Most federal court litigators are familiar with Rule 30(b)(6) as a discovery tool. But what do you know about the use of Rule 30(b)(6) witnesses at trial? You may find there is a great deal about the topic that you don't know or haven't even considered.

BY STEPHEN J. O'NEIL

Rule 30(b)(6) Witnesses at Trial

The use of Fed. R. Civ. P. 30(b)(6) to take depositions of corporate representatives has proliferated in recent years. The rule's popularity can be attributed to the efficiency of the device in enabling a party through a single notice to elicit a broad range of deposition testimony from an adverse corporate party or a corporate third party.[1] The designated corporate representative may be questioned not only about facts known to the corporation, but also about corporate beliefs, opinions, and, subject to the constraints of the attorney–client privilege and the attorney work product doctrine, even about legal positions, and the testimony can, depending on the circuit, bind the corporation.

Between the language of the rule and the growing body of case law interpreting it, a fairly well-defined set of practice guidelines exist for Rule 30(b)(6) in the discovery context, but few decisions address the use of Rule 30(b)(6) testimony at trial. In the analysis that emerges from those decisions, obvious tension can be observed between the Federal Rules of Evidence requiring a foundation in the personal knowledge of the witness and the absence of any such requirement for deposition testimony taken pursuant to Rule 30(b)(6).

When a party receives a notice of deposition issued pursuant to Rule 30(b)(6), the corporation has a duty to designate one or more than one deponent, if necessary, to provide information "known or reasonably available" about topics described "with reasonable particularity" in the deposition notice or subpoena.[2] If the witness does not have personal knowledge, the corporation must educate the witness so that he or she can testify fully and knowledgeably about the topics identified.[3] The rule makes no requirement for the witness to have personal knowledge of the matters to which he or she testifies, and the witness may use documents, present or past employees, or other sources of information to prepare.[4] Because the corporation is the deponent under the rule, the witness presents the knowledge, opinions, or positions of the corporation, not of the witness himself or herself.[5,6]

In view of these principles, deposition testimony taken under Rule 30(b)(6) would normally be inadmissible at trial if not based on matters within the witness's personal knowledge. However, the only guidance in the Federal Rules of Civil Procedure regarding admissibility of Rule 30(b)(6) testimony at trial appears in Rule 32(a)(3), which provides that, if the other conditions of Rule 32(a)(1) are met, Rule 30(b)(6) *deposition* testimony of a corporate party may be introduced at trial *by the adverse party for any purpose*. Neither the rules nor the advisory committee comments make any reference to the use of live Rule 30(b)(6) testimony at trial. Nevertheless, the one court of appeals decision to squarely consider the issue has held this is permitted, and even encouraged.[7] The *Brazos* decision, and a number of district court decisions allowing live Rule 30(b)(6) testimony at trial, raise some difficult questions about the rule and its role at trial, including the following:

- Can a party's Rule 30(b)(6) witness be compelled by the adverse party to testify live in his representative capacity at trial?
- If called live at trial by an adverse party, can a party Rule 30(b)(6) witness testify just as if it were a Rule 30(b)(6) deposition and rely on information about which the witness has no personal knowledge or which may be hearsay?
- Does examination by the adverse party live at trial open

the door for the witness to explain the company's position using information that became available to the witness after the deposition?

- Is the Rule 30(b)(6) deposition testimony of a *third party* admissible at trial even if the testimony was based on hearsay or information outside the personal knowledge of the deponent?
- If a corporate Rule 30(b)(6) designee is unavailable to testify, can the corporate party affirmatively introduce the deposition testimony of its own designee at trial?
- How should the testimony of a "dual witness," one appearing in both an individual and a representative capacity, be handled by the parties and the court at trial?

This article will address each of these questions below.

1. Can a party's Rule 30(b)(6) designee be compelled by the adverse party to testify live in his representative capacity at trial?

"Although there is no rule requiring that the corporate designee testify 'vicariously' at trial, as distinguished from at the Rule 30(b)(6) deposition, if the corporation makes the witness available at trial, he should not be able to refuse to testify to matters as to which he testified at the deposition on grounds that he had only corporate knowledge of the issues, not personal knowledge."[8] With this statement, the Fifth Circuit established the somewhat arbitrary rule that a previously designated Rule 30(b)(6) witness can be questioned in his representative capacity at trial if he is present and testifying anyway in his personal capacity.[9]

The *Brazos* court did not consider the slightly different question of whether a Rule 30(b)(6) witness who does not appear voluntarily, but is subpoenaed individually, can refuse to testify in his representative capacity. That question was raised more recently in *Sara Lee Corp. v. Kraft Foods, Inc.*,[10] (ruling on a separate issue discussed later herein).[11] However, the case was resolved during trial, before any published decision was handed down, and before the witness in question took the stand. Kraft argued that, under *Brazos*, a witness appearing pursuant to subpoena should be open to questions about his corporate knowledge and positions just like a Rule 30(b)(6) witness that appears and testifies voluntarily. Otherwise, the right of a party to question an adverse Rule 30(b)(6) witness at trial would turn solely on whether he happened to be called by the party controlling him. In response, Sara Lee argued that, in that instance, it no longer controlled the former Rule 30(b)(6) witness and it filed affidavits indicating that the witness had left the company and did not have time to prepare to speak on behalf of the company and that the company did not authorize him to testify on its behalf.

These are powerful competing considerations. On one hand, why should a corporate party be able to blunt the effect of potentially damaging live Rule 30(b)(6) testimony by disowning its own designee? On the other, how can a corporate party be bound to positions taken by a witness who has no interest in the proceedings? Assuming that a court were inclined to allow live testimony from a Rule 30(b)(6) witness who was not appearing voluntarily (a modest extension of *Brazos*), it might resolve this issue by requiring that the party seeking to abandon its former designee make a showing that the witness has left the corporation under circumstances resulting in a true lack of control such that it would be unfair to allow him to speak for the company. Requiring such a showing would at least reduce the risk that the corporate party was abandoning its prior designee for strategic reasons.

Whether or not the *Brazos* holding extends to witnesses appearing at trial pursuant to subpoena, the ruling in *Brazos* that a Rule 30(b)(6) witness can be questioned in his representative capacity at trial has important practical implications. The law is settled that a 30(b)(6) witness need not be the most knowledgeable on and, in fact, need not have *any* personal knowledge of the subject matter. Based on that proposition, the court in *QBE Ins.* commented that a corporation might choose to designate a less-knowledgeable witness for any number of reasons, including that the more-knowledgeable witness "might be comparatively inarticulate, he might have a criminal conviction, she might be out of town for an extended trip, he might not be photogenic (for a videotaped deposition), she might prefer to avoid the entire process. …"[12] These kinds of considerations, important at the time that a Rule 30(b)(6) witness is selected for deposition, take on even greater significance if the witness might be called live at trial. In fact, in light of *Brazos*, a Rule 30(b)(6) respondent should give serious consideration to designating a witness who will not be appearing voluntarily as a fact witness at trial.

2. If called live at trial by an adverse party, can a party Rule 30(b)(6) witness testify just as if it were a Rule 30(b)(6) deposition and rely on information about which the witness has no personal knowledge or which may be hearsay?

The least potential for conflict between the Federal Rules of Evidence and Rule 30(b)(6) arises when a party calls the adverse party's Rule 30(b)(6) witness live at trial. In that situation, any statement made by the witness, even if predicated on hearsay or information outside the witness's personal knowledge, should be admissible as an admission by a party opponent. Fed. R. Evid. 801(d)(2) provides that a statement is not hearsay if it is offered against an opposing party and it "was made by the party in an individual or representative capacity"[13] or "was made by a person whom the party authorized to make a statement on the subject."[14] Either of these requirements should be easily satisfied in the case of a Rule 30(b)(6) designee, even if the witness had no personal knowledge of the matters, because it was learned as part of his Rule 30(b)(6) "education." Most circuits have found that personal knowledge is not required for an admission under Rule 801(d)(2).[15]

As noted above, the standard Rule 801(d)(2) analysis requires that the statement be "offered against an opposing party" before it will be considered an admission by a party opponent, and courts have generally held that a party's statements may not be admitted under this rule against a party on the same side of the litigation as the declarant party.[16] Interestingly, in *Brazos,* the plaintiff attempted to question the Rule 30(b)(6) representative of one defendant about matters relating to a co-defendant. The district court ruled that the witness could be asked to testify in his representative capacity about the defendant that designated him but not about the co-defendant. On appeal, the Fifth Circuit found that testimony about the co-defendant was not completely off limits given the broad scope of "corporate knowledge" under Rule 30(b)(6); however, it held that no testimony could be offered about whether the co-defendant made any misrepresentations about its equipment to the defendant to the extent such testimony

was hearsay. While the court did not refer to the Rule 801(d)(2) requirement that an admission be offered "against an opposing party," such testimony by a defendant's Rule 30(b)(6) witness, offered to show that a co-defendant had made misrepresentations about its equipment and would not meet the requirement or qualify as an admission of a party opponent.

3. Does examination by the adverse party live at trial open the door for the witness to explain the company's position using information that became available to the witness after the deposition?

If the adverse party intends to probe Rule 30(b)(6) matters live at trial, the corporate party can be expected to educate its designee beforehand about the corporation's positions, just as it did prior to the deposition. By the time of trial, months or even years may have passed since the Rule 30(b)(6) deposition, and the record is likely to have become far more developed. The corporate party may also have a better sense of its positions after completion of discovery, summary judgment briefing, and trial preparation. In the summary judgment setting, most courts have allowed the corporate party to modify or supplement positions previously articulated in the Rule 30(b)(6) deposition.[17] At trial, however, allowing a Rule 30(b)(6) witness to update his corporate knowledge through documents, depositions, and interviews provided to him after the deposition could allow much otherwise inadmissible hearsay evidence to come in the back door. There would be no clear obligation under the rules to bring the updated Rule 30(b)(6) position of the corporate deponent to the attention of the adverse party because, unlike other forms of discovery responses and disclosures, a party has no duty to supplement deposition testimony that may have been incomplete or incorrect when given.[18]

One recent district court case presented such a conflict. In *Cooley v. Lincoln Electric Co.*, the defendant's Rule 30(b)(6) witness was called at trial and confronted with the deposition testimony of the defendant's CEO in which the CEO admitted that in the 1940s the company knew that manganese in welding fumes could cause neurological injury.[19] When asked at trial whether the company's position differed from the deposition testimony of the CEO, the Rule 30(b)(6) witness sought to explain the company's position using a recent conversation he had with the CEO.[20] The defendant argued that a Rule 30(b)(6) witness is entitled to rely on this kind of information for purposes of a Rule 30(b)(6) deposition and should be permitted to do so at trial.[21] The court found the recent conversation to be hearsay and barred the proposed explanatory testimony.[22]

Although there is no rule requiring that the corporate designee testify "vicariously" at trial, if the corporation makes the witness available at trial, he should not be able to refuse to testify to matters as to which he testified at the deposition on the grounds that he had only corporate knowledge of the issues, not personal knowledge.

The *Cooley* court's determination that the conversation was hearsay is correct, but reliance on hearsay is permitted under Rule 30(b)(6). The problem was that the hearsay at hand was of questionable reliability. Thus, the result in *Cooley* might be different if the Rule 30(b)(6) witness had learned of additional information in the discovery record as opposed to the undiscoverable water-cooler conversation with the CEO, or if the Rule 30(b)(6) witness had learned of new information at trial that was not in the discovery record but was verifiable and reliable. For example, if the defendant's Rule 30(b)(6) designee in *Cooley* had given damaging deposition testimony based on his deposition preparation at the time, admitting that the corporation knew of the dangers of manganese in the 1940s, would he be able to explain that a more thorough review of the available evidence after his deposition revealed some testing that calls that conclusion into question? This would seem to present a much stronger case than in *Cooley* for permitting the corporate spokesperson to rely on new information rather than force the witness to simply reiterate his more damaging but incomplete deposition testimony. Because any unfairness to the party calling the Rule 30(b)(6) witness at trial can be avoided by reading the deposition testimony, courts should allow a Rule 30(b)(6) witness to update his statement of the company's positions with information that can be shown to be reliable. Otherwise, the party calling the witness live at trial would be free to cross-examine, armed with information, documents, or deposition testimony learned after the Rule 30(b)(6) deposition with no opportunity for the deponent (now a live witness at trial) to respond in kind.

4. Is the Rule 30(b)(6) deposition testimony of a third party admissible at trial even if the testimony was based on hearsay or information outside the personal knowledge of the deponent?

In the case of third-party Rule 30(b)(6) deposition testimony, real tension exists between the Federal Rules of Evidence and Rule 30(b)(6).[23] Like any 30(b)(6) witness, the third-party designee may have relied upon the company's documents or interviews with present or past employees in forming and articulating the company's positions. Unlike the party Rule 30(b)(6) witness, however, the testimony of the third-party designee would not be admissible under Rule 32(a)(3) or as an admission of a party opponent under Fed. R. Evid. 801(d)(2). In addition, a third-party has less incentive to undergo a thorough predeposition education and typically no stake in the outcome of the case. As a result, the risk is higher that the Rule 30(b)(6) deposition testimony will be incomplete, erroneous, or imprecise, with little chance for the parties to challenge or cross-examine.

The court in *Sara Lee* considered this issue and attempted to balance the benefits of Rule 30(b)(6) deposition testimony of third parties with the risk that admitting third-party testimony that was not based on personal knowledge, or that constituted inadmissible hearsay, could effectively deny the party opposing admission of the evidence the right of meaningful cross-examination.[24] Under Fed. R. Civ. P. 32(a), deposition testimony is admissible if it satisfies all three of the conditions of Rule 32(a)(1). The court found that

the deposition testimony of a third-party Rule 30(b)(6) designee is admissible if the individual witness (not the corporation) is more than 100 miles from the courthouse under Rule 32(a)(4)(B). However, even if the witness were "unavailable" under the rule, the testimony must still be otherwise admissible under Rule 32(a)(1)(B). The court found that admissibility for purposes of Rule 32(a)(1)(B) did not require personal knowledge, just "corporate knowledge" as that concept is embodied in Rule 30(b)(6).[25] The next question, as the court saw it, was "how far the concept of 'corporate knowledge' can be stretched."[26] The court found that third-party Rule 30(b)(6) testimony regarding corporate policy and procedure would be admissible "corporate knowledge" but that specific events better recounted by witnesses with personal knowledge would require such a witness.[27] The task of separating true "corporate knowledge" testimony from testimony that required personal knowledge would presumably be left to the trial court after a thorough review of the proposed deposition testimony.

In a jury trial, the court should explain to the jury what it means to be a Rule 30(b)(6) witness and then attempt to explain to the jury when the witness takes off one hat and dons the other. But this will be nearly impossibly for the jury to follow and likely will result in claims of error by the losing party.

The *Sara Lee* ruling leaves much to be determined on a case-by-case basis. However, there is one practical way to avoid the problem that arose at trial in the *Sara Lee* case. Once a third-party designates a Rule 30(b)(6) witness to testify in deposition, the party taking the deposition or the opposing party (as Kraft did) should serve a subpoena on that witness in his individual capacity. In that way, any testimony given by the witness that is based on his own personal knowledge will have an independent basis for admission. While taking a "dual" deposition of a witness in both his representative and individual capacities is preferable to running the risk that testimony will be barred, it does raise unique problems of deposition management, like the need for the questioner to advise the witness when a question or line of questioning is directed at him in his individual or representative capacity.

5. If a corporate Rule 30(b)(6) designee is unavailable to testify, can the corporate party affirmatively introduce the deposition testimony of its own designee at trial?

Now assume that the corporate representative gave a sparkling presentation of her employer's position in her Rule 30(b)(6) deposition, but she has since left the company and cannot be compelled to testify at trial. Can the designating corporate party affirmatively introduce its own Rule 30(b)(6) witness's deposition testimony at trial? Because Rule 32(a)(3) provides only for admission of Rule 30(b)(6) deposition testimony when introduced by the adverse party (and Rule 801 (d)(2) applies only to admissions of a party *opponent*), the argument that a designating corporate party should be able to introduce the deposition testimony of its own Rule 30(b)(6) witness is a weak one. Even if a witness is unavailable under Rule 32(a)(4), the proposed deposition testimony must still be admissible as if the witness were testifying live under Rule 32(a)(1)(B). Unless the proposed testimony were based on personal knowledge, it should not be admissible.

6. How should the testimony of a "dual witness," one appearing in both an individual and a representative capacity, be handled by the parties and the court at trial?

Consider the witness who has testified extensively as a Rule 30(b)(6) witness in deposition and is now called as a fact witness by her employer at trial. She has considerable personal knowledge of relevant events and so testifies at length on direct examination in her *individual capacity*. On cross-examination, she is impeached or confronted with deposition testimony she gave *in her representative capacity.* On redirect, she is asked to explain or clarify the testimony she gave as a Rule 30(b)(6) witness in deposition that was then used against her. In a jury trial, the court should explain to the jury what it means to be a Rule 30(b)(6) witness and then attempt to explain to the jury when the witness takes off one hat and dons the other. But this will be nearly impossible for the jury to follow and likely will result in claims of error by the losing party.

In this situation, a vigilant court could decide not to allow "dual witnesses," or could at least prohibit questions that would result in individual and representative testimony being elicited from the witness in the same sitting. If the direct examination is properly limited to the witness' individual testimony, the cross-examination should be so limited as well. If the adverse party wants to call the same witness to testify about her prior Rule 30(b)(6) deposition testimony, that party should call the witness during its case-in-chief, and the cross-examination should be limited to the representative aspects of her testimony. This would minimize, but fall far short of eliminating, the potential jury confusion that would result from trial testimony of a "dual witness." Alternatively, a court could admit the Rule 30(b)(6) *deposition* testimony of the witness and bar any live testimony by a witness in her representative capacity.

Conclusion

It may be premature to assume that *Brazos* and the district court cases allowing live Rule 30(b)(6) testimony at trial will gain general acceptance. But if they do, courts may find that a number of difficult issues await them as the use of Rule 30(b)(6) evidence at trial becomes more common. Precluding parties from calling adverse Rule 30(b)(6) witnesses to testify live, or at least live in their representative capacity, would avoid these problems and would result in little loss of relevant evidence because the deposition testimony would always be available to be used. The express authorization in Rule 32(a)(3) that Rule 30(b)(6) *deposition* testimony may be offered by the adverse party for any purpose may be the *only* use at trial that the drafters intended. The *Brazos*

court relied on the general reluctance of district courts to allow the reading of deposition testimony when the witness is available to testify live, but the complications associated with allowing live testimony may outweigh the benefit. ⊙

Stephen J. O'Neil is a senior litigation partner and experienced trial lawyer at K&L Gates LLP. He is one of two practice group coordinators for the firm's Commerical Disputes Practice Group. He practices out of the firm's Chicago office and is a member of the Chicago Chapter of the FBA. He can be reached at stephen.oneil@klgates.com

Endnotes

[1]In addition to corporate parties, the rule also applies to partnerships, associations, government agencies, and other entities. For simplicity, references in this article are to corporations alone.

[2]Fed. R. Civ. P. 30(b)(6).

[3]*Great Am. Ins. of N.Y. v. Vegas Constr. Co.,* 251 F.R.D. 534, 543 (D. Nev. 2008).

[4]*Id.* at 538; *Harris v. New Jersey,* 259 F.R.D. 89, 92 (D.N.J. 2007).

[5]*Brazos River Author. v. GE Ionics, Inc*., 469 F.3d 416, 433 (5th Cir. 2006).

[6]An excellent and more complete compendium of the guiding principles of Rule 30(b)(6) depositions from the case law appears in the recent case of *QBE Ins., Corp. v. Jorda Enter., Inc*., 277 F.R.D. 676, 687-92 (S.D. Fla. 2012).

[7]*See Brazos*, 469 F.3d at 434.

[8]*Brazos*, 469 F.3d at 434.

[9]This does not mean that a corporate party can be compelled to produce a designee to testify for the first time at trial in response to a Rule 30(b)(6) notice. A notice may only be issued for a deposition, not for the appearance of a corporate representative at trial. *Hill v. Nat'l R.R. Passenger Corp*., 88-5277, 1989 WL 87621 (E.D. La. July 28, 1989).

[10]276 F.R.D. 500 (N.D. Ill. 2011)

[11]The author was lead counsel for Kraft Foods Global, Inc., in the case of *Sara Lee Corp v. Kraft Foods, Inc*., 276 F.R.D. 500 (N.D. Ill. 2011).

[12]*QBE Ins*., 277 F.R.D. at 688.

[13]Fed. R. Evid. 801 (d)(2)(A).

[14]Fed. R. Evid. 802(d)(2)(C).

[15]*See U.S. v. Southbend Corp*., 760 F.2d 1366, 1376 n.4 (2d Cir. 1985), *cert. denied*, 474 U.S. 825 (1985) noting that the Third, Seventh, and Eighth Circuits have not required personal knowledge for a statement to qualify as an admissions by a party opponent. *See also Brookover v. Mary Hitchcock Memorial Hosp*., 893 F.2d 411, 418 (1st Cir. 1990).

[16]*See Stalbowsky v. Belew*, 205 F.3d 890, 894 (6th Cir. 2000).

[17]*See Cuff v. Trans States Holdings, Inc*., 816 F. Supp. 2d 556, 559 (N.D. Ill. 2011) and cases cited therein.

[18]*See* Fed. R. Civ. P. 26(e).

[19]693 F. Supp. 2d. 767, 790 (N.D. Ohio 2010).

[20]*Id*. at 790–92.

[21]*Id*.

[22]*Id.*

[23]Rule 30(b)(6) has been held applicable to third parties as it permits a party to name any corporation as a deponent and to so through use of either a "notice or subpoena." In fact, using a Rule 30(b)(6) subpoena is particularly valuable in the third-party context where the party serving the subpoena is less likely to know which employees of the third party have relevant knowledge.

[24]276 F.R.D. at 503.

[25]*Id*.

[26]*Id.*

[27]*Id*.

ARBITRATION continued from page 63

individual litigation. As the Court explained, "[t]ruth to tell, our decision in *AT&T Mobility* all but resolves this case," given that "[w]e specifically rejected the argument that class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'"[10] Perhaps now that the Court has said it twice, other legal actors will begin to get the message.

Endnotes

[1]131 S. Ct. 1740 (2011).

[2]9 U.S.C. § 2.

[3]201 Cal. App. 4th 74 (Cal. Ct. App. 2011).

[4]29 U.S.C. § 157.

[5]357 NLRB No. 184 (2012).

[6]2012 WL 124590 (S.D.N.Y. 2012).

[7]*D.R. Horton* may also be invalidated because the board issued it at a time that one of its members, Craig Becker, was serving pursuant to an intrasession "recess" appointment that was invalid under the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

[8]12 CFR § 1026.36.

[9]Case No. 12-133 (June 20, 2013).

[10]*Id.*, slip op. at 8-9.