hile the rule may not require absolute perfection in preparation . . . it nevertheless . . . requires a good faith effort on the party of the designate to find out the relevant facts—to collect information, review documents, and interview employees with personal knowledge just as a corporate party is expected to do in answering interrogatories.[106]

"There is no obligation to produce witnesses who know every single fact, only those that are relevant and material to the incident or incidents that underlie the suit."[107]

Although the length of time involved in preparation will not be determinative of whether the corporation has reasonably prepared its deponent, courts do consider it.[108] In one case, the court found that a corporate representative failed to "appear" when the deponent spent a total of three hours reviewing materials, merely glancing at some; conducted no investigation into the corporation's role in the case; and spent a "scant" one and one-half hours meeting with the corporate attorney prior to the deposition.[109]

In light of the above, some courts consider the production of an unprepared designee to be "tantamount to [the] failure to appear" at a deposition.[110] "[I]f it becomes obvious during the course of a deposition that the designee is deficient, the corporation . . . [must] provide a substitute."[111] In addition, "'[m]onetary sanctions are mandatory under Rule 37(d) for [the] failure to appear by means of . . . failing to [adequately] educate a Rule 30(b)(6) wit-

104. *Id.*
105. *Calzaturficio*, 201 F.R.D. at 37.
106. *Wilson*, 228 F.R.D. at 528–29.
107. *Id.* at 529 n.7.
108. *See id.* at 528.
109. *See Calzaturficio*, 201 F.R.D. at 37.
110. *E.g.*, United States v. Taylor, 166 F.R.D. 356, 363 (M.D.N.C. 1996).
111. Dravo Corp. v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 75 (D. Neb. 1995).

ness, unless the conduct was substantially justified.'"[112] The rule provides that a "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."[113] In some cases where there is a repeated violation of the rule, courts have held the corporation bound to the initial level of the response and have precluded any later contradiction or supplementation.[114]

IV. SELECTION OF CORPORATE REPRESENTATIVES

A. *The Importance of the Selection*

Before 1970, it was generally held that if a corporation was to be examined through its officers, directors, and managing agents, the individual to be questioned had to be identified in the notice.[115] Now that the corporation selects the witnesses to testify as corporate representatives, this has become an extremely important decision for two reasons.

First, since the deposition will be treated at trial as the testimony of a party and not just an independent witness, the deposition may be used at trial "for any purpose."[116] This means that the deposition may be read at trial and offered as substantive evidence, regardless of the availability of the witness to testify in person.[117]

Second, and most obviously, the corporate party is bound by testimony of the corporate representative, and the representative's statements can be admitted as an admission of the corporation.[118] In other words, "[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, however, this does not mean that the witness has made a judicial admission that formally and finally decides an issue."[119]

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112. Int'l Ass'n of Machinists & Aerospace Workers v. Werner-Masuda, 390 F. Supp. 2d 479, 489 (D. Md. 2005) (quoting *In re* Vitamins Antitrust Litig., 216 F.R.D. 168, 174 (D.D.C. 2003)).

113. FED. R. CIV. P. 37(d)(3).

114. Werner-Masuda, 390 F. Supp. 2d at 491.

115. FED. R. CIV. P. 30(b)(6).

116. *See* FED. R. CIV. P. 32(a)(3); FLA. R. CIV. P. 1.330(a)(2).

117. *See, e.g.*, LaTorre v. First Baptist Church of Ojus, Inc., 498 So. 2d 455, 458 (Fla. 3d Dist. Ct. App. 1986).

118. McKesson Corp. v. Islamic Republic of Iran, 185 F.R.D. 70, 79 (D.D.C. 1999).

119. Canal Barge Co. v. Commonwealth Edison Co., No. 98-C-0509, 2001 WL 817853, at *1 (N.D. Ill. July 19, 2001) (citing W.R. Grace & Co. v. Viskase Corp., No. 90-C-5383, 1991 WL 211647, at *2 (N.D. Ill. Oct. 15, 1991)).

Accordingly, a corporation should be careful not to choose a representative whose testimony will contradict other testimony offered on behalf of the corporation.[120] The situation would probably be likened to a party who alters its deposition testimony in order to create a genuine issue of material fact to preclude the entry of summary judgment. "'When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact [for summary judgment], that party cannot thereafter create such an issue with an affidavit that merely contradicts *without explanation*, previously given clear testimony.'"[121]

B. *The Knowledge Base of the Representative(s)*

> The testimony elicited at [a corporate representative's] deposition represents the knowledge of the corporation, not of the individual deponents. The designated witness is "speaking for the corporation," and this testimony must be distinguished from that of a "mere corporate employee" whose deposition is not considered that of the corporation and whose presence must be obtained by subpoena.[122]

Under both the state and federal rules, the corporate representative has a duty to provide information that is "'known or reasonably available to the'" corporation.[123] As such, "the duty to present and prepare a Rule 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved."[124] For this reason, the

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120. *See* United States v. Taylor, 166 F.R.D. 356, 361–62 (M.D.N.C. 1996). As stated by one court:

> The designee, in essence, represents the corporation just as an individual represents him or herself at a deposition. Were it otherwise, a corporation would be able to deceitfully select at trial the most convenient answer presented by a number of finger-pointing witnesses at the depositions. Truth would suffer. . . . The attorney for the corporation is not at liberty to manufacture the corporation's contentions. Rather, the corporation may designate a person to speak on its behalf and *it is this position which the attorney must advocate.*

Id. (citation omitted) (emphasis added).

121. McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1240 n.7 (11th Cir. 2003)(per curiam) (quoting Van T. Junkins & Assocs. v. U.S. Indus., Inc., 736 F.2d 656, 657 (11th Cir. 1984)).

122. *Taylor*, 166 F.R.D. at 361. *See also* Ierardi v. Lorillard, Inc., No. 90-7049, 1991 WL 158911, at *2 (E.D. Pa. Aug. 13, 1991)(mem.).

123. *Taylor*, 166 F.R.D. at 360 (quoting FED. R. CIV. P. 30(b)(6)).

124. *Id.* at 361 (citing Buycks-Roberson v. Citibank Fed. Sav. Bank, 162 F.R.D. 338, 343 (N.D. Ill. 1995); SEC v. Morelli, 143 F.R.D. 42, 45 (S.D.N.Y. 1992)).

corporate representative does not need to have "personal knowledge of the facts to which he testifies."[125]

The corporation "must make a conscientious good-faith [effort] to designate the person[] [who has] knowledge [about] the matters sought by" the party noticing the deposition.[126] But the corporation's "duty extends beyond the mere act of presenting a human body to speak on the corporation's behalf."[127] Therefore, the corporation is not relieved of producing a representative simply because it has no employee who participated in the underlying event or transaction or who "has sufficient [personal] knowledge to provide the requested information."[128] In such situations, a number of district court decisions have held that the corporation must make a good faith effort to *prepare* the representative to answer fully and completely any questions posed as to the relevant subject matters based on any reasonably available information including documents, past employees, or other sources.[129] It may not be enough for the representative to simply review documents previously produced in deposition and to confer with the corporation's attorney if this will not sufficiently prepare him to testify as to the designated areas.[130]

The corporation's duty to provide information through a knowledgeable representative has been equated to its obligations in answering interrogatories:

> The Advisory Committee said: "This burden is not essentially different from that of answering interrogatories under Rule 33 . . . ." As with interrogatories, depositions should be answered directly and without evasion, in accordance with the information the deposed party possesses, after due inquiry. [The corporation] must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the noticing party] and to prepare those persons in order that they can answer fully, com-

125. PPM Fin., Inc. v. Norandal USA, Inc., 297 F. Supp. 2d 1072, 1085–86 (N.D. Ill. 2004).

126. Mitsui & Co. v. P.R. Water Res. Auth., 93 F.R.D. 62, 67 (D.P.R. 1981); *see also Buycks-Roberson*, 162 F.R.D. at 342.

127. Quantachrome Corp. v. Micromeritics Instrument Corp., 189 F.R.D. 697, 699 (S.D. Fla. 1999).

128. Dravo Corp. v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 75 (D. Neb. 1995); *see also Taylor*, 166 F.R.D. at 361–62; *Morelli*, 143 F.R.D. at 45; *Mitsui*, 93 F.R.D. at 67.

129. *See* Cont'l Cas. Co. v. Compass Bank, No. CA04-0766-KD-C, 2006 WL 533510 at *14, 18–19 (S.D. Ala. Mar. 3, 2006); *Buycks-Roberson*, 162 F.R.D. at 343; *Dravo*, 164 F.R.D. at 75; United States v. Mass. Indus. Fin. Agency, 162 F.R.D. 410, 412 (D. Mass. 1995) (cases cited therein); *Morelli*, 143 F.R.D. at 45; CIVIL DISCOVERY STANDARDS, *supra* note 71, § 19(f).

130. *See* Starlight Int'l, Inc. v. Herlihy, 186 F.R.D. 626, 638 (D. Kan. 1999).

> pletely, unevasively, the questions posed by Mitsui as to the relevant subject matters.[131]

As previously discussed in more detail in Part II.B., a number of federal district courts have limited inquiry under Rule 30(b)(6) to factual matters in order to avoid allowing litigants to use the rule to circumvent a corporation's work product protections.[132] There is, however, a line of federal district opinions which state that the corporate representative "must not only testify about facts within the corporation's knowledge, but also its subjective beliefs and opinions" and its "interpretation of documents and events."[133] In *Lapenna v. Upjohn Co.*,[134] the court qualified this requirement by stating: "Before compelling such a witness to testify regarding the subjective beliefs of the corporation, a court should first be satisfied that the employee has the requisite knowledge and authority to make an accurate statement."[135]

Unfortunately, these cases do little to explain how a corporation can have a "subjective belief," much less give any clue as to how it could ever be determined. Is the subjective belief of the corporation the belief of its CEO? How about a majority of its directors? Its stockholders? Its attorneys?

Perhaps even more importantly, such a requirement creates a very high risk of violating a corporation's work product privilege.[136] It is one thing to require a corporate representative to testify about *factual* matters, but quite another to require testimony about conclusions and interpretations which clearly enter the realm of the attorney's mental impressions, strategy, advice, and legal conclusions.

While many of these courts have given lip-service to the proposition that "[t]he designee, in essence, represents the corporation just as an individual represents [himself],"[137] these courts, in fact, hold the corporation to a much higher standard.[138] Although an individual is not required to speculate

131. Mitsui & Co. v. P.R. Water Res. Auth., 93 F.R.D. 62, 66–67 (D.P.R. 1981) (citations omitted).

132. *See, e.g.*, *Morelli*, 143 F.R.D at 47.

133. Cont'l Cas. Co. v. Compass Bank, No. CA04-0766-KD-C, 2006 WL 533510, at *19 (S.D. Ala. Mar. 3, 2006); United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C. 1996) (relying on Lapenna v. Upjohn Co., 110 F.R.D. 15, 21 (E.D. Pa. 1986)); *see also* A.I.A. Holdings, S.A. v. Lehman Bros., No. 97-CIV-4978, 2002 WL 1041356, at *2 (S.D.N.Y. May 23, 2002); Ierardi v. Lorillard, Inc., No. 90-7049, 1991 WL 158911, at *2 (E.D. Pa. Aug. 13, 1991)(mem.) (opposing party entitled to discover corporation's "interpretation" of documents).

134. *Lapenna*, 110 F.R.D. at 15.

135. *Id.* at 20.

136. *See id.* at 21–22.

137. *A.I.A. Holdings*, 2002 WL 1041356, at *2.

138. *See generally* United States v. Taylor, 166 F.R.D. 356 (M.D.N.C. 1996).

as to matters of which he or she has no direct knowledge, these cases require the representative to testify as to matters of which the corporation itself may have no knowledge.[139] Similarly, while an individual would not be required to give expert opinions in areas where he or she is not an expert, this line of cases in effect requires the corporation to do so by compelling the representative to testify concerning the corporation's "subjective beliefs and opinions."[140] Since an individual litigant would not be required to divulge opinion work product or speculate as to expert opinions, why should a corporation be required to do so?

C. *The Knowledge Level of the Representative(s)*

A common misconception among litigants, and sometimes even courts,[141] is that the rules require the production of the person with the "most" knowledge regarding the designated issues.[142] Neither the state nor federal rule contains such a requirement, and instead only provide that the witness be able to "testify about matters known or reasonably available to the organization."[143]

Both the state and federal rules clearly call for the selection of the witness to be made by the corporation.[144] The party seeking to take the deposition may not name a particular employee or individual under this rule.[145] To require the corporation to produce the individual with the "most" knowledge of a designated issue, however, would nullify the corporation's choice in the matter and, in many cases, would be tantamount to requiring the production of a specific employee.[146]

For example, if the case involved a suit for personal injuries arising from an accident, those corporate employees with the "most" knowledge of

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139. *See id.* at 361.

140. *Id.*; *see also Lapenna*, 110 F.R.D. at 20; *A.I.A. Holdings*, 2002 WL 1041356, at *2.

141. *See* Paparelli v. Prudential Ins. Co. of Am., 108 F.R.D. 727, 729–30 (D. Mass. 1985).

> It makes no sense for a party to state in a notice that it wishes to examine a representative of a corporation on certain matters, have the corporation designate the person *most knowledgeable* with respect to those matters, and then to ask the representative about matters totally different from the ones listed in the notice.

Id. (emphasis added).

142. *See id.*

143. FLA. R. CIV. P. 1.310(b)(6); *see also* King v. Pratt & Whitney (*King I*), 161 F.R.D. 475, 476 (S.D. Fla. 1995).

144. *See* Chiquita Int'l Ltd. v. Fresh Del Monte Produce, N.V., 705 So. 2d 112, 113 (Fla. 3d Dist. Ct. App. 1998) (per curiam).

145. *See id.*

146. *See id.* at 112–13.

how the accident occurred would be the ones who actually witnessed it. The same could be true in a products liability suit; the employee with the "most" knowledge concerning the operation of the product would likely be the engineer who designed it. In these cases, the corporation would therefore be deprived of its right to make a selection of the representative to speak for it as guaranteed by the rule.

Such a construction would pose other problems. If, for instance, the accident in the first example occurred on a cruise ship sailing in the Mediterranean Sea, the crew members who witnessed it would likely reside and work in Europe. Similarly, if the product in the second example was manufactured in Japan, the engineer who designed it would likely live and work in Asia. To require their employers to bring them to Florida, as the witnesses with the "most" knowledge, would violate the well-established rule that witnesses who work and reside outside of the state cannot be required to come to the state for a deposition.[147]

It is also important to note that under both the state and federal rules, the corporation, or other organization is not limited to designating an officer, director, or managing agent, but may also select anyone who consents to act as a corporate representative, which may include an employee, attorney, or consultant.[148] An individual may decline to appear as a corporate representative, particularly if they have an independent interest from, or conflicting interest with, the corporation in the pending litigation.[149]

Finally, if there is no single individual that can offer testimony on each of the designated areas, the corporation is obligated to produce as many representatives as necessary to satisfy the request.[150]

D. *The Corporation's Use of the Rule to Avoid Harassment*

While the state and federal rules provide an important tool for the litigant seeking to depose a corporation, they may help corporations reduce harassment in the form of having to produce excessive numbers of corporate

147. *See, e.g.*, United Teachers Ass'n Ins. Co. v. Vanwinkle, 657 So. 2d 1232, 1232–33 (Fla. 3d Dist. Ct. App. 1995) (per curiam).

148. FED. R. CIV. P. 30 advisory committee's note, subdivision (b)(6) (1970) (explaining that a person who is not an officer, director, or managing agent may be designated to testify only with their consent).

149. *See id.*

150. *See* Reilly v. NatWest Mkts. Group, Inc., 181 F.3d 253, 268 (2d Cir. 1999); Cont'l Cas. Co. v. Compass Bank, No. CA04-0766-KD-C, 2006 WL 533510, at *18 (S.D. Ala. Mar. 3, 2006) ("[A] corporation served with a Rule 30(b)(6) notice of deposition has a duty to 'produce such number of persons as will satisfy the request.'"); Quantachrome Corp. v. Micromeritics Instrument Corp., 189 F.R.D. 697, 699 (S.D. Fla. 1999).

employees for deposition. In *Plantation-Simon, Inc. v. Bahloul*,[151] the Fourth District Court of Appeal concluded that while a party seeking to depose corporate employees was not required to use Rule 1.310(b)(6) and could instead set the depositions of specific employees as provided elsewhere in the *Florida Rules of Civil Procedure*, "if the trial court finds that seriatim depositions of corporate officers has created a burden on the corporate party, the court is empowered to alleviate that burden in a proper case by, e.g., limiting the examining party to the designation procedure."[152]

Where, however, a corporate officer or employee has specific additional personal knowledge of matters in controversy, it is erroneous to prevent the opposing party from deposing such a witness.[153] Likewise, a corporation may insist on the designation of a corporate representative as an alternative to deposing high-ranking corporate officers who possess no unique, superior, personal knowledge of the matter in issue.[154]

> A 30(b)(6) deposition may not be justified where, assuming the witness is properly prepared, the entity establishes that the witness's testimony as a 30(b)(6) witness would be identical to his testimony as an individual and the 30(b)(6) is limited, or substantially limited, to topics covered in the deposition taken in the witness's individual capacity. In such a situation, there appears to be no obstacle to the entity's complying with its obligations under Rule 30(b)(6) by adopting the witness's testimony in his individual capacity.[155]

V. THE IMPACT OF THE CORPORATE REPRESENTATIVE'S TESTIMONY

A. *Changing Testimony Through Errata Sheets*

As with most other aspects of corporate representative depositions, there is scant law dealing with the subject of what changes can be made in the transcript after the deposition is completed. Even resort to the rules applicable to depositions, in general, offers little help. Although the federal

151. 596 So. 2d 1159 (Fla. 4th Dist. Ct. App. 1992).

152. *Id.* at 1161.

153. *See, e.g.*, Medero v. FPL, 658 So. 2d 566, 567 (Fla. 3d Dist. Ct. App. 1995) (per curiam).

154. *See, e.g.*, Crown Cent. Petroleum Corp. v. Garcia, 904 S.W.2d 125, 128 (Tex. 1995); Liberty Mut. Ins. Co. v. Super. Ct., 13 Cal. Rptr. 2d 363, 366 (Cal. Ct. App. 1992); Baine v. GMC, 141 F.R.D. 332, 334 (M.D. Ala. 1991).

155. A.I.A. Holdings, S.A. v. Lehman Bros., No. 97-CIV-4978-LMMHBP, 2002 WL 1041356, at *3 (S.D.N.Y. May 23, 2002).

and state rules are worded somewhat differently, they both provide deponents with the opportunity to review the transcript after it is completed and to make "changes in form or substance" on a written signed statement, which also must set forth the reasons given by the deponent for each change.[156] Despite the similarity of their respective rules, Florida and federal courts have interpreted their rules differently.[157]

Florida Rule of Civil Procedure 1.310(e) provides in pertinent part that "[a]ny changes in form or substance that the witness wants to make [to the transcript] shall be listed in writing by the officer with a statement of the reasons given by the witness for making the changes."[158] As is clear from the language of the rule, a "deponent can make changes of any nature [to the transcribed deposition,] no matter how fundamental or substantial."[159]

If, however, the changes are substantial the opposing party can reopen a deposition to inquire about the changes.[160] While a party may inquire as to whether the substantive changes originated with the deponent or his attorney, the attorney-client privilege precludes inquiry into the substance of the communications between the deponent and his or her counsel.[161] The errata sheet, indicating the changes and corrections to the witness's deposition testimony, is admissible in evidence since it becomes a part of the testimony.[162]

While earlier interpretations of the federal rule allowed a deponent to make any change whatsoever to the deposition transcript, recent decisions, including cases in the Eleventh Circuit Court of Appeals, have limited the changes to matters of form and not the substance of the testimony given under oath.[163]

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156. FED. R. CIV. P. 30(e); FLA. R. CIV. P. 1.310(e).

157. *See* Greenway v. Int'l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992). *But see* Feltner v. Internationale Nederlanden Bank, 622 So. 2d 123, 124 (Fla. 4th Dist. Ct. App. 1993) (per curiam).

158. FLA. R. CIV. P. 1.310(e).

159. *Feltner*, 622 So. 2d at 124; *see also* Lugtig v. Thomas, 89 F.R.D. 639, 641 (N.D. Ill. 1981); Allen & Co. v. Occidental Petroleum Corp., 49 F.R.D. 337, 340 (S.D.N.Y. 1970).

160. *See* Motel 6, Inc. v. Dowling, 595 So. 2d 260, 262 (Fla. 1st Dist. Ct. App. 1992) (citing Sanford v. CBS, Inc., 594 F. Supp. 713, 715 (N.D. Ill. 1984)).

161. *Feltner*, 622 So. 2d at 125.

162. *Dowling*, 595 So. 2d at 262.

163. *See* Greenway v. Int'l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992); *see also* Burns v. Bd. of County Comm'rs of Jackson County, 330 F.3d 1275, 1281–82 (10th Cir. 2003); Garcia v. Pueblo Country Club, 299 F.3d 1233, 1242 n.5 (10th Cir. 2002) ("We do not condone counsel's allowing for material changes to deposition testimony and certainly do not approve of the use of such altered testimony that is controverted by the original testimony."); Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000); Harrell v. Wood & Assoc. of Am. (*In re Harrell*), 351 B.R. 221, 240 (Bankr. M.D. Fla. 2006); Reynolds v. IBM Corp., 320 F. Supp. 2d 1290, 1300 (M.D. Fla. 2004), *aff'd*, 125 F. App'x 982 (11th Cir. 2004)

The rationale for these more restrictive interpretations of Rule 30(e) was set forth in the oft-quoted *Greenway v. International Paper Co.*:[164]

> The purpose of Rule 30(e) is obvious. Should the reporter make a substantive error, i.e., he reported "yes" but I said "no," or a formal error, i.e., he reported the name to be "Lawrence Smith" but the proper name is "Laurence Smith," then corrections by the deponent would be in order. The Rule cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination.[165]

In *Greenway*, a plaintiff sought to make sixty-four corrections to her deposition testimony.[166] The majority of the changes, indicated on the plaintiff's errata sheet, sought to materially alter the testimony given at deposition.[167] The reasons given for the changes were "(1) [the plaintiff's] belief that the correction is a more accurate and complete answer or (2) that she subsequently recalled more accurate information or (3) that she wished to clarify her answer."[168]

Cases from both the United States Middle District Court of Florida and the Eleventh Circuit Court of Appeals have followed the more recent interpretation of Rule 30 and disallowed substantive changes to depositions.[169] In *Reynolds v. IBM Corp.*,[170] a former IBM employee sued the company, asserting that he was fired because of discrimination.[171] The plaintiff alleged that after he sent an e-mail to a supervisor on February 27, 2001 requesting information about medical leave, the company set up a March 6, 2001 meeting

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(unpublished table decision); SEC v. Parkersburg Wireless L.L.C., 156 F.R.D. 529, 535–36 (D.D.C. 1994) ("Defendant Gerstner argues that Rule 30(e) allows her to make any substantive change she so desires. While older cases appear to support this position, later cases have often limited this blank check; perhaps because of the potential for abuse.") (footnote omitted); Rios v. Bigler, 847 F. Supp. 1538, 1546–47 (D. Kans. 1994) ("The court will only consider those changes which clarify the deposition, and not those which materially alter the deposition testimony as a whole.").

164. 144 F.R.D. at 322.

165. *Id.* at 325.

166. *Id.* at 323.

167. *See id.* 323–25.

168. *Id.* at 325.

169. *See, e.g.*, Reynolds v. IBM Corp., 320 F. Supp. 2d 1290, 1301 (M.D. Fla. 2004), *aff'd*, 125 F. App'x 982 (11th Cir. 2004) (unpublished table decision).

170. *Id.* at 1290.

171. *Id.* at 1298.

with him to discuss either his resignation or placement in a performance improvement plan.[172] In his deposition, though, the plaintiff stated that the meeting was actually scheduled two to three weeks before he had requested information about medical leave.[173] This testimony refuted the plaintiff's contention that the meeting was set up in response to his e-mail, since the meeting was clearly set up prior to the e-mail.[174] Realizing that his testimony destroyed his case, the plaintiff attempted to submit an errata sheet changing "'two to three weeks' to 'a little before the meeting,' and indicated [that] he could not recall if [his supervisor] called him 'a week or a few days before' the March 6, 2001 meeting."[175] The plaintiff's reason given for these changes was "confusion."[176]

The court disallowed the plaintiff's changes, adopting the rule that substantive changes to deposition testimony are impermissible:

> Although the Eleventh Circuit has not spoken, the Seventh and Tenth Circuits have dealt with situations where a deponent filed an errata sheet that materially changed original deposition testimony. Both courts analogized the situation to the rule that an affidavit may not be used to contradict a witness's prior sworn testimony.[177]

The Eleventh Circuit affirmed the *Reynolds* decision[178] in an unpublished opinion, which under its rules makes it persuasive, although not binding as precedent.[179]

In *Amlong & Amlong, P.A. v. Denny's, Inc.*,[180] Judge Hill, in a dissenting opinion, discussed the competing rules regarding changes to errata sheets, noting that the rule followed in the Eleventh Circuit is that substantive changes to a deposition are not permitted.[181] There, a district court sanctioned a law firm over $400,000 "for their conduct in representing a Title VII plaintiff in a sexual harassment lawsuit."[182] Originally, the district court "referr[ed] the issue of sanctions to a magistrate judge for an evidentiary hear-

172. *Id.* at 1299–1300.
173. *Id.* at 1300.
174. *Reynolds*, 320 F. Supp. 2d at 1301.
175. *Id.* at 1300.
176. *Id.*
177. *Id.* (citations omitted).
178. Reynolds v. IBM Corp., 125 F. App'x 982, 982 (11th Cir. 2004) (unpublished table decision).
179. 11TH CIR. R. 36-2.
180. 457 F.3d 1180 (11th Cir. 2006).
181. *Id.* at 1220–21 (Hill, J., dissenting).
182. *Id.* at 1184 (majority opinion).

ing," report, and recommendation.[183] One of the issues presented to the magistrate was whether the law firm's submission of an errata sheet to the plaintiff's deposition with over 868 changes to the plaintiff's testimony—consisting of 1200 pages—showed that the law firm had brought the plaintiff's suit in bad faith and knew that the suit was totally baseless.[184] Although the magistrate judge found that the law firm had not acted improperly, he further noted that the submission of the errata sheet was improper.[185] The district court subsequently discarded the magistrate's findings and "substituted its own findings of fact," entering sanctions without conducting an evidentiary hearing.[186]

In a two to one decision, the Eleventh Circuit concluded that the district court had abused its discretion when it rejected the magistrate's findings and entered an order of sanctions without a hearing of its own or the calling of a single witness.[187] Although the majority did not address the propriety of the errata sheet filed by the plaintiff, Judge Hill noted in his dissenting opinion: "Although early cases may have given the impression that such [substantive] changes are permissible, *the rule is, and was* at the time the Amlongs filed the Errata Sheet, to the contrary."[188]

Even more recently, a Middle District bankruptcy court disregarded an errata sheet that made substantive changes to a deposition, citing to both *Am-*

183. *Id.*

184. *See id.* at 1185–86.

185. *Amlong & Amlong*, 457 F.3d at 1200.

186. *Id.* at 1184.

187. *Id.* at 1202 n.6 ("*Our holding . . . is simply this*: the district court abused its discretion and clearly erred when it squarely rejected the magistrate judge's findings of fact and credibility determinations and substituted its own, without hearing so much as a single witness at a sanctions hearing.") (emphasis added).

188. *Id.* at 1220 (Hill, J., dissenting) (emphasis added). Judge Hill's dissenting opinion also states:

> The Amlongs maintain that Rule 30(e) "in no way limits the types and number of changes" that an errata sheet is permitted to make to a prior deposition. The majority seems to agree, noting without comment or objection that Norelus's sworn testimony was changed 868 times by the Errata Sheet.

Id. (footnote omitted). However, as Judge Hill points out, the majority in *Amlong & Amlong* never ruled on the issue of whether errata sheets could be used to make substantive changes to a deposition, instead they only noted that it was attempted below. *Amlong & Amlong*, 457 F.3d at 1200 (Hill, J., dissenting). The Eleventh Circuit also noted, without comment, that the magistrate found the submission of the errata sheet to be improper, which based on the reasoning stated above, would instead support the conclusion that the Eleventh Circuit agreed that the errata sheet was improper because it made substantive changes. *Id.* at 1194 (majority opinion).

long and *Reynolds* as precedent in *Harrell v. Wood & Associates of America, Inc. (In re Harrell)*:[189]

> Federal Rules of Civil Procedure, Rule 30(e) permits a deponent to modify or make corrections to a deposition for form or substance. However, while older case law has taken a broader view of the rule, the modern trend, one that is bolstered by the Eleventh Circuit, is to view Rule 30(e) with a restrictive eye. The Eleventh Circuit recently broached the issue in *Amlong & Amlong P.A. v. Denny's, Inc.*, 457 F.3d 1180 (11th Cir. 2006). The *Amlong* court surveyed case law which articulated the narrow view of Rule 30(e). For example, in quoting *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992), the Eleventh Circuit echoed that "[a] deposition is not a take home examination." . . .
>
> The Eleventh Circuit continued its analysis by stating a broader interpretation of Rule 30(e) holds "potential for abuse." In addition, the *Amlong* court noted that the Eleventh Circuit itself had affirmed a district court's decision to disregard an errata sheet that attempted to contradict a deposition when the deponent claimed confusion at the deposition.[190]

B. *Conflicting Testimony*

Another important issue that has not been fully addressed by either the rules or the Florida state courts is whether a party is permitted to call other witnesses at trial to refute or contradict the testimony of the corporate representative.

Numerous federal district courts have repeated the standard: "[A] corporation served with a Rule 30(b)(6) notice of deposition has a duty to 'produce such number of persons as will satisfy the request [and] more importantly, prepare them so that they may give complete, *knowledgeable and binding answers on behalf of the corporation.*'"[191]

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189. 351 B.R. 221, 240 (Bankr. M.D. Fla. 2006).

190. *Id.* (citations omitted).

191. Cont'l Cas. Co. v. Compass Bank, No. CA04-0766-KD-C, 2006 WL 533510, at *18 (S.D. Ala. Mar. 3, 2006) (emphasis added) (citing Marker v. Union Fid. Life Ins. Co., 125 F.R.D. 121, 126 (M.D.N.C. 1989)); *see* Twentieth Century Fox Film Corp. v. Marvel Enters., Inc., No. 01-CIV-3016(AGS)(HB), 2002 WL 1835439, at *2, (S.D.N.Y. Aug. 8, 2002) ("A 30(b)(6) witness testifies as a representative of the entity, his answers *bind* the entity . . . .") (emphasis added); Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 638 (D. Minn. 2000); Dravo Corp. v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 75 (D. Neb. 1995) (citing *Marker*, 125 F.R.D. at 126).

The unanswered question, however, is what does "binding" mean in this context? In a statement that has been repeated by a number of other cases,[192] the court in *United States v. Taylor*[193] concluded:

> The designee, in essence, represents the corporation just as an individual represents him or herself at a deposition. Were it otherwise, a corporation would be able to deceitfully select at trial the most convenient answer presented by a number of finger-pointing witnesses at the depositions. Truth would suffer.
>
> . . . The attorney for the corporation is not at liberty to manufacture the corporation's contentions. Rather, the corporation may designate a person to speak on its behalf and *it is this position which the attorney must advocate.*[194]

Although the foregoing quote would appear to prevent the subsequent introduction of contrary evidence, the court softened its stance on the conclusive nature of such testimony in a footnote:

> When the Court indicates that the Rule 30(b)(6) designee gives a statement or opinion binding on the corporation, this does not mean that said statement is tantamount to a judicial admission. Rather, just as in the deposition of individuals, it is only a statement of the corporate person which, if altered, may be explained and explored through cross-examination as to why the opinion or statement was altered. However, the designee can make admissions against interest under Fed. R. Evid. 804(b)(3) which are binding on the corporation.[195]

In *W.R. Grace & Co. v. Viskase Corp.*,[196] cited in *Taylor*, the United States District Court for the Northern District of Illinois went on to further define the meaning of "binding" in this context by explaining:

> 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

192. *See, e.g.*, A.I.A. Holdings, S.A. v. Lehman Bros, No. 97-CIV-4978, 2002 WL 1041356, at *2 (S.D.N.Y. May 23, 2002); Exxon Res. & Eng'g Co. v. United States, 44 Fed. Cl. 597, 600 (Fed. Cl. 1999).

193. 166 F.R.D. 356 (M.D.N.C. 1996).

194. *Id.* at 361–62 (citation omitted) (emphasis added); *see also Twentieth Century Fox Film Corp.*, 2002 WL 1835439, at *3.

195. *Taylor*, 166 F.R.D. at 362 n.6 (citations omitted).

196. No. 90-C-5383, 1991 WL 211647 (N.D. Ill. Oct. 15, 1991).

> in time. It does not mean that the witness has made a judicial admission that formally and finally decides an issue. Deposition testimony is simply evidence, nothing more. Evidence may be explained or contradicted. Judicial admissions, on the other hand, may not be contradicted. Viskase ignores the differences between evidentiary testimony and judicial admissions.[197]

Other cases have gone further, however, indicating that courts could in fact bar inconsistent testimony.[198] In *Wilson v. Lakner*,[199] the United States District Court for the District of Maryland warned that: "[D]epending on the nature and extent of the obfuscation, the testimony given by the non-responsive deponent (*e.g.* 'I don't know') may be [designated] 'binding on the corporation' so as to prohibit it from offering contrary evidence at trial."[200]

Similarly, in *Rainey v. American Forest & Paper Ass'n*,[201] the United States District Court for the District of Columbia refused to allow a corporate party to present evidence which conflicted with the testimony of its corporate representative in opposition to a subsequent motion for summary judgment:

> In light of this factual predicate, plaintiff reads Rule 30(b)(6) as precluding defendant from adducing from Ms. Kurtz a theory of the facts that differs from that articulated by the designated representatives. Plaintiff's theory is consistent with both the letter and spirit of Rule 30(b)(6). First, the Rule states plainly that persons designated as corporate representatives "shall testify as to matters known or reasonably available to the organization." This makes clear that a designee is not simply testifying about matters within his or her own personal knowledge, but rather is "speaking for the corporation" about matters to which the corporation has reasonable access. By commissioning the designee as the voice of the corporation, the Rule obligates a corporate party "to prepare its designee to be able to give binding answers" in its behalf. Unless it can prove that the information was not known or was inaccessible, a

197. *Id.* at *2 (citation omitted); *see also* A & E Prods. Group, L.P. v. Mainetti USA, Inc., No. 01 Civ. 10820 (RPP), 2004 WL 345841, at *6–7 (S.D.N.Y. Feb. 25, 2004).

198. *See generally* Wilson v. Lakner, 228 F.R.D. 524 (D. Md. 2005); Rainey v. Am. Forest & Paper Ass'n, 26 F. Supp. 2d 82 (D.D.C. 1998).

199. 228 F.R.D. at 524.

200. *Id.* at 530.

201. *Rainey*, 26 F. Supp. 2d at 82. In reaching this holding the court did not rely upon the principle that a party cannot change its sworn testimony by a subsequent affidavit to defeat a motion for summary judgment, but instead ruled squarely on its analysis of Rule 30(b)(6), so that its holding would be equally applicable at trial. *See id.* at 102.

> corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition.[202]

VI. CONCLUSION

The varying interpretations of the respective state and federal rules governing corporate representative depositions lead to the inescapable conclusion that the rules need to provide better guidance on the noticing, preparation for, conduct of, and use of corporate representative depositions. Given the potentially harsh sanctions for what courts may deem to be noncompliance with the rules, the parties need clear parameters on how to proceed. The courts and the rules committees cannot take a wait-and-see approach because most of these issues never reach the appellate courts given the stringent appellate requirements to obtain review of discovery matters.

When the rules committees decide to improve the rules, they should carefully analyze and consider that, to the extent possible, corporate representative depositions should be governed by the same rules and limitations as individual party depositions with regard to work product, speculative testimony, and the rendering of expert opinions. This will facilitate the process of bringing the corporate representative rules into focus for litigants on both sides of the bar, while at the same time, leveling the playing field so that corporations are not unfairly penalized simply because they are corporations.

202. *Id.* at 94 (citations omitted).