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Taking and Defending Depositions
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WRITTEN MATERIALS

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INTRODUCTION

These written materials are intended to supplement the discussion on the video recording that is the main component of this program.

To a significant extent, the following commentaries are excerpted from **The Deposition Handbook**, **5th Edition**, by Dennis R. Suplee, Nicole Reimann and H. Justin Park,© Wolters Kluwer Law and Business, 2013. The American College of Trial Lawyers thanks Wolters Kluwer for its consent to this use of such materials.

A. INTERVIEWING ADVERSE PARTY'S CURRENT OR FORMER EMPLOYEES

This is a very tricky area where the risk of being wrong carries with it the prospect of serious sanctions. It is further complicated if there is doubt as to which State's rules apply – for example, where counsel is in State A, the prospective witness is in State B, and the case is pending in State C. So, one should resolve doubts against interviewing an adversary's current or former employees.

The starting point is Rule 4.2 of the Model Rules of Professional Conduct, which provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

How does this Rule apply to a current or former employee of an adverse party? Before 2002 the commentary to Rule 4.2 read as follows:

> In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).
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> Model Rules of Prof'l Conduct R. 4.2, cmt. at [4] (2000).

In 2002, the comment to the Rule relating to this issue was rewritten, so that it now states:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4, Comment [2].
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> Model Rules of Prof'l Conduct R. 4.2, cmt. at [7] (2011).

1. Interviewing Current Employees

The pre-2002 comment to Rule 4.2 contained three tests to determine whether an employee is a represented party. Under it, the employee is "represented" by the corporate adverse party's counsel: (1) if the employee has "managerial responsibility on behalf of the organization"; (2) if the employee's "act or omission in connection with [the] matter [could be] imputed to the organization"; and (3) if the employee's statement "may constitute an admission on the part of the organization." When the comment was rewritten in 2002, the first ("managerial responsibility") and third ("admissions") tests were eliminated from the text, thereby leaving only the "imputation" test. However, some courts today still apply the pre-2002 concepts in determining whether a lawyer's communication with a current employee is permissible. So a brief discussion of each test follows.

First, the "managerial responsibility" test prohibits interviews with an employee who has managerial responsibility in the corporation, as such a person is deemed to be tantamount to the corporate party itself.[1] It can be difficult to draw a clear line of demarcation between managerial and non-managerial employees. It seems clear that the adverse party's present officers, directors, and managing agents may not be contacted, as the Federal Rules of Civil Procedure expressly recognize these individuals as corporate representatives for purposes of testifying,[2] but contacts with current lower-level employees present different and more difficult questions.

An even narrower version of the managerial responsibility test – still the standard in some jurisdictions – is the "control group" test. It classifies "those employees who manage and speak for the corporation" as the members of the represented party with whom interviews are prohibited.[3] Thus, for example, New Jersey prohibits contact with those employees

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1 *E.g.,* Richards v. Holsum Bakery, Inc., 2009 U.S. Dist. LEXIS 109337, at *5-*10 (D. Ariz. Nov. 5, 2009) (applying managerial responsibility test to employment claim, and finding violation of Rule 4.2 where employee contacted by counsel had "authority to act for or bind [defendant]" with respect to hiring and firing); Carter-Herman v. City of Phila., 897 F. Supp. 899, 903 (E.D. Pa. 1995) (applying managerial-responsibility test to sexual harassment claim brought by female police officers against City of Philadelphia and drawing line by rank).

2 Fed. R. Civ. P. 30(b)(6) and 32(a)(3).

3 The test is described in ABA Committee on Ethics and Professional Responsibility Formal Op. 396 (1995). *But see* Upjohn Co. v. United States, 449 U.S. 383 (1981) (extending attorney–client privilege beyond corporation's control group).

responsible for, or significantly involved with, determining the corporation's legal position in the matter, unless counsel for the corporation consents.[4]

Second, the "imputation" test – the test retained in the 2002 comment to Model Rule 4.2 – bars a lawyer from communicating with those employees of the adverse corporate party whose conduct was relevant to the claims and defenses at issue in the litigation. For example, if a plaintiff has been injured in a collision with an automobile driven by a company's employee acting within the scope of his employment, then the plaintiff's lawyer may not communicate with the employee who drove that vehicle.[5]

Third and finally, the "admissions" test is similar to the "imputation" test in that it prohibits a lawyer from communicating with an employee of the corporate adverse party whose statements could be binding on the adverse party as an admission.[6] In conjunction with Fed. R.

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4 *See* Andrews v. Goodyear Tire & Rubber Co., Inc., 191 F.R.D. 59, 77-79 (D.N.J. 2000) (applying "litigation control group" test and duty of reasonable diligence to determine whether interview target is within group); N.J. Rules of Prof'l Conduct 1.13; *In re* Opinion 668 of Advisory Comm. on Prof'l Ethics, 633 A.2d 959, 964 (N.J. 1993) (per curiam).

5 *See* Bedoya v. Aventura Limousine & Transp. Serv. Inc., 861 F. Supp. 2d 1346, 1360-61 (S.D. Fla. 2012) (discussions by plaintiff's counsel with defendant's independent contractor violated Rule 4.2 because the contractor implemented the policies plaintiff sought to impute to defendant); Lewis v. CSX Transp., Inc., 202 F.R.D. 464 (W.D. Va. 2001) (plaintiff's counsel violated Rule 4.2 by conducting *ex parte* interviews of current employees whose complaints about unsafe conditions could be used to impute notice to defendant); Woodard v. Nabors Offshore Corp., 2001 U.S. Dist. LEXIS 177, at *8 (E.D. La. Jan. 4, 2001) (plaintiff's supervisor at time of accident off limits).

6 *See* Roe v. Karval Sch. Dist. RE23, 2013 U.S. Dist. LEXIS 52952, at *7 (D. Colo. Apr. 12, 2013) (plaintiff's counsel impermissibly communicated with defendant's records custodian because custodian could bind the defendant as to admissions regarding documents maintained in the normal course of business).

Evid. 801(d)(2)(D), the admissions test permits communications with employees who merely witnessed an event at work, but disallows communications with employees involved in the decision-making process.[7]

The new comment to Rule 4.2 continues to reflect the American Bar Association's position that, although communications with current employees of an adverse corporate party are to be carefully restricted, the corporate adverse party may not simply make a blanket assertion that its counsel represents all of its employees.[8] Nevertheless, counsel are well-advised to study the rules in their jurisdictions before contacting any such employees (including those who do not have high-level responsibilities) and to err on the side of caution.

2. Interviewing Former Employees

The new comment to Rule 4.2, as rewritten in 2002, explicitly states that a lawyer may freely communicate with any former employee of a corporate adverse client,[9] provided that the lawyer does "not use methods of obtaining evidence that violate the legal rights of the organization,"[10] and provided that the lawyer does not "inquire into privileged attorney-client

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7 *See* Perry v. City of Pontiac, 254 F.R.D. 309, 316 (E.D. Mich. 2008) (plaintiff's counsel could interview "rank and file" police officers whose interviews were not likely to "generate statements that amount to admissions" by defendant).

8 ABA Formal Op. 396, *supra* note 11.

9 Model Rules of Prof'l Conduct R. 4.2, cmt. at [7] ("Consent of the organization's lawyer is not required for communication with a former constituent.").

10 *Id.*

communications [or] . . . listen while the former [employee] attempts to divulge privileged communications voluntarily."[11]

Nevertheless, there are cases – some decided after 2002 – in which courts have held that the Rule's "imputation" test ***could*** apply to communications between a lawyer and the former employees of an adverse corporate party.[12] (Indeed, even some courts that have permitted such communications have done so not by declaring that such communications are always permissible, but rather by advancing the much more modest proposition that such communications are ***not always prohibited***.[13]) Also be aware that some courts have gone so far as to issue blanket prohibitions on informal communications between a lawyer and an adverse corporate party's former employees, regardless of the former employees' previous positions or

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11 Colo. Bar Ass'n Formal Ethics Op. 69 (June 19, 2010); *see also* Victory Lane Quick Oil Change, Inc. v. Hoss, 2009 U.S. Dist. LEXIS 22579, at *5 (E.D. Mich. Mar. 20, 2009) (Rule 4.2 implicated when former employees' statements would constitute admissions, their acts can be imputed to corporation, or where former employee was privy to confidential attorney-client privileged communications).

12 *See, e.g.,* Serrano v. Cintas Corp., 2009 U.S. Dist. LEXIS 120068 (E.D. Mich. Dec. 23, 2009) (imputed-to-the-organization test applies to former employees); see also Nicholls v. Philips Semiconductor Mfg., 2009 U.S. Dist. LEXIS 64644 (S.D.N.Y. July 27, 2009) (attorney-client privilege may bar interviews with adverse party's former employee if she is currently acting as trial consultant or assisting in defense of litigation). *Compare* United States v. W. R. Grace, 401 F. Supp. 2d 1065 (D. Mont. 2005) (*ex parte* contact with former employees permissible under amended version of ABA Model Rule 4.2 and cmt. 7, as adopted by Local Rule 83.13).

13 *See* Action Air Freight, Inc. v. Pilot Air Freight Corp., 769 F. Supp. 899 (E.D. Pa. 1991), *appeal dismissed without opinion*, 961 F.2d 207 (3d Cir. 1992) (rejecting bright-line test); Niesig v. Team I, 558 N.E.2d 1030 (N.Y. 1990) (reversing blanket prohibition on former employee contacts). *But see In re* Prudential Ins. Co. of Am. Sales Practices Litig., 911 F. Supp. 148, 151 n.2 (D.N.J. 1995) (explaining that New Jersey has modified Rule 4.2 to explicitly restrict *ex parte* contacts with former employees).

power to bind the party, although these cases pre-date the 2002 revisions to the comment to Rule 4.2.[14]

Under most sets of circumstances, the apparent incongruity between the new comment to the Rule and the case law applying the "imputation" test will not matter much. For instance, as a factual matter, former employees are no longer in a position to bind former employers.[15]

Again, because these rules can vary from one jurisdiction to another, it is highly advisable to exercise caution and to check all applicable rules and decisional law of the jurisdiction before proceeding with any attempt to communicate with the former employees of a corporate adverse party.

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[14] *See In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 658 F.2d 1355 (9th Cir. 1981), *cert. denied sub nom*. California v. Standard Oil Co. of Cal., 455 U.S. 990 (1982); Command Transp., Inc. v. Y.S. Line (USA) Corp., 116 F.R.D. 94 (D. Mass. 1987) (applying attorney-client privilege to former employees, thereby banning contact). *Compare* Estate of Schwartz v. H.B.A. Mgmt., Inc., 673 So. 2d 116 (Fla. Dist. Ct. App. 1996) (plaintiff executor of deceased nursing home patient could interview past employees of defendant nursing home), *with* Barfuss v. Diversicare Corp. of Am., 656 So. 2d 486 (Fla. Dist. Ct. App. 1995) (affirming trial court order that absolutely prohibited contact between nursing home resident's lawyer and former employees of home), *overruled by* H.B.A. Mgmt., Inc. v. Estate of Schwartz, 693 So. 2d 541 (Fla. 1997).

[15] *See, e.g.,* Cole v. Appalachian Power Co., 903 F. Supp. 975 (S.D.W. Va. 1995) (former employees are not in position to bind former employer under Fed. R. Evid. 801(d)(2)(D) because admissions were not made during existence of employment relationship).

B. COMPENSATING FACT WITNESSES

The American Bar Association's Standing Committee on Ethics and Professional Responsibility has formally opined that a lawyer, on behalf of a client, may compensate a witness for time spent in preparing for and testifying at a deposition, provided that the payment is not conditioned on the substance of the testimony and is not barred by local law. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-402 (Aug. 2, 1996). That opinion construed Model Rule 3.4, which, in subsection (b), prohibits a lawyer from assisting a witness to testify falsely. The State Bar of California Standing Committee on Professional Responsibility and Conduct has adopted the ABA's position on compensating fact witnesses for time spent preparing for a deposition. Cal. Bar Ass'n Formal Op. 1997-149 (Apr. 21, 1997). Compensation must be reasonable and must not be contingent on the outcome of the case. *Id*. The opinion suggests several bases for determining what constitutes "reasonable" compensation: the witness's normal rate of pay if employed, what the witness last earned if unemployed, or what others earn for comparable activity.

Other states take a more restrictive view of the propriety of compensating witnesses for preparation time. For example, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility construed Pennsylvania Rule 3.4 somewhat differently from the ABA and concluded that the rule "can be read to disfavor compensation to nonexpert witnesses for time invested in preparing for testimony," and to permit reimbursement of expenses and compensation only for time spent testifying. Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Op. 95-126A (Sept. 26, 1995). The opinion notes that, if you nevertheless choose to pay compensation to a fact witness for preparation time, "that witness

must be instructed that, if asked on cross-examination, he is to be candid about the nature and amount of the compensation he had been paid. *Id.*

In New Jersey, a defendant's agreement to compensate a witness for time spent preparing to testify was held improper (and would have been unenforceable by the witness) as a matter of public policy. *Goldstein v. Exxon Research & Eng'g Co.*, 1997 U.S. Dist LEXIS 14600, at *9 (D.N.J. Feb. 28, 1997).

Check applicable ethics rules carefully before venturing into these murky waters.

C. PRIVATE CONFERENCES BETWEEN COUNSEL AND THE DEPONENT DURING THE DEPOSITION

Consider these questions:

A. May the deponent and his counsel confer privately about the deponent's testimony while a question is pending, that is, after the interrogator asks his question but before the deponent answers?

B. May they confer after the deponent answers the pending question even though it is obvious that the interrogator will be pursuing the same line of inquiry in his next several questions?

C. What about after the interrogator has completed that line of inquiry and is about to begin another?

D. During midmorning or mid-afternoon breaks or lunch breaks?

E. During an overnight recess?

F. During a recess that may last weeks until the deponent is next available to resume his deposition?

Perhaps surprisingly, the Federal Rules of Civil Procedure provide no answer to any of these questions, although they have been the subject of sharp dispute for at least two decades.

Until the early 1990's, it is likely most litigators would have answered these questions as follows:

A. No, by a wide margin. One court has used an apt sports analogy to condemn the practice of conferences between deponent and counsel while a question is pending: "It is too late once the ball has been snapped for the coach to send in a different play."[16]

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[16] Eggleston v. Chi. Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 902 (7th Cir. 1981).

B. No, they may not confer after the deponent answers the pending question, by a small margin.

C. No, they may not confer after the interrogator completes the line of inquiry, by an even smaller margin.

D. Yes, they may confer during breaks in the day, with few dissents.

E. Yes, they may confer during an overnight recess, with even fewer dissents.

F. Yes, they may confer during a recess that lasts for weeks, perhaps with no dissents.

The "No" answer to questions A, B and C would have been subject to the qualification that one can never say never in deposition practice.

In 1993, this more-or-less conventional lore was shaken by the opinion of Judge Robert S. Gawthrop, III (now deceased) in *Hall v. Clifton Precision*.[17] Dealing with a case of discovery abuse, Judge Gawthrop entered an order setting forth nine guidelines, three of which, as numbered in the judge's order, were:

5. ***Counsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks or recesses***, except for the purpose of deciding whether to assert a privilege.

6. Any conferences which occur pursuant to, or in violation of, guideline (5) are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what.

7. Any conferences which occur pursuant to, or in violation of, guideline (5) shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record.

(Emphasis added.)

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[17] 150 F.R.D. 525 (E.D. Pa. 1993).

Thus, through guideline 5 Judge Gawthrop ruled that counsel and the witness could not confer privately about the deponent's testimony even during interim or lunch breaks, even during an overnight recess, or even during any longer recess before the next session of the deponent's examination.

Taking note of *Hall*, other judges entered their own orders to restrict conferences between the deponents and counsel during the course of the depositions,[18] and some states amended their rules of civil procedure to address the issue.[19]

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[18] *See* Hrometz v. Local 550 Int'l Ass'n of Bridge, Constr. & Ornamental Iron Workers, 135 F. App'x 787, 792 (6th Cir. 2005); Pastura v. CVS Caremark, 2012 U.S. Dist. LEXIS 72179, at *19 (S.D. Ohio May 23, 2012) (granting request for discovery of attorney-client conversations that occurred during deposition breaks); Chassen v. Fid. Nat'l Title Ins. Co., 2010 U.S. Dist. LEXIS 141852 (D.N.J. July 21, 2010) (granting request for discovery of attorney-client conversations that occurred during recess in deposition of client); Ngai v. Old Navy, 2009 U.S. Dist. LEXIS 67117, at *12-*18 (D.N.J. July 31, 2009) (ordering production of text messages sent by counsel to witness during teleconference deposition, even if those messages were sent during deposition breaks).

[19] TEX. R. CIV. P. 199.5(d) ("Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony."); DEL. CT. C.P. CIV. R. 30(d)(l) (prohibiting consultation between deponent and his counsel on substance of testimony from beginning to end of deposition session, including recesses shorter than five days, except to consult about privilege or compliance with court orders); S.C. R. Civ. P. 30(j)(5) (prohibiting private, off-the-record conferences between counsel and witness during deposition, breaks or recesses about substance of deposition testimony except with respect to asserting privilege, making an objection, or moving for a protective order); E.D.N.Y. & S.D.N.Y. L. CIV. R. 30.6 (attorney for deponent "shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted"); D.C. COLO. L. CIV. R. 30.3(A)(2) (prohibiting interruption of the deponent "for an off-the-record conference between

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1. The Lessening Importance of *Hall*

Although many experienced litigators applauded Judge Gawthrop's ruling that there should be no private conferences between the deponent and his counsel about the deponent's testimony during the course of opposing counsel's interrogation, they also believed that the judge had gone too far in prohibiting such conferences during normal breaks, lunch breaks, and overnight breaks.[20] With all the discussion about discovery abuses and abusive practices at depositions, the criticism had focused, and continues to focus, not on what happens at breaks or overnight, but what happens at the deposition itself.

As time has gone on, courts, commentators and in-the-pit litigators have gradually come to conclude that the disadvantages of the no-attorney-deponent-conferences-even-during-breaks rule far outweigh the advantages. Two articles reflect the waning influence of *Hall*.

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counsel and the witness, except for the purpose of determining whether to assert a privilege," and providing that "[a]ny off-the-record conference during a recess may be a subject for inquiry by the opposing counsel or pro se party, to the extent the conference is not privileged"); N.J. R. 4:14-3(f) ("[o]nce the deponent has been sworn, there shall be no communication between the deponent and counsel during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege, a right to confidentiality or a limitation pursuant to a previously entered court order").

20 *See* Acri v. Golden Triangle Mgmt. Acceptance Co., 1994 Pa. Dist. & Cnty. Dec. LEXIS 150, at *8 (Pa. Ct. C.P. Allegheny Cty. Apr. 22, 1994) (critiquing and rejecting the *Hall* guidelines on six bases); *see also* Pia v. Supernova Media, Inc., 2011 U.S. Dist. LEXIS 140396, at *11-*12 (D. Utah Dec. 6, 2011) (permitting discovery of attorney-client communications during breaks while a question was pending, but denying discovery of communications during other deposition breaks and recesses); Ecker v. Wis. Cent. Ltd., 2008 U.S. Dist. LEXIS 121200 (E.D. Wis. Apr. 16, 2008) (concluding that there was nothing improper in deponents' conferences with counsel during breaks); Robert L. Byman, *I Can't Talk to My Client? Give Me a Break,* Nat'l L.J., Aug. 1, 2011, at 10 (criticizing *Chassen* (see note 19) and stating that "[t]he court in *Ecker* . . . got it right").

The first, a 2005 article based upon an informal survey by a former United States Attorney of leading trial lawyers in the Eastern District of Pennsylvania, Judge Gawthorp's home district, reported these conclusions:

- *Hall* was a proper vehicle to curb some of the insidious practices that were occurring in depositions at that time [1993]. As a result of the decision, there is a generally accepted more civil atmosphere in deposition practice . . . .

- ***An attorney should be permitted to consult with a client at breaks and recesses, and such consultation should not be limited to discussions of privilege.*** There are legitimate reasons to confer.

Peter F. Vaira*, Hall v. Clifton Precision: Alive, Dead or Quietly Slipping Away?*, Legal Intelligencer (Oct. 11, 2005) (emphasis added).

The second article, reflective of a sea change in the influence of *Hall*, is Professor Cary's simultaneously scholarly and practical 2006 article in which she candidly reversed her earlier position favoring the no-consultation-even-during-breaks approach:

> I now find myself in the uncomfortable position of changing my earlier recommendation. I have come to the conclusion that these "no-consultation" orders are dangerous to the attorney-client relationship and should not be entered. . . . The harm these "no-consultation" orders and rules inflict on the attorney-client relationship outweighs the benefit to the fact-finding process derived from preventing the defending attorney and the witness from talking to each other once the deposition begins. These "no-consultation" orders and rules have the dangerous potential of transforming the deposing attorney into a "Rambo," fighting against a deponent whose attorney cannot properly protect him due to a "no-consultation" order or rule.[21]

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[21] Jean M. Cary, *Rambo Depositions Revisited: Controlling Attorney-Client Consultations During Depositions*, 19 GEO. J. LEGAL ETHICS 367, 373 (2006).

Accordingly, Professor Cary recommends that two sentences be added to Rule 30(c)(2). The first is:

> Counsel may not consult with a deponent while the deposing attorney is in the middle of a question,[22] or is following a line of questions that can be completed in a reasonable time ***except when necessary*** to [a] discuss privilege issues, [b] ***correct a false statement, or [c] correct an unintended misimpression left by the witness.***
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> Cary, *supra,* at 402 (brackets and emphasis added).

Professor Cary's second recommended addition to the Rule 30(c)(2) is, "Courts may not restrict attorney-deponent consultations during recesses and overnight breaks in a deposition."[23]

Although neither of these sentences has been added to Rule 30(c)(2), as a matter of fact they reflect actual deposition practice, the most notable exception being those courts that still follow the *Hall* guidelines or some variation of them.

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[22] Note that modern technology provides deponents and their counsel with avenues for conferring in midstream that would not have been imaginable at the time of *Hall*. For example, in one recent case, a witness was deposed by videoconference, with attorneys for both sides participating in the deposition from different remote locations. *See* Ngai v. Old Navy, 2009 U.S. Dist. LEXIS 67117 (D.N.J. July 31, 2009). The witness was visible on the video feed only from the chest up — a situation that one of the witness's attorneys exploited by communicating with her by text message during the deposition. The interrogator discovered these shenanigans and presented them to the court, requesting production of the text messages. Citing *Hall*, among other authorities, a magistrate ordered the production of all text messages exchanged during the deposition.

[23] *Id*.

D. VIDEO DEPOSITIONS

There is plenty of room for creativity in taking video depositions. That is, you should think beyond the "talking heads" format. Even if that is the method prescribed by local rule, you can seek leave of court to do something different if that makes sense. As one court observed more than 25 years ago, "Rule 30(b)(4) [now 30(b)(3)] encourages experimentation." *Rice's Toyota World, Inc. v. Southeast Toyota Distribs., Inc*., 114 F.R.D. 647, 650 (M.D.N.C. 1987).

1. Video Reenactments

In a product liability case, it can be very useful to have the plaintiff at a video deposition participate in a kind of reenactment of the accident, and courts have been willing to order plaintiff to participate in such an exercise so long as doing so poses no risk to plaintiff. In compelling plaintiff's participation in a reenactment, one court observed:

> In the case at bar, the machine which allegedly caused [plaintiff's] injury weighs several thousand pounds and cannot be transported to the courtroom. Both sides agree that the machine is [a] complex piece of machinery, and it appears that the jury – and counsel, for purposes of discovery – would better understand the happening of the accident by viewing the actual object in action. Not only is a picture – a fortiori, a moving picture – worth a thousand words, but often it can convey the nuance of motion and description better than the most precise and articulate witness could ever convey merely by means of the tongue.

Moncrief v. Fecken-Kipfel *Am., Inc.,* 1988 U.S. Dist. LEXIS 6153, at *4-*5 (E.D. Pa. June 23, 1988).

A number of other courts have made similar rulings: Schmidt v. Bryner, 2007 U.S. Dist. LEXIS 60365 (D. Neb. Aug. 15, 2007) (denying defendants' motion for protective

order and permitting plaintiff to subpoena their presence to place of incident for site inspection and accident reenactment); *Gillen v. Nissan Motor Corp*., 156 F.R.D. 120 (E.D. Pa. 1994) (granting defendant manufacturer's motion for video deposition, including demonstration of alleged seatbelt defect); *Kiraly v. Berkel, Inc*., 122 F.R.D. 186 (E.D. Pa. 1988) (requiring plaintiff to participate in reenactment but allowing her to decide whether to touch machine or just use pointer); *Emerson Elec. Co. v. Superior Court*, 946 P.2d 841 (Cal. 1997) (deponent at video deposition could be compelled to diagram location of radial-arm saw and deponent's location at time of accident, and also to reenact accident, on penalty of being barred from introducing any such diagrams or reenactments at trial); *Brown v. Bridges*, 327 So. 2d 874 (Fla. Dist. Ct. App. 1976) (requiring defendant karate instructor to demonstrate instruction that he gave plaintiff as to how to perform a "block and take-down" karate move).

2. Docu-Depositions

As to the use of "docu-depositions," where the testimony of a particular witness is presented partly through narrative as to what the witness said at his deposition and partly through the Q-and-A itself, here's a description by counsel for plaintiff of what happened in the trial of *ETSI Pipeline Project v.* Burlington *Northern, Inc*. before Judge Robert M. Parker:

> [T]he manner and extent of [video depositions'] use in this case seem unprecedented. The Court gave the parties wide latitude in editing and rearranging deposition testimony, allowing interspersal of narrated lawyer summaries with excerpts of testimony. The result was a presentation that closely resembled a television documentary or news report.

C. Michael Buxton & Michael Glover, *Managing a Big Case Down to Size*, 15 Litigation 22, 22-23 (Summer 1989).

There is good authority for allowing counsel to rearrange a particular deponent's testimony so that, for example, all of the deponent's testimony about a particular meeting is grouped together:

> Video deposition editing techniques are equally important in gaining maximum impact from a witness' testimony. Typically, a particular subject matter will be interspersed throughout the course of a witness' testimony. Editing by subject matter allows a witness' testimony to be represented in a more cohesive manner. It makes no sense to impose on counsel the restraints associated with the chronology of the manner in which the testimony was originally elicited. With few exceptions, form should yield to substance.
>
> Robert M. Parker, Streamlining *Complex Cases*, 10 Rev. of Litig. 547, 552 (1991).

As to splicing clips from several witnesses on the same subject, Standard 24 of the American Bar Association's Civil Trial Practice Standards (2007), concerning video-recorded testimony, provides:

a. Edited by Subject Matter

i. If it will assist the jury to understand the evidence or to determine a fact in issue, the court should permit the parties to edit and present videotaped testimony by subject matter.

ii. The testimony of a single witness, or of multiple witnesses, relating to designated subject matter may be combined into a single presentation.

3. Opening Statements

As to using video depositions during opening statements, there are few reported cases. *Compare* Smith v. I-Flow Corp.. 2011 U.S. Dist. LEXIS 63229, at *11-*12 (N.D. Ill. June 15, 2011) (permitting parties to use video deposition during opening statements), *and MBI Acquisition Partners, L.P. v. Chronicle Publ'g Co*., 2002 U.S. Dist. LEXIS 28458, at *3 (W.D. Wis.. Oct. 3, 2002) (allowing defendants to use video deposition excerpts during opening statement provided that counsel advised their adversaries promptly of the particular excerpts they intended to show), *with Hynix Semiconductor Inc. v. Rambus Inc*., 2008 U.S. Dist. LEXIS 51006, at *11-*12 (N.D. Cal. Jan. 21, 2008) (denying leave to use video deposition excerpts during opening because "[v]ideotaped testimony may seem more believable or important to the lay jury," and because "[r]epeatedly showing the same few deposition segments [i.e., both in the opening and during the trial itself] seems to exalt the relevance of those videotaped shreds of evidence over live testimony"), *and Beem v. Providence Health & Servs.*, 2012 U.S. Dist. LEXIS 56077 (E.D. Wash. Apr. 19, 2012) (relying on *Hynix Semiconductor* and denying plaintiff's motion to use video deposition during opening).

4. Closing Speeches

Using video deposition excerpts during closing speeches is much more an accepted practice. *See Parker, supra*, at 556; Buxton & *Glover, supra*, at 22-23; *Alexander R. Sussman & Edna R. Sussman, Electronic Depositions*, 15 Litigation 26, 27 (Summer 1989).

E. PREPARING THE DEPONENT TO TESTIFY

There is nothing wrong with preparing a witness to testify. One bar association opinion has put it this way: "[I]ndeed, a lawyer who did not prepare his or her witness for testimony, having had an opportunity to do so, would not be doing his or her professional job properly." District of Columbia Bar, Legal Ethics Comm., Op. No. 79 (Dec. 18, 1979) (hereinafter "D.C. Bar Opinion"), at 139.

Three Model Rules of Professional Conduct prohibit a lawyer from presenting false testimony, but each supposes that the lawyer has knowledge that the witness's testimony will not be the truth. Rule 1.2(d) provides: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ." Rule 3.3(a)(3) provides: "A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.4(b) provides: "A lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. . ."

The harder situation is where the lawyer senses, but is not sure, that the witness may be going beyond the truth to make his account better and stronger. Usually it turns out that the testimony when given is just the opposite: worse and weaker. It is worse because it is contrary to the oath or affirmation of the witness. It is weaker because such overstatements are almost always exposed as such and so even the truthful part of the witness's testimony ends up being discounted by the fact finder. And the ethical constraint is clear: a lawyer cannot

participate in preparing a witness to give testimony that the lawyer "knows, or ***ought to know***, is false or misleading." D.C. Bar Opinion, supra (emphasis added).

On the other hand, there is nothing wrong with the lawyer working with the witness to make truthful testimony stronger. Thus, the D.C. Bar Opinion, takes the position that, so long as the lawyer is not violating the proscription against preparing the witness to give testimony that the lawyer knows or ought to know is false or misleading, "a lawyer may properly suggest language ***as well as the substance*** of testimony, and may – indeed, should – do whatever is feasible to prepare his or her witness for examination." (Emphasis added). The Opinion stressed that this practice is ethical only to the extent that the suggested testimony is truthful and the witness "is willing and (as respects his or her state of knowledge) able honestly to testify." *Id.*

But counsel should be aware that other commentators have argued in favor of a more limited role for the lawyer preparing the witness to testify. After saying that preparing a witness to testify is permissible, while coaching him to testify is not, one commentator declared, "Coaching is improperly adding content to the witness's testimony, attempting to make it more useful to one's side." David M. Malone, *Talking Green, Showing Red – Why Most Deposition Preparation Fails, And What to Do About It*, 24 Litigation 27 (Summer 1998).

> Similarly, another author has opined:
>
> Lawyers have an obligation to be advocates for their clients, but . . . this duty does not apply with full force to discovery. … With limited exceptions, advocacy comes into play only after the facts are fully disclosed.

W. Bradley Wendel, Rediscovering *Discovery Ethics*, 79 Marq. L. Rev. 895 (Summer 1996).

Most seasoned – and ethical – trial lawyers would say that the D.C. Bar Opinion got it right, and that advocacy begins even before the complaint is filed and continues throughout the process.

F. 30(b)(6) DEPOSITIONS

Under Federal Rule of Civil Procedure 30(b)(6), the deposition notice or subpoena may name as the deponent a corporation, partnership, association, governmental agency or other entity and should describe with reasonable particularity the matters on which examination is sought. The organization named must then designate one or more officers, directors, managing agents, or other persons who consent to testify for the organization and set out the matters on which each person designated will testify.[24] The federal subpoena form requires a nonparty organization to designate those persons who will testify on its behalf and further provides that the organization may set forth the matters on which each will testify.

If the organization is an adverse party, it may be tempted not to identify a very knowledgeable or helpful witness to appear at the deposition in response to the Rule 30(b)(6) notice. That strategy, which defies the intent of the rule and is contrary to the American Bar Association Civil Discovery Standards,[25] will fail in the long run and may result in sanctions.[26]

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24 Fed. R. Civ. P. 30(b)(6).

25 Civil Discovery Standards, 19 (2004 A.B.A. Sec. Lit. 18), cited in Hermosilla v. Coca-Cola Co., 2010 U.S. Dist. LEXIS 139020 (S.D. Fla. Dec. 27, 2010).

26 Robinson v. Quicken Loans, Inc., 2013 U.S. Dist. LEXIS 59127, at *8 (S.D.W. Va. Apr. 25, 2013) ("Producing an unprepared Rule 30(b)(6) witness is tantamount to a failure to appear under Federal Rule of Civil Procedure 37(d)(1)(A)(i)."); Spicer v. Universal Forest Prods., 2008 U.S. Dist. LEXIS 77232, at *12 (W.D. Va. Oct. 1, 2008) (when corporation designates Rule 30(b)(6) representative who is not knowledgeable, sanctions under Rule 37 are appropriate because such an "appearance is, for all practical purposes, no appearance at all."); *see also* Resolution Trust Corp. v. S. Union Co., 985 F.2d 196 (5th Cir. 1993) (when corporation selects Rule 30(b)(6) representative who is not knowledgeable, corporation treated as failing to appear under Rule 37 for purposes of sanctions).

Courts have not hesitated to compel corporations to re-designate witnesses when those initially designated to testify had insufficient knowledge.[27] Such orders may be accompanied by sanctions, including directions to pay opposing counsel's fees and costs and reserving judgment on a motion to dismiss if appropriate designees are not promptly provided.[28] However, the

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[27] *See* QBC Ins. Corp. v. Jorda Enters., Inc., 277 F.R.D. 676, 690 n.6 (S.D. Fla. 2012) (observing that "[r]equiring the responsive party to provide another 30(b)(6) deposition witness who is prepared and educated is a frequently-invoked sanction"); Wachovia Sec., LLC v Nola, LLC, 248 F.R.D. 544, 547-558 (N.D. Ill. 2008); Kanaji v. Phila. Child Guidance Ctr. of Children's Hosp., 2001 U.S. Dist. LEXIS 8670, at *8 (E.D. Pa. June 20, 2001); Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 639 (D. Minn. 2000). But some corporate designees cannot provide all of the information sought, and courts do not always require the designation of other corporate representatives. ***E.g.,*** Barron v. Caterpillar, Inc., 168 F.R.D. 175 (E.D. Pa. 1996) (court rejected plaintiff's motion to compel defendant to produce additional corporate designee, because initial corporate designee was logical person to have most information, some gaps existed due to lapse of time, and defendant did not act willfully or in bad faith to obstruct discovery). Defendant in *Barron* was directed instead to produce additional documents and to respond to additional interrogatories if plaintiff served further discovery. ***But see*** Tequila Centinela, S.A. de C.V. v. Bacardi & Co., 242 F.R.D. 1, 5 (D.D.C. 2007) (court ordered company to designate as many representatives as necessary to relevant areas of inquiry where defendant argued it would not have knowledge as to certain areas).

[28] *See* Cedar Hill Hardware & Constr. Supply, Inc. v. Ins. Corp. of Hannover, 563 F.3d 329, 344-345 (8th Cir. 2009) (noting that exclusion of testimony is appropriate sanction for a corporation that fails to designate 30(b)(6) witness); QBC Ins. Corp. v. Jorda Enters., Inc., 277 F.R.D. 676, 690 (S.D. Fla. 2012) ("The rules provide for a variety of sanctions for a party's failure to comply with its Rule 30(b)(6) obligations, ranging from the imposition of costs to preclusion of testimony and even entry of default."); S. Cal. Stroke Rehab. Assocs. v. Nautilus, 2010 U.S. Dist. LEXIS 76508 (S.D. Cal. July 29, 2010) (ordering defendant to pay costs incurred in preparing sanctions motion and fees associated with taking deposition of Rule 30(b)(6) witness who was not properly prepared and did not have requisite knowledge); Cont'l Cas. Co. v. First Fin. Emp. Leasing, Inc., 716 F. Supp. 2d 1176 (M.D. Fla. 2010) (same remedy); Poole v. Textron, Inc., 192 F.R.D. 494, 505 (D. Md. 2000) (awarding 75% of attorneys' fees and costs of motion against lawyers); Starlight Int'l, Inc. v. Herlihy, 186 F.R.D. 626, 649-650 (D. Kan. 1999) (imposing "substantial monetary sanction" to be quantified after plaintiff filed affidavit of time and expenses incurred as a result of defendants' misconduct and warning that further violations could result in default judgment).

opposing party cannot compel an organization to designate a particular person as its rule 30(b)(6) witness.[29]

It is now well settled that if no current or former employee of the organization has the personal knowledge to testify on the matters described in the Rule 30(b)(6) notice, the organization has a duty to prepare a witness by seeing that he learns the requisite information "reasonably available" to the organization to testify on its behalf.[30] Unlike other witnesses, the

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[29] Roger S. Haydock & David F. Herr, Discovery Practice § 3.1.5, at 3:9 (3d ed., 1996, as supplemented 2003 and 2004). *See* Wachovia Secs., LLC v. Nola, LLC, 2007 U.S. Dist. LEXIS 14304, *6-*7 (N.D. Ill. Feb. 27, 2007); Operative Plasterers' & Cement & Masons' Int'l Ass'n v. Benjamin, 144 F.R.D. 87 (N.D. Ind. 1992).

[30] *See, e.g.*, Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 433 (5th Cir. 2006) ('"[T]he 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."); (Stokes v. Interline Brands Inc., 2013 U.S. Dist. LEXIS 113489, at *5 (N.D. Cal. Aug. 9, 2013) ("A corporate designee need not have personal knowledge of the topics at issue but must be sufficiently prepared on the topics such to be able to provide knowledgeable and binding testimony."); United States v. Health Dimensions Rehab., Inc., 2013 U.S. Dist. LEXIS 114479, at *3-*4 (E.D. Mo. Aug. 14, 2013) ("Once noticed of a Rule 30(b)(6) deposition, a designating entity has the duty to produce a knowledgeable witness; to prepare the witness to testify on matters not only known by the deponent, but those that should be reasonably known by the designating entity; and to substitute an appropriate deponent when it becomes apparent that the previous deponent is unable to respond to certain relevant areas of inquiry."); Tatlow v. Columbia/Boone Cnty. Cmty. P'ship, 2010 U.S. Dist. LEXIS 129688 (W.D. Mo. Dec. 8, 2010) (same); Martin Cnty. Coal Corp. v. Universal Underwriters Ins. Servs., 2010 U.S. Dist. LEXIS 118722 (E.D. Ky. Nov. 8, 2010) (noting corporation was obligated to make designated official knowledgeable on matters identified in Rule 30(b)(6) notice, and that corporation did not satisfy its obligation where it did not prepare Rule 30(b)(6) designee and did not show that information was not reasonably available); S. Cal. Stroke Rehab. Assocs. v. Nautilus, 2010 U.S. Dist. LEXIS 76508 (S.D. Cal. July 29, 2010) ("The corporate party then has an affirmative duty to educate and prepare the designated representative for the deposition."); Canal Barge Co. v. Commonwealth Edison Co., 2001 U.S. Dist. LEXIS 10097, at *8 (N.D. Ill. July 19, 2001) (duty to designate "even if the employee has no personal knowledge and has to be educated"); Kanaji v. Phila. Child Guidance Ctr. of Children's Hosp., 2001 U.S. Dist. LEXIS 8670, at *5 (E.D. Pa. June 20, 2001) ("the Rule

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30(b)(6) designee testifies concerning the knowledge of the organization, not his own personal knowledge.[31] Where a designee has some knowledge but has not been adequately prepared for the deposition, courts have held that the organization and its counsel have not fulfilled their duty to produce an appropriate designee under Rule 30(b)(6).[32]

Preparing a designee requires an organization to conduct an investigation regarding each matter described in the 30(b)(6) notice to determine the organization's knowledge. This might include compiling and reviewing sensitive corporate documents and examining documents from other litigation involving the organization. Often the investigation is conducted by in-house or outside counsel. Counsel might interview present or former employees to piece together information.

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requires a corporation when necessary to prepare a witness with pertinent information reasonably available to it"); Hayes v. Mazda Motor Corp., 2000 U.S. Dist. LEXIS 20002, at *13-14 (D. Md. Aug. 4, 2000); Poole v. Textron, Inc., 192 F.R.D. 494, 504 (D. Md. 2000); Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 638 (D. Minn. 2000).

[31] *See* Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 432-433 (5th Cir. 2006) ("Rule 30(b)(6) is designed 'to avoid the possibility that several officers and managing agents might be deposed in turn, with each disclaiming personal knowledge of facts that are clearly known to persons within the organization and thus to the organization itself'. . . . '[T]he 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.'"); *see also* Union Pump Co. v. Centrifugal Tech., Inc., 2010 U.S. App. LEXIS 25761, *20-*22 (5th Cir. Dec. 16, 2010); United States v. Taylor, 166 F.R.D. 356, 360 (M.D.N.C. 1996), *aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996).

[32] *See* ZCT Sys. Group, Inc. v. FlightSafety Int'l, 2010 U.S. Dist. LEXIS 38375, *10 (N.D. Okla. Apr. 19, 2010) ("By failing to choose an appropriate witness or by failing to prepare its witness, [a corporation] has violated its obligations under the Federal Rules."); Calzaturficio S.C.A.R.P.A. S.p.A. v. Fabiano Shoe Co., Inc., 201 F.R.D. 33, 36-39 & n.5 (D. Mass. 2001) (ordering that corporate designees be redeposed where, *inter alia,* one designee at initial deposition replied, "Ask the company, I'll go get you a business card and you can talk to that.").

Having designated a deponent on a particular issue, the organization is then "bound" by that witness's testimony.[33] But in what sense is the testimony binding on the organization? The organization has in effect represented that the witness is authorized to speak for it on the issue, unlike a lower-level employee who is directly subpoenaed for a deposition.[34] Moreover, the deposition of a person designated under Rule 30(b)(6) can be used "for any purpose" at trial, whether or not that person is available to testify, pursuant to Rule 32(a)(2).

Some courts have stressed, however, that the organization is bound by its designee's testimony only in the way that any other witness is bound, distinguishing between binding testimony, which can be refuted by other evidence at trial, and judicial admissions, which cannot be.[35] Other courts and some commentators have taken the position that a Rule

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[33] *E.g.*, Hardin v. Wal-Mart Stores, Inc., 2011 U.S. Dist. LEXIS 138892, at *5 (E.D. Cal. Dec. 2, 2011) ("A Rule 30(b)(6) deposition notice serves a unique function: it is the sworn corporate admission that is binding on the corporation."); Beazer East, Inc. v. Mead Corp., 2010 U.S. Dist. LEXIS 129202, at *9 (W.D. Pa. Dec. 6, 2010) ("In producing representatives for a Rule 30(b)(6) deposition, a corporation must prepare them to give complete, knowledgeable and binding answers.") (quoting Nev. Power Co. v. Monsanto Co., 891 F. Supp. 1406, 1418 (D. Nev. 1995) (internal citation and quotation marks omitted).

[34] Gen. Elec. Co. v. Wilkins, 2012 U.S. Dist. LEXIS 87094, at *28 (E.D. Cal. June 22, 2012) ("A proper corporate designee-deponent is one with the authority to bind the corporation. Thus a corporation cannot be required to designate a Rule 30(b)(6) designee who lacks authority to speak on behalf of the corporation."); Lapenna v. Upjohn Co., 110 F.R.D. 15, 20 (E.D. Pa. 1986) (ruling that corporate employee designated under Rule 30(b)(6) may be compelled to testify about corporation's subjective opinions and beliefs, whereas employee not so designated was not compelled to testify on such subjects).

[35] Little Hocking Water Ass'n v. E.I. DuPont de Nemours & Co., 2013 U.S. Dist. LEXIS 60012, at *31 (S.D. Ohio Apr. 26, 2013) ("Although it is true that a corporation may be bound by the testimony of its Rule 30(b)(6) designee, that testimony is not tantamount to a judicial admission and does not unequivocally bind the corporation to the exclusion of other evidence that may explain or explore that testimony."); Seabron v. Am. Family

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30(b)(6) witness makes conclusive judicial admissions on behalf of the organization because the deposition is the statement of a party in a "representative capacity" or "by a person authorized by the party to make a statement concerning the subject."[36] At the very least, an organization's trial witness who attempts to contradict the testimony of a designee can be impeached with the organization's prior inconsistent statement.[37]

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Mut. Ins. Co., 2013 U.S. Dist. LEXIS 75979, at *5 (D. Colo. May 30, 2013) ("Rule 30(b)(6) depositions produce evidence, not judicial admissions."); Radian Asset Assurance, Inc. v. Coll. of the Christian Bros. of N.M., 2010 U.S. Dist. LEXIS 127390, *8 (D.N.M. Nov. 15, 2010) ("[T]he testimony of a Rule 30(b)(6) representative, although admissible against the party that designates the representative, is not a judicial admission absolutely binding on that party."); Cont'l Cas. Co. v. First Fin. Emp. Leasing, Inc., 716 F. Supp. 2d 1176, 1190 (M.D. Fla. June 3, 2010) ("Although Rule 30(b)(6) testimony is that of the corporation, it does not constitute a judicial admission and the corporation 'is no more bound than any witness is by his or her prior deposition testimony.'"); Canal Barge Co. v. Commonwealth Edison Co., 2001 U.S. Dist. LEXIS 10097 (N.D. Ill. July 19, 2001) ("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. . . .").

36 Fed. R. Evid. 801(d)(2)(A) and (C). *See also* River Oaks Furniture, Inc. v. BDO Seidman (In re River Oaks Furniture, Inc.), 276 B.R. 507, 525 (N.D. Miss. Bankr. 2001); Haydock & Herr, *supra* note 30, at 3:9 (testimony of (Rule 30(b)(6) witness "conclusively binds the corporation").

37 *See* Seabron v. Am. Family Mut. Ins. Co., 2013 U.S. Dist. LEXIS 75979, at *5-*6 (D. Colo. May 30, 2013) (observing that although Rule 30(b)(6) testimony is not a judicial admission, it "can be contradicted and used for impeachment purposes"); Whitesell Corp. v. Whirlpool Corp., 2009 U.S. Dist. LEXIS 101106 (W.D. Mich. Oct. 30, 2009).