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M. Minnette Massey

University of Miami School of Law

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Depositions of Corporations: Problems and Solutions—Fed. R. Civ. P. 30(b)(6)

M. Minnette Massey*

Rule 30(b)(6) of the Federal Rules of Civil Procedure¹ provides that proper notice for the taking of a deposition of an organization need only designate the *matters* on which discovery is sought, and not the *individual(s)* within the organization to be deposed. The organization² then names one or more of its officers, directors, or managing agents to appear and to testify on its behalf with respect to matters known or reasonably available to the organization. The organization may also designate persons other than officers, directors, or managing agents, but only with the designee's consent.

This Rule, added in 1970, is intended to reduce the difficulties encountered in identifying "managing agents."³ It also attempts to aid the deposing party by deterring the deponent from disclaiming knowledge of facts known by the organization or by persons therein. At the same time, the Rule attempts to protect the organization from having large numbers of

* Professor of Law, University of Miami, B.B.A., 1948, J.D. 1951, M.A. 1952, University of Miami, LL.M. 1956, New York University.

1. FED. R. CIV. P. 30(b)(6) states the following:

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

2. Since the great majority of cases involving organizations within the context of the Rule concern corporations, the corporate entity will be the focus of this discussion. Although the case law and the Rule itself recognize that 30(b)(6) is applicable to all types of organizations, including government agencies, the corporate emphasis of this article is used solely for simplicity.

3. FED. R. CIV. P. 30 (b)(6); Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery: Advisory Committee's Note, 48 F.R.D. 487, 514-15 (1970) [hereinafter cited as Advisory Committee's Note].

officers and agents deposed by a party uncertain of who in the organization has knowledge of the information being sought.⁴ The Rule outlined a procedure designed to "supplement . . . the [previously] existing practice whereby the examining party designate[d] the corporate official to be deposed."⁵

The purpose of this article is to provide (1) a brief history of the background which led to adoption of Rule 30(b)(6); (2) an analysis of the use, effect, and interpretation of the Rule; (3) a review of problems faced by those using the Rule; (4) a proposed amendment to Rule 30(b)(6) conforming it with Rule 801(d)(2)(d) of the Federal Rules of Evidence; and (5) an analysis of Rule 30(b)(6) today.

I. A BRIEF HISTORY

Although a corporation or other entity may be a legal "person" within the American system of jurisprudence, it has no voice of its own and must speak through one or more of its agents. Under Rule 30(b)(6), the organization, upon receiving notice of deposition from the examining party, must designate one or more of its officers, directors, managing agents, or other persons for this purpose. Consequently, the primary problems that have arisen under the Rule concern the identities of those who must be produced for deposition and the extent to which the organization is responsible to produce such persons.

Prior to the 1970 amendments to the Federal Rules of Civil Procedure, Rule 26(a) governed the taking of corporate depositions.⁶ Under this Rule, the examining party had to determine which person or persons were qualified to speak for the corporation regarding the matters upon which one sought discovery. Rule 26(d) then governed the use of depositions of a corporation's officers, directors, or managing agents, allowing their use for

4. *Id.*

5. *Id.* at 515.

6. FED. R. CIV. P. 26(a) (1966) (superseded) stated the following:

When Depositions May be Taken. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules, except that in admiralty and maritime claims within the meaning of Rule 9(h) depositions may also be taken under and used in accordance with sections 863, 864, and 865 of the Revised Statutes (see note preceding 28 U.S.C. 1781). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

“any purpose” permissible under the rules of evidence.⁷ Rule 37(b) greatly reduced the effectiveness of Rule 26, however, providing for sanctions against a corporation only if one of its *officers* or *managing agents* failed to make discovery.⁸ Thus, although Rule 26(d) allowed the use of a deposition of a director as evidence against the corporation at trial, Rule 37 did not penalize the corporation when a director failed to attend a deposition or refused to obey a discovery order. Taken together, the rules had the effect of giving a party the right to examine a corporation through its directors while denying any effective means of enforcing this right.

The interaction of Rules 26(a), 26(d), and 37 spawned the “managing agent” concept in the federal courts. The courts concluded that a corporation could not be compelled to produce one of its directors for examination unless the director had been so active or knowledgeable in the conduct of corporate affairs as to qualify as a managing agent.⁹

Judicial construction of the managing agent concept in cases dealing with directors was, however, fairly straightforward. The paramount problem arose under former federal practice when the managing agent concept was applied to the vast numbers of other individuals who were associated with the corporate entity. In an attempt to remedy that problem, the

7. FED. R. CIV. P. 26(d) (1966) (superseded) stated in part:

Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose

8. FED. R. CIV. P. 37(b) (1966) (superseded) stated in part:

Failure to Comply with Order.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just

9. See, e.g., *Proseus v. Anchor Line, Ltd.*, 26 F.R.D. 165 (S.D.N.Y. 1960); *Rubin v. General Tire & Rubber Co.*, 18 F.R.D. 51 (S.D.N.Y. 1955).

federal courts formulated three major tests to determine which persons qualified as managing agents.

The first test classified a corporate employee as a managing agent if he was vested with broad general powers to exercise judgment and discretion in the conduct of corporate affairs.¹⁰ This standard posed problems because it required the corporation to produce only its upper-echelon executives or decision-makers. Such a development often undermined the purpose of discovery because such persons frequently had little or no knowledge of the information sought to be discovered.

The second test classified a corporate employee as a managing agent if the employee, because of his status as an executive or advisor, would be expected to obey an instruction from the corporation to comply with a discovery order.¹¹ This standard was also inadequate. It provided no meaningful way to distinguish managing agents from any other employees, because virtually all employees might be expected to follow the employer's directives in order to ensure their continued employment.

The third test classified a corporate employee as a managing agent if the employee tended to identify himself with the interests of the corporate employer rather than with the interests of the adverse party seeking his deposition.¹² Again, this standard lacked a meaningful way to distinguish managing agents from other employees, because most employees will presumably identify their interests with those of their employer rather than with those of a third party.

The pre-1970 procedure was further complicated by Rule 30(a) of the Federal Rules of Civil Procedure which required that notice of the taking of a corporate deposition include the name and address of the person to be deposed or a general description of the person to be deposed.¹³ This requirement created problems because the examining party often did not know the identity of those employees having knowledge of the relevant facts which he sought to discover. The examining party was, therefore,

10. See, e.g., *Shenker v. United States*, 25 F.R.D. 96, 98-99 (E.D.N.Y. 1960); *Rubin v. General Tire & Rubber Co.*, 18 F.R.D. 51, 56 (S.D.N.Y. 1955).

11. See, e.g., *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 15 F.R.D. 37, 39 (S.D.N.Y. 1953) (dictum).

12. See, e.g., *Independent Prods. Corp. v. Loew's, Inc.* 24 F.R.D. 19, 25-26 (S.D.N.Y. 1959); *Krauss v. Erie R.R. Co.*, 16 F.R.D. 126, 127 (S.D.N.Y. 1955).

13. FED. R. CIV. P. 30(a) (1966) (superseded) stated in part:

Time and Place. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs

unable to identify such persons specifically or by their corporate positions or job titles. Thus, the examining party was not able to provide an identification or description sufficient to meet the notice requirements of Rule 30(a). If the corporation challenged the notice, then the Rule would have precluded the examining party from taking the corporate deposition.

As a result of this operation of former Rule 30(a), the examining party frequently had to resort to other discovery devices in order to obtain enough information to accurately identify knowledgeable corporate officials. Normally, the examining party used subpoenas to compel the deposition of corporate agents as witnesses, or he would send interrogatories to the corporation in order to learn the names of other agents.¹⁴ Only after these additional discovery techniques had been used could the deposition originally desired be noticed and taken. Thus, the pre-1970 procedure forced the examining party to complete in two or more steps what could have been accomplished in one.

Some courts' interpretation of the managing agent concept also forced the examining party to use multiple discovery techniques. These courts held that once a corporation raised the issue of improper designation in the examining party's notice, the burden shifted to the examining party to prove that the employee was a managing agent.¹⁵ In order to meet this burden, the courts forced the examining party to acquire additional information from the corporation prior to noticing a corporate official for deposition. Again, such efforts usually took the form of witness depositions or interrogatories to known corporate officials.

Mistakes were costly. If the party chose to examine only those employees with higher status in the corporation, he then took the risk that such persons had little or no relevant information to disclose. If he chose to examine other employees having relevant information, he took the risk of costly additional discovery if the corporation objected by claiming that such persons were not managing agents. The ambiguities in the pre-1970 procedure presented the discovering party and the corporation with unnecessary burdens. Both welcomed the 1970 rule change.

II. AN ANALYSIS OF RULE 30(b)(6)

To remedy the problems concerning the discovery of information from corporations and other organizations, Rule 30(b)(6) was added to the Federal Rules of Civil Procedure in 1970.¹⁶ As the Advisory Committee

14. See, e.g., *Mattingly v. Boston Woven Hose & Rubber Co., Inc.*, 12 F.R.D. 266, 267 (S.D.N.Y. 1952).

15. See, e.g., *Proseus v. Anchor Line, Ltd.*, 26 F.R.D. 165, 167-68 (S.D.N.Y. 1960).

16. For the text of Rule 30(b)(6), see *supra* note 1.

Note states: "The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process."¹⁷ Specifically, the Committee designed the Rule to:

- 1) Reduce the difficulty of the examining party in determining who is a managing agent prior to deposition;
- 2) Lift the burden from the examining party of designating exactly which corporate officials to depose;
- 3) Prevent the "bandying" by which corporate officials disclaim knowledge of facts clearly known within the corporate structure; and
- 4) Assist corporations which find that a large number of their officials are being deposed by a party uncertain of which person has particular knowledge.¹⁸

Pursuant to Rule 30, any party to an action may depose, by way of oral deposition, any party or non party witness to the action.¹⁹ Furthermore, when a corporation is served pursuant to Rule 30(b)(6), a subpoena is no longer required to procure the appearance of the designated person.²⁰ The corporation must designate a proper person to testify and that person must appear, or else the court can use Rule 37 to impose sanctions for the corporation's failure to provide discovery under Rule 30(b)(6).²¹

There are some circumstances, however, in which the examining party will still need to obtain a subpoena. A subpoena ad testificandum is required to depose non-parties in order to advise them of their duty to designate a person to testify pursuant to the Rule.²² Additionally, Rule 45 mandates the use of a subpoena duces tecum whenever the production of documents is required.²³ Rule 45 and not Rule 30(b)(6) answers the questions of whether the corporation must produce documents from locations outside the court's judicial district and whether the person designated to testify must travel from a location outside the court's judicial district for purposes of examination.²⁴ As one court noted: "In short, Rule 30(b)(6)

17. Advisory Committee's Note, *supra* note 3, at 515.

18. *Id.*

19. 86 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2102, at 367 (1970).

20. *See id.* § 2103, at 371.

21. FED. R. CIV. P. 37(b)(2) states in part:

Sanctions by Court in Which Action is Pending. If a party, officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey

22. FED. R. CIV. P. 30(b)(6). For text of the Rule, *see supra* note 1.

23. *See, e.g., Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115, 118 & n.3 (E.D. Mich. 1977); *see also* C. WRIGHT & A. MILLER, *supra* note 19, § 2108 at 392.

24. *See, e.g., Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623-24 (5th Cir. 1973); *Ghandi v.*

provides a procedure to use in determining the proper person to depose. It does not deal with the issue of where the deposition is to be taken or where the documents are to be produced."²⁵

The courts disagree, however, as to the *reach* of a subpoena duces tecum served under Rule 30(b)(6) in conjunction with Rule 45. In *Cates v. LTV Aerospace Corporation*,²⁶ the Fifth Circuit held that Rule 30(b)(6) cannot be used to require the production of documents in a judicial district, where such documents are in the custody or control of an organization located outside of that judicial district. The court stated that "a person designated by an organization pursuant to Rule 30(b)(6) could not be required to travel outside the limits imposed by Rule 45(d)(2)."²⁷

The district court in *Ghandi v. Police Department of Detroit* is in direct conflict.²⁸ In that case, the *Cates* decision was specifically addressed and found to be unpersuasive in view of the language of Rule 45. The court opined:

Alternatively, this Rule provides that the Court may order a deposition to be taken at a place convenient to both the witness being deposed and the party seeking this pre-trial discovery. [citation omitted]. A non-resident of the district may be ordered to appear at a place within the district and produce documents requested in conjunction with the deposition if, in the opinion of the Court, a location within the district would be a convenient place to take the deposition.

. . . .

As [another court previously] noted:

A foreign corporation doing business in a district is subject to all process, including subpoena, in the district, and if the documents are required in response to a subpoena, the court has the power to order their production even though they are physically located outside the jurisdiction.

[citation omitted]. Absent extraordinary circumstances . . . this doctrine should extend to all Rule 30(b)(6) organizations²⁹

Under the language of Rule 30(b)(6), the party seeking discovery may "describe with reasonable particularity the matters on which examination is requested."³⁰ The rule regarding subject matter designation is very

Police Dep't of Detroit, 74 F.R.D. 115, 120-22 (E.D. Mich. 1977).

25. *Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623 (5th Cir. 1973).

26. 480 F.2d 620 (5th Cir. 1973).

27. *Id.* at 623.

28. 74 F.R.D. 115 (E.D. Mich. 1977).

29. *Id.* at 120-21 (citing *Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc.*, 45 F.R.D. 515-16 (S.D.N.Y. 1968)).

30. FED. R. CIV. P. 30(b)(6). For text of the Rule, see *supra* note 1.

broad and as long as the subject matter can be described with "reasonable particularity," any request would appear to be proper. On balance, however, is the limiting language of the rule requiring that "the persons so designated [by the organization] shall testify as to matters known or reasonably available to the organization."³¹

Thus, the proper designation of subject matter should include those items the examining party believes, or has reason to believe, the organization has knowledge of or are reasonably available. The words "reasonably available"³² imply that the burden of obtaining the available information cannot be unreasonable within the normal meaning of the words and the circumstances of the case. The corporation is protected from overbroad discovery as long as it lives up to the spirit of the word "reasonable."

III. A REVIEW OF PROBLEMS UNDER RULE 30(b)(6) AND COURT-IMPOSED SOLUTIONS

Although Rule 30(b)(6) strikes a more even balance between the duties imposed on the party seeking discovery and the organization from which information is sought, problems nonetheless remain.

Proper designation of subject matter in the notice of deposition is both essential and difficult. If the designation is too narrow, the information requested may be so particular that no one in the organization will know the answer. The burden of obtaining the information may be so great that the request warrants the court's intervention. For example, suppose party X serves notice pursuant to Rule 30(b)(6) on company Y and designates the subject matter as the number of threads per square inch in the fabric of a quality man's suit. Company Y is the operator of a retail store which sells men's suits. This kind of technical knowledge is probably unknown to the corporation or unavailable without costly effort and research. Depending on the circumstances, such an expenditure could be excessively burdensome and, as such, be grounds for a court's protective action.

The overbroad designation is likely to create the same kind of situation. If the request forces the corporation to expend a great deal of time and effort to supply information which may be needed, then the court may again intervene and modify or disallow the discovery request. For example, in a recent case, the plaintiff served a subpoena on a non party corporation under Rule 30(b)(6), calling upon the company to:

produce competent witnesses and pertinent documents in response to 143 categories of questions, a number of which contain questions

31. *Id.*

32. *Id.*

within questions. The subpoena calls upon IBM to produce every document, and recall every fact, conception, intention, understanding, belief, and sense impression, in respect [to several different patents and a preference profile].³³

Before the subpoena was served, the corporation had voluntarily made documents available to the plaintiff and had produced a witness for deposition. The corporation contended that "to even attempt to respond fully to the [subpoena would require] at least hundreds of professional man-hours of effort over many months."³⁴ The district court stated that "the subpoena in its present form is entirely too broad and burdensome, and will be quashed."³⁵ The court further stated that questions which sought only to confirm answers received through prior discovery should be asked by deposition upon written questions pursuant to Rule 31.³⁶

A second problem area in interpreting Rule 30(b)(6) concerns the meaning of the term "managing agent." The second sentence of Rule 30(b)(6) states that "the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf . . ."³⁷ The meaning of the terms "officers" and "directors" has caused no difficulty, but the term "managing agent" still presents a definitional dilemma under Rule 30(b)(6), just as it did under former Rule 26(d).³⁸

Most federal courts have continued to use the same three tests for determining whether a deponent is a managing agent.³⁹ Before Rule 30(b)(6), these courts applied all of the tests with equal frequency to determine status as managing agents.⁴⁰ After Rule 30(b)(6), some of these courts have suggested that the third test, identification with the interests of the employer, is preferable.⁴¹

Other federal courts, however, have abandoned the three traditional tests. Because the purpose of Rule 30(b)(6) is to simplify the procedure by which a party could depose a corporate entity, these courts have abandoned the established managing agent tests and have adopted a more lib-

33. *General Foods Corp. v. Computer Election Sys., Inc.* 211 U.S.P.Q. 49, 49-50 (S.D.N.Y. 1980).

34. *Id.* at 50.

35. *Id.*

36. *Id.*

37. FED. R. CIV. P. 30(b)(6). For text of the Rule, see *supra* note 1.

38. See *supra* text accompanying notes 10-15.

39. See *supra* text accompanying notes 10-12.

40. See, e.g., *Tomingas v. Douglas Aircraft Co.*, 45 F.R.D. 94, 96 (S.D.N.Y. 1968).

41. See, e.g., *Groh v. Decker*, 29 A.F.T.R.2d 72-948, 72-954 (W.D. Mich. 1971); see also C. WRIGHT & A. MILLER, *supra* note 19, § 2103 at 377-78.

eral definition of the term.⁴² This more liberal approach represents a policy decision by these courts to provide discovery to examining parties in accordance with the spirit of the current Rule. In some cases, these courts have circumvented the established managing agent concept altogether, substituting in its place a "persons most knowledgeable" test.⁴³

The more liberal approach adopted by some courts under Rule 30(b)(6) actually had its roots in a decision handed down two years before the Supreme Court of the United States enacted the current rule. In *Tomingas v. Douglas Aircraft Co.*,⁴⁴ the cause of action arose out of an aircraft crash that killed the plaintiff's decedent. The defendant-manufacturer supplied two of its engineers to assist the investigation team sent to ascertain the reason for the accident. When the plaintiff subsequently served notice pursuant to Rule 30(a) to depose the engineers, the defendant moved to quash the notice on the ground that the engineers were not managing agents. In refusing to quash the notice, the court held that the "term 'managing agent' should not be given too literal an interpretation."⁴⁵ Although the engineers were not managing agents within the course of their everyday duties for the defendant corporation, the court held that they should be classified as managing agents for the purpose of giving testimony regarding the accident investigation.⁴⁶ The court further noted that the defendant did not show that his business would suffer from the deponents' absence from their jobs.⁴⁷ This left open the question whether such a showing would be sufficient to justify the quashing of a notice of deposition.

Although the Southern District of New York decided *Tomingas* two years before the adoption of Rule 30(b)(6), decisions since 1970 serve to fortify and expand its definition of managing agents as any knowledgeable persons. One of these decisions, *Robbins v. Abrams*,⁴⁸ may indicate the outer limit on this kind of liberal construction. In *Robbins*, the plaintiff moved to reopen discovery after receiving what it deemed unsatisfactory responses from the corporate defendant. The court held that the corporation must produce (for deposition) the mother-in-law of one of the defendant's former officers and the mother-in-law's German bankers, all of

42. See, e.g., *Tomingas v. Douglas Aircraft Co.*, 45 F.R.D. 94, 96 (S.D.N.Y. 1968).

43. See, e.g., *Robbins v. Abrams*, 79 F.R.D. 600 (S.D.N.Y. 1978); see also *In re Arbitration between Puerto Rico Maritime Shipping Authority and Star Lines, Ltd.*, No. 79 Civ. 2659 (S.D.N.Y. June 10, 1980) (available Oct. 26, 1984, on LEXIS, Genfed library, Dist. file).

44. 45 F.R.D. 94 (S.D.N.Y. 1968).

45. *Id.* at 96.

46. *Id.*

47. *Id.* at 97.

48. 79 F.R.D. 600 (S.D.N.Y. 1978).

whom were non parties to the action but were the most knowledgeable with regard to the designated subject matter. The court concluded that these witnesses did not fall into any of the categories of Rule 30(b)(6), but reasoned that the defendant knew where the witnesses could be found and that the familial relationships involved in the case made it appropriate for the corporate defendant to produce them for deposition.⁴⁹

The Southern District of New York once again expanded *Tomingas* in the decision *In the re Arbitration between Puerto Rico Maritime Shipping Authority and Star Lines, Ltd.*⁵⁰ In postjudgement proceedings, Puerto Rico Maritime moved for an order compelling Star Lines to designate an agent or other person to appear for oral deposition in aid or execution. Star Lines responded that the corporation existed in name only and contended that no one was qualified to speak for the corporation because there were no longer any officers, directors, or managing agents. In granting the motion to compel, the court ruled that two former directors of Star Lines were the persons most knowledgeable about the subject matter of the litigation and, therefore, that they should be designated as the managing agents.⁵¹

The court suggested nothing, however, to resolve the issue of whether a designation can be compelled if a corporate entity no longer exists. Arguably, designation of a person to appear for a deposition should not be compelled if the corporation is defunct. Because of the clear wording of the rule, courts generally have not compelled a designation under such circumstances. After the corporate entity has terminated, normal deposition procedure is usually sufficient to permit discovery of former corporate officials whose existence is known.

A third problem area under Rule 30(b)(6) concerns the rule's consent requirement. The rule states that a corporation may designate persons other than officers, directors, or managing agents, but only those "who consent to testify on its behalf."⁵² This provision raises the question whether a corporation must produce an employee (an "other person" under the rule) who refuses to testify. Although no case law directly addresses this issue, the advisory committee notes point out that "an employee or agent who has an independent or conflicting interest in the litigation—for example, in a personal injury case—can refuse to testify on

49. *Id.* at 602.

50. No. 79 Civ. 2659 (S.D.N.Y. June 10, 1980) (available Oct. 26, 1984, on LEXIS, Genfed library, Dist. file).

51. *Id.*

52. FED. R. CIV. P. 30(b)(6). For text of the Rule, see *supra* note 1.

behalf of the corporation.”⁵³ Thus, it appears that a corporation cannot be compelled to produce an unwilling employee even if the corporation’s officers, directors, or managing agents are not knowledgeable on the subject matter.

The final problem area in which the courts have had to interpret the managing agent concept under Rule 30(b)(6) is in the relationship between attorneys and their corporate clients. Some courts have designated the corporation’s attorney as a managing agent. For example, in *Groh v. Decker*,⁵⁴ the Internal Revenue Service sought discovery of certain information within the knowledge of the defendant securities company. By the time of the discovery request, however, the company was no longer engaged in securities business. The Internal Revenue Service named the company’s president and sole shareholder as the only individual defendant, and he promptly asserted his fifth amendment right against self-incrimination to defeat the discovery request. The plaintiff urged that the defendant’s attorney be designated for oral deposition. The court ruled that although the attorney might fit into the category of “other persons” who could be produced for deposition upon consent, even though he was never an officer or director of the corporation, he should not be designated as such an “other person” because he would never consent to testify against his own client.⁵⁵ However, the court then looked to the broad holding in *Tomingas*⁵⁶ and held that the attorney met the requirements for a managing agent and should, therefore, be produced for deposition.

This conclusion did not completely resolve the issue. The corporate attorney, as the deponent, could not be compelled to testify on certain matters within the protection of the attorney-client privilege. To protect the privilege and to facilitate discovery, the court struck a compromise by ordering the attorney to answer only those questions where the answer did not violate the attorney-client privilege. If the attorney thought that an answer to a specific question would violate the privilege, the court ordered him to submit documents for *in camera* inspection. In these documents, the attorney listed the answers he would have made but for the claimed privilege, and the grounds on which he claimed the privilege.⁵⁷ The court thereby mitigated the discovery problem and provided a solution consistent with the intent of Rule 30(b)(6).

Even when an examining party has properly served notice on an organi-

53. Advisory Committee’s Note, *supra* note 3, at 515.

54. 29 A.F.T.R.2d 72-948 (W.D. Mich. 1971).

55. *Id.* at 72-954.

56. *Tomingas*, 45 F.R.D. at 96.

57. *Groh*, 29 A.F.T.R.2d at 72-954.

zation pursuant to Rule 30(b)(6), has properly described the subject matter of the deposition, and the organization has properly designated a person to answer on its behalf at deposition, problems may still arise. Sometimes a deponent will claim the privilege against self-incrimination under the fifth amendment of the United States Constitution.⁵⁸ As noted previously in *Groh*, the person designated to testify by the defendant corporation was also its sole shareholder.⁵⁹ The designated defendant declined to answer, claiming the fifth amendment right against self-incrimination. In such a situation, the designee cannot be forced to answer, but the corporation remains responsible for providing the requested testimony.⁶⁰

In another case,⁶¹ the designee initially appeared without sufficient knowledge to answer, but was aware that the desired information was within the corporation's knowledge. The court ordered the designee to return to the corporation to obtain the information. The persons who were the sources of the information invoked their fifth amendment privileges, and the designee remained unable to answer. The court held that the information sought was gained by corporate employees in the course of their employment and was therefore discoverable from the corporation. Because the corporate officials refused to reveal the information to a person designated by the corporation to disclose such information, sanctions were proper against the corporation.⁶² If the court had not allowed sanctions, the corporation, in effect, would have been able to invoke a right to which it was not entitled. But while the court held that some sanctions were proper, it chose to disallow the sanction of default. Because the actions of its officials prevented the corporation from disclosing the information, the court felt that the extreme sanction of default would be inappropriate. Instead, the court ordered that the defendants could not introduce any evidence regarding the matters surrounding the undisclosed information.⁶³

A similar problem occurs when a party refuses or otherwise fails to testify after receiving notice of deposition. The means for dealing with such refusal or failure are within the discretion of the federal trial court. Dismissal of the party's case is an extreme sanction that is available to

58. The organization itself is not entitled to use the privilege because it applies only to natural persons.

59. *Groh*, 29 A.F.T.R.2d at 72-949.

60. *Id.* at 72-950.

61. *In re Anthracite Coal Antitrust Litigation*, 82 F.R.D. 364 (M.D. Pa. 1979).

62. *Id.* at 368-69.

63. *Id.* at 369-70.

the court under Rule 37.⁶⁴

Another problem is that of a deponent who claims a lack of sufficient knowledge. In an informal survey of federal judges conducted in preparation of this article, the judges surveyed stated that, in such cases, the corporation's witnesses should either be excluded from testifying at trial on matters upon which the deponent has claimed a lack of sufficient knowledge, or that a continuance should be granted in order to allow the deposing party an opportunity to question a knowledgeable witness or witnesses.⁶⁵ All of the judges agreed that the examining counsel should, on request, be supplied with the general background of the proposed deponent or deponents.⁶⁶ They also agreed that all counsel should settle Rule 30(b)(6) discovery problems amicably, but that the party seeking discovery should propound appropriate questions under Rule 31 and Rule 33 if the opposing attorneys are unable to provide such information informally.⁶⁷

Another problem occurs when the deponent claims insufficient knowledge, and his attorney, or some other source, informs examining counsel that a former employee is knowledgeable about the matters sought to be discovered. The question arises when the corporation is responsible for producing someone who is no longer associated with it, but who is the most knowledgeable person. Under the liberal decisions of *Tomingas* and *Puerto Rico Maritime*, the corporation would probably be required to produce the individual under the "persons most knowledgeable" test, provided that the corporation is aware of his existence and is not unreasonably burdened by the requirement. Alternatively, the individual might be produced under the "other persons" classification of Rule 30(b)(6). If, however, the deponent is falsely claiming insufficient knowledge, it is unlikely that he would "consent" under the "other persons" classification. Finally, the corporation might possibly acquire the information from the individual under the "reasonably available" language of Rule 30(b)(6). The corporation would not be able to escape producing the information unless the court was extremely conservative or there was a showing that obtaining the information would be unreasonably burdensome.

Finally, a potential problem exists whenever a designated corporate agent appears at a deposition and testifies to collateral subjects without

64. See, e.g., *Atlantic Cape Fisheries v. Hartford Fire Ins. Co.*, 509 F.2d 577, 579 (1st Cir. 1975).

65. Informal survey of the United States District Judges, Southern District of Florida (Mar. 1985) (unpublished).

66. *Id.*

67. *Id.*

objection. The corporation may later raise the objection that the agent's questions and answers were beyond the scope of the designated subject matter. The corporation may argue that the deposed agent acquired certain knowledge pertaining to the corporation on his own, and that disclosure of this information was beyond the scope of the agent's corporate knowledge and capacity. Because a definite subject matter must be specified by the terms of the notice, however, counsel and the discovered party should be aware of the scope of the deposition being taken. According to federal court judges, any failure of the discovered party to object to the scope, or any failure to question the knowledge or capacity of the corporate deponent, should be deemed a waiver of any later objections.⁶⁸

IV. USE OF THE FED. R. EVID. 801(d)(2)(D) LANGUAGE TO SOLVE THE "MANAGING AGENT" PROBLEM

The foregoing discussion illustrates many of the problems that can arise under Rule 30(b)(6). A large number of these problems are directly attributable to the rule's ambiguous "managing agent" concept. To solve the problems created by this ambiguous concept and, moreover, to facilitate deposition use as evidence at trial, the Federal Rules of Civil Procedure's description of corporate spokesmen should be enlarged by using the language found in Federal Rules of Evidence (FRE) 801(d)(2)(D).⁶⁹ Under FRE 801(d)(2)(D), a statement may be admitted into evidence as an admission by a party opponent if it is "a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship."⁷⁰

The Advisory Committee's Note accompanying Rule 801(d)(2)(D) shows that the Committee intended the above definition to be interpreted broadly.⁷¹ Before the enactment of the rule, the common practice was to apply standard agency law, which did not allow a statement outside the scope of employment (i.e., an unauthorized statement) to be imputed to the employer as an admission.⁷² Statements which could bind the employer were referred to as statements within the "speaking authority" of

68. *Id.*

69. FED. R. EVID. 801 states in part:

(d) **Statements which are not hearsay.** A statement is not hearsay if -

. . . .

(2) **Admission by party-opponent.** The statement is offered against a party and is . . .

(D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship

70. *Id.*

71. See FED. R. EVID. 801(d)(2)(D) advisory committee note.

72. *Id.*

the agent.⁷³ This test often resulted in the exclusion of the statement since, as the notes point out, "few principals employ agents for the purpose of making damaging statements."⁷⁴ Citing "[d]issatisfaction with [the] loss of valuable and helpful evidence," the Committee sought to correct this problem by broadening the common law agency definition for use in the Federal Rules of Evidence.⁷⁵ Rule 801(d)(2)(D) eliminates the need to examine a particular statement in determining its admissibility. As Professor Weinstein notes: "Once agency, and the making of the statement while the relationship continues, are established, the statement is exempt from the hearsay rule so long as it relates to a matter within the scope of the agency."⁷⁶

Courts have used Rule 801(d)(2)(D) successfully to admit statements concerning a matter within the scope of agency or employment of "agents or servants" who fall outside the definition of a managing agent that would otherwise be inadmissible evidence on the ground of hearsay. For example, in a personal injury action arising from an explosion of propane gas inside the plaintiff's motor home, a statement made by the defendant's employee (in charge of filling the gas tank) to an insurance adjuster was properly admitted under Rule 801(d)(2)(D).⁷⁷ Similarly, in an admiralty action against a maritime indemnity insurer for tortious interference with the employment of the plaintiffs/seamen (by way of "blacklisting" the plaintiffs as a high insurance risk), a statement by the defendant's deceased insurance broker that medical expenses incurred by one of the plaintiffs after a fire would not be paid was properly admitted because the declarant was "speaking in his capacity as a broker" for the owner at the time.⁷⁸ As a final example, in an antitrust action by the United States alleging a conspiracy to allocate contracts and to rig bids in violation of the Sherman Act, a statement made on the telephone by a defendant's secretary to the co-conspirator/witness was admissible under Rule 801(d)(2)(D).⁷⁹ The above examples illustrate the tremendous breadth of the FRE language. The opponent can use testimony of professional experts such as staff engineers, chemists, doctors, and other technical per-

73. See, e.g., *Northern Oil Co. v. Socony Mobile Oil Co.*, 347 F.2d 81, 85 (2d Cir. 1965).

74. FED. R. EVID. 801(d)(2)(D) advisory committee note.

75. *Id.*

76. J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* 801(d)(2)(D) [01], 801-221 to -221 (footnotes omitted).

77. *Wright v. Farmers Co-op of Arkansas and Oklahoma*, 681 F.2d 549, 552-53 (8th Cir. 1982).

78. *Pino v. Protection Maritime Ins. Co.*, 599 F.2d 10, 13 (1st Cir. 1979).

79. *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 321-22 (4th Cir. 1982). The court stressed that the record contained independent evidence purporting to show that the woman with whom the co-conspirator/witness spoke was the agent of the defendant. *Id.*

sonnel who are rarely "managing agents," but who often have vital evidence in areas such as product design testing procedures in product liability, breach of warranty, patent law, and other areas which may be needed by the examining party.

The troublesome managing agent concept found in the Federal Rules of Civil Procedure can be easily replaced by the "agent or servant" language of the FRE. This change would facilitate the use of depositions at trial and would also cut back on the time-consuming managing agent determination. Additionally, the rights of the objecting party could still be protected after the change. That party could obtain a protective order, an exception for privileged communications, or could rely on the right against self-incrimination.

V. CONCLUSION

While a party seeking discovery from a corporation may still have some trouble obtaining a corporate deposition, the 1970 amendment of Rule 30(b)(6) has eliminated many of the problems. Before 1970, deposing a corporation required a two-step process: first, discovery from the corporation of the proper identity of the knowledgeable person; and second, deposition of that person by service directed to him rather than to the corporation. Pursuant to Rule 30(b)(6), the party seeking discovery can now notice a corporation and draft a subject matter designation with enough detail to narrow the field of possible designated persons. If the examining party can designate the subject matter narrowly enough, then possibly only the person or group of persons who should be designated will be produced.

On the other hand, if the limits of reasonable subject matter designation are exceeded, or the deposing party fails to designate the subject matter with "reasonable particularity,"⁸⁰ the court may intercede to limit the inquiry. In this situation, the full range of discovery available under Rule 31 (Depositions Upon Written Question) and Rule 33 (Interrogatories to Parties) to aid in the subject matter designation under Rule 30(b)(6) are still available. Under this method, the party seeking discovery would first use Rule 31 and/or Rule 33 to determine the following:

- 1) The names of those persons connected with the organization who are most knowledgeable about the subject matter;
- 2) The background of each such knowledgeable person, including a job description detailing the duties and powers of such person at the time of the event in question;

80. FED. R. CIV. P. 30(b)(6). For text of the Rule, see *supra* note 1.

3) An exact description, in fullest detail possible, of the scope of each such person's knowledge. If this is not possible, then an exact description of the scope of knowledge for the entire group of knowledgeable persons; and

4) A table of the corporate structural organization that identifies the location of the designee at the time in question.

If the party seeking discovery, either by informal means or pursuant to Rules 31 and 33, obtains background information on the Rule 30(b)(6) designees before deposing the corporation, many problems will be prevented. Certainly, if a designee lacks the requisite background to properly respond, this can be noted early on and a more suitable person can be designated. Furthermore, a party that initially seeks discovery under Rule 31 and/or Rule 33 is in a superior position to use Rule 30(b)(6) as an effective discovery tool. An examining party who has properly used all of the discovery devices in conjunction with one another should be able to discover the greatest amount of relevant information from the corporation. As the Advisory Committee stated, "[Rule 30(b)(6)] supplements the existing practice"⁸¹ When properly used, the discovery rules provide a powerful method to obtain all relevant information known or reasonably available to an organization.

Proper use of the discovery rules does not, however, preclude the possibility of discovery problems. Fifth amendment and attorney/client privilege issues are unavoidable if an examining party wishes to depose the other party's counsel. A district court recently denied both a motion to dismiss various defenses and claims based on the party's refusal to answer questions, and a motion for a protective order based on the fifth amendment right against self-incrimination brought in opposition to the motion to dismiss.⁸² "Absent a court order compelling discovery [which the court refused to give], and given the likelihood that the merits of the defendants' claims can be more fully considered at trial, the court is reluctant to dismiss the charges prematurely."⁸³

Possibly, Rule 30(b)(6) could be amended to provide a category of deponent designees classified as "knowledgeable persons associated with the named organization." In view of the continuing effort on the part of the courts to construe "persons most knowledgeable" as "managing agents" for the purposes of testifying under the rule, such a change would eliminate much of the strained reasoning that the courts have had to use to

81. Advisory Committee's Note, *supra* note 3, at 515.

82. *Argonaut Ins. Co. v. Goepfert*, No. 76 Civ. 802, (S.D.N.Y. July 1, 1980) (available Nov. 13, 1985, on LEXIS, Genfed library, Dist. file).

83. *Id.*

give the rule effect. Further, the amendment would make it easier for examining parties to reach those persons associated with the organization whose actual knowledge make them best qualified to testify. Finally, such a change is within the spirit and intent of the rule.

Alternatively, Rule 30(b)(6) should be amended to correspond to Federal Rule of Evidence 801(d)(2)(D). By using the language "agent or servant," the problematic managing agent determination can be avoided and much time and effort on the part of the courts, as well as the respective parties, will be saved. Additionally, this broader definition will allow the admissibility of evidence otherwise difficult, if not impossible, to obtain. For example, by using Rules 31 and 33 in conjunction with a broader Rule 30(b)(6), the strategic attorney can target the right persons to depose and no problem will be posed even if the individual is well below the "managerial" level.

These proposals are not meant to suggest that persons without any significant connection to the named corporation or other organization (for example, simple shareholders) should be subjects under such a revision. But, as case law indicates, present organization employees, former employees, organization counsel, and others so closely related to the entity should be available for deposition if they are the persons most knowledgeable about designated matters. Such persons are appropriately the best qualified to speak for organizations receiving notice of Rule 30(b)(6) depositions.

Ultimately, a test of reasonableness must apply. Parties can and should anticipate that the courts will apply a reasonableness standard, and they should seek to avoid costly and dilatory objections. The ultimate goal is to uncover the facts necessary to render justice in the case. It is a goal desired by the courts and necessary to the administration of justice.