THE FLORIDA BAR TRIAL LAWYERS SECTION

The Advocate

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MESSAGE FROM THE CHAIR

If We Are Going to Fight, Let's Fight for Something Worthwhile

Being a lawyer and fighting with the unprofessional lawyers in our midst is tiring, degrading, and not what we signed up for when we left law school. It costs all of us time and money (both ours and that of our clients), and adds to our already high level of vocational stress. Is this what you want? I know I do not need more stress and more grief. Our jobs are hard enough without unnecessary stress.

So, what are we going to do about it? Are you going to "fight fire with fire" the next time another lawyer treats you unprofessionally? Are you going to get caught up in name calling at a deposition, or resort to trickery at a hearing or trial, just because the other lawyer is doing it? After all, they started it, right?

Wrong. We are called upon by the Bar, and by our noble profession to be more than just fighters. We are advocates for our clients, but only within the bounds of the law and our ethical standards. We are also called upon to be civil, not just to the judges and juries who decide our clients cases, but the lawyers against whom we battle. I realize there are lawyers who

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Rule 30(B)(6) Depositions: Who Gets the Short Straw When No One Knows the Answer?

By William S. Ohlemeyer

Rule 300(b)(6)[1] of the Federal Rules of Civil Procedure seems simple enough – sue a corporation, serve a notice, make them produce someone who can answer your questions. After all, how else can you extract oral testimony from a legal fiction?

Is it really that easy? Of course not. Consider this "based on actual events" scenario:

> Your client has just become involved in litigation involving a product a predecessor corporation stopped selling 20 years ago. No one currently employed at your client's corporation was involved in the design, manufacture, labeling, advertising, marketing, or sale of the product. The current owners and management of the company had nothing to do with the sale of the product at issue.

You receive what appears to be an exercise in futility – a 30(b)(6) notice asking you to produce a person with knowledge of the design, manufacture, labeling, advertising, marketing, and sale of the product at issue.

Insofar as you cannot manufacture a witness who does not exist, you would think your time would be better spent preparing to respond to the inevitable set of contention interrogatories. You would be wrong.

It is often hard to see the discov-

See "Rule 30 (B)(6)" page 8

In This Issue:

think both the opposing lawyer and his/her client are evil. Fortunately, those people in our ranks are few. If we allow ourselves to be consumed and twisted by the battle, and lose sight of the greater goal of our court system, then we are just mercenaries, soldiers hired by the highest bidder.

I was recently in the hospital for surgery, which gave me some time for reflection as I recuperated. Life went on in the office without me. I was neither indispensable nor necessary to keep the world turning (God did that entirely on His own). But what difference will that make to my practice? Will I become a better lawyer because I had the chance to slow down for a couple of weeks and reflect on my life, and my practice? I certainly hope so. I was blessed to have visits, cards, letters, emails and calls from lawyers and judges from around the state. All wished me well. Never was a case mentioned. It just didn't seem important at the time.

What is important? If we are going to fight, let us do so on behalf of something worthwhile, such as helping out with relief to Haiti, or AIDS in Africa, or the problems right here in Florida (and we have plenty). Maybe a little pro bono work, through the Bar, or your house of worship, or other local charities? Charities are hurting along with the rest of the world, trying to scrape by on less money and help. If all we lawyers do is work (and I have at times been guilty of that), we miss life along the way, and end up battling over trivial issues.

I apologize to any who might find this too preachy, but if one lawyer reading this column recognizes the offensive traits and does something about it in his/her own practice or in that of a fellow practitioner, my efforts have been worthwhile. I for one am sick of the kind of conduct from lawyers that only results in the public's opinion of us sinking below any other learned profession, and the telling of lawyer jokes. I do not let anyone tell lawyer jokes in my presence. I am proud to be a trial lawyer. I do not want to be a joke, or a member of profession that the public thinks is fair game for criticism and mockery. That helps lead to a mind-set I see in our current state legislature that does not view the judiciary as a separate and independent branch of government, and instead wants to take away the rule making authority from our supreme court. So if you want to fight, get involved by calling, writing and visiting your state legislators, and let them know how important our justice system is. Tell your neighbors and friends too. And most of all, start treating every other lawyer the same as you would want to be treated. Sound familiar? It should.

Mark your Calendars!

(Look for brochures in the mail and find information on the Trial Lawyers Section's website: www.flatls.org)

2010

April 22 – 25	**Executive Council Meeting** Santa Fe, New Mexico
May 11 – 15	**Trial Advocacy Seminar (1024R)** University of Florida, Gainesville
June 23 – 26	**The Florida Bar Annual Meeting** Boca Raton Resort & Club, Boca Raton
June 25	**Executive Council Meeting** Boca Raton Resort & Club, Boca Raton

Dealing With Difficult People

By Mark Mays

"I hope you don't mind my referring people to you," I told an attorney friend over lunch. He'd been working for some years in the field of workers' compensation, and I didn't know if he was still taking new referrals.

"No, that's great. . . so long as you don't mind if I don't accept them as clients," he replied. I quickly reassured him that I always gave three referral names.

He went on to say that he had become quite clear on a few things related to his practice. He explained: "A few years ago, someone came to see me who was very aggressive. He bullied my secretary, and loudly insisted upon seeing me immediately. Hearing the commotion, I invited him into my office. I sat down behind my desk, but, rather than sit in one of the chairs, he stood, looked down at me, and told me exactly what we were going to do."

"'No, actually, we're not going to do any of those things.' I said. He looked perplexed.

"What do you mean?" he asked.

"Because I'm not going to be your lawyer.'

"Why the hell not?"

"Because I don't like you. And the truth is that if I don't like you, you are not going to get good legal representation from me. To be honest, yours would not be the first phone call I'd return if I had several messages waiting. I wouldn't want to expand upon my conversations with you, so I might not have all the information I needed, and you wouldn't be able to communicate with me very effectively, which is important in representing you. I'm going to give you the names of several people who might like you. Talk with them. I'm sure they would do a better job.'"

The person left a bit bewildered, but my friend had realized that he was at a point where it was important for him to control his practice, which begins at the outset of the relationship.

I have thought a lot about what he said. I thought he was quite blunt, bordering on rude. (I also wished that I had that much nerve or wealth.) But I also realized that he was right. ThinGs seldom get better, and if they start off horribly wrong, there is often a bigger problem down the road. And our emotional reaction to a client can affect how well we represent or respond to him or her.

It's a different way of thinking than I was used to. As a psychologist and a healthcare provider, I have always seen it as my job to cope with, tolerate, or try to ignore certain things in order to be of help. After all, in healthcare, the implicit contract of the relationship is based on the assumption that the person is ill, we are there to help, and to do professionally means to deliver services in a respectful way, whether it's reciprocated or not.

Difficult clients usually are either well-functioning people going through a tough time or people with ongoing behavior issues

But compatibility of style, or even circumstances in our own lives, can make our capacity for patience and tolerance fluctuate. My friend was blunt, but he probably did a service to his client, as well as whomever the client went to see subsequently for legal representation.

But not everyone is in a situation where they can decide who they represent. There are agency positions in which cases are assigned. Even in private practice, there are economic circumstances and "practice politics" which dictate who one represents.

Difficult clients are typically either well-functioning people going through a touGh but temporary situation, or individuals with ongoing patterns of difficult behavior. It's important to distinguish what endures and is a pattern that will persist, as opposed to what's more situational and likely more manageable. Here are a few of the most commonly seen types of problem clients:

Frightened: Frightened clients can make demands upon our time and our resources, and want reassurance and predictability where none can honestly be given. Their anxiety and distress can be contagious; we can find ourselves a bit taxed, tired, or tense after interacting with them.

Taking the initiative and reminding them that they are remembered and that they matter, and are neither neglected nor abandoned, can be extremely helpful. Status letters can be sent every few weeks, merely letting a client know that nothing has happened recently, and that it is the natural order of things for matters to take awhile. It's sometimes just as important to communicate something, rather than to communicate something meaningful.

Embarrassed: Clients who are embarrassed can pose a problem, because their embarrassment might make them avoid disclosure, or avoid doing certain essential things, such as completing interrogatories or making timely responses. Often, people are embarrassed about things that they believe are unique to them, but which are really quite normal. Sometimes it's helpful to communicate the normalcy of their situation indirectly by mention that "people often feel that they are the only ones who have ever. . . ." or "What I almost always see in these situations is . . . ." Other matters are just downright embarrassing, and it may be best simply to directly address the issue with the client, since it will have to be dealt with sooner or later.

Angry: Angry clients can create the temptation to form alliances with their anger, not merely with their cause of action. Many people are involved in litigation because they feel wronged, and want the wrong righted right now! They are often looking for an attorney who can hold their opponent's arms behind their backs so that they can beat them up with no ill consequence. It's tempting, but a mistake, to jump on that bandwagon. Reinforcing anger is a bad idea, both because it's unpleasant to be around and because it can paint one into a

corner if litigation is seen as a moral crusade, rather than a legal exercise. One cannot negotiate from a moral position.

Unreasonable; Then there are people who just don't understand what a reasonable expectation might be. Many have never before encountered a legal situation and may have very unrealistic expectations about an attorney's availability, the time it takes for matters to resolve, or the amount of energy involved in assisting an attorney prior to litigation or dispute resolution. It's our job to communicate all of this.

Let clients know that others in your office can usually provide information in a quick and equally accurate way, and designate your secretary, paralegal, or legal assistant the resource to contact. Help you client understand that talking to staff can result in quick responses and reduced costs.

Personality disorders: Finally, there are those who pose problems no matter what the situation. These are, most often, people with personality disorders. They are not individuals who are merely going through tough times, but those who tend to create tough times, more often for others than for themselves. A personality disorder is, by definition, a long-standing maladaptive pattern of behavior of a magnitude to interfere with social and vocational functioning. These patterns may interfere with an individual's capacity to resolve conflicts, communicate effectively, maintain agreements, or maintain some balance between the emotional and the rational as one makes decisions and manages behavior.

Personality disorders come in all "shapes and sizes," but they can be divided into these categories, or clusters:

- Cluster A (off): schizotypal, schizoid, or paranoid personality disorders
- Cluster B (dramatic): antisocial, borderline, histrionic, or narcissistic personality disorders
- Cluster C (anxious): dependent, obsessive-compulsive, or avoidant personality disorders

Three personality patterns are particularly relevant in legal practice: the antisocial personality, the narcissistic personality, and the borderline personality.

The antisocial personality disorder can, in its more full-blown version, include long-standing patterns of disregard for limits, rules, and authority. The formal diagnostic criteria include such characteristics as failure to conform to social norms with respect to lawful behaviors; deceitfulness; impulsivity; irritability and aggressiveness; consistent irresponsibility; and a lack of remorse at having hurt, mistreated, or stolen from another.

More often seen is the less severe personality trait disturbance with antisocial characteristics. A trait disturbance suggests that this pattern of behavior is present, but with less severity than a personality disorder. Individuals with this personality trait disturbance are typically quite impulsive. It's hard for them to "keep on track," since the temptations of the moment, their immediate desires, and the habit problems that may arise from such a personality type (such as gambling, drinking, or drug use) may keep them from performing consistently and reliably.

Those with antisocial personality traits prompt an attorney to confirm their statements and reports, and warrant extremely clear, detailed, and enforceable agreements.

The borderline personality disorder is very misunderstood. In fact, it doesn't "border" on anything, and it is not a reflection of a person who is near to psychosis. It refers to a personality type that is excessively emotional, quickly changeable, and extremely ambivalent. These individuals are emotionally determined, impulsive, and self-defeating. Their vows towards other people can change quite abruptly. These are people who can go from idealizing someone to castigating them, with very few midpoints in between.

It is sometimes quite difficult for an attorney to maintain some sense of professional distance while simultaneously being caring and responsive to a client's needs, given the potential overwhelming involvement demanded by this personality type with emotionality, changeability, and "high maintenance" behavior. Such loss of attorney perspective can inadvertently accentuate the risk of later conflict.

With a borderline personality, the professional attorney would be well-advised to maintain consistent boundaries and to not veer off course from how one typically deals with clients. Beware of rearranging appointment times, making variations in billing arrangements, or going "the extra mile" in situations in which one might not typically do so.

The narcissistic personality disorder might be seen as the "prince" or the "special person." They often exhibit a sense of entitlement and are more likely to be male than female, although there is a sense of entitlement found in many conditions and situations across gender lines. They are typically condescending, dismissive of others, and arrogant.

These are people who remember slights, affronts, and insults forever. A "wounded narcissist," as the phrase is used, can be quite vengeful and can engage in protracted conflict because of how they were treated. The narcissistic personality disorder will likely pose a long-standing problem, since conflicts may occur, and reoccur, due to emotional slights. These are the clients for whom not mediation, but arbitration, may be well advised. These are the people for whom court files can take several volumes. These are people not to offend.

Difficult people (or people who behave in difficult ways) are not uncommon in legal practice. There are ways in which we can limit or manage those who are typically less well-function, and, in the process, maintain integrity and professionalism in our practices, as well as protect our capacity to continue to practice. Finally, there really are those people we just don't like, and, when the circumstances are right, maybe my friend who refuses to work with them has a point.

Mark Mays, Ph.D., J.D. is a clinical psychologist and an attorney

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The Florida Bar Continuing Legal Education Committee and the Trial Lawyers Section present

Advanced Trial Advocacy 2010

ALL THE CLE and ETHICS HOURS
YOU NEED FOR THREE FULL YEARS
CERTIFICATION HOURS

May 11 – 15, 2010

University of Florida
Fredric G. Levin College of Law
Gainesville, Florida

This program will substitute as one of the trials required for certification and recertification for Civil Trial and Workers' Compensation

Advanced Registration Required

The Advanced Trial Advocacy Seminar is a hands-on, learning-by-doing trial skills training. It is intended for attorneys who have practiced a minimum of five years and are involved in a full time litigation practice. Jury experience is preferable, but not required.

This advanced seminar is a NITA Style interactive format with judges and lawyers from around the state. It provides all the required CLE and Ethics credits for the three year cycle.

If you or someone in your firm needs CLE credit or litigation training this is the seminar for you. The faculty consists of trial court judges and board certified trial lawyers from around the state. This is an intense interactive program for both the novice and the experienced litigator.

Forty-eight (48) attorneys will be selected. Selection is based on a first-come, first served basis. When your application is processed, you will receive program materials in advance of the program. The case file for this program is used as a source of facts and law for the training. Following lectures, discussion and demonstration, you will learn primarily through participatory exercises. Following your performances, you will receive suggestions on how you can be more effective by experienced Florida trial lawyers. Your presentation will be videotaped and you will receive a one-on-one video performance review. Your advance preparation is critical to the success of the program and your own learning. You are expected to attend all sessions. If you cannot, please do not apply.

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HOTEL RESERVATIONS

A block of rooms as been reserved at the Hampton Inn & Suites, at the rate of $119.00 single/double occupancy. To make reservations, call the Hampton directly at 1(800)HAMPTON. Reservations must be made by April 12, 2010 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

SCHEDULE OF EVENTS

TUESDAY, MAY 11, 2010

6:00 P.M. – 9:00 P.M.
Registration
Introductory Remarks
Demonstration of Opening
Statements and Direct and Cross of an Expert

WEDNESDAY, MAY 12, 2010

8:30 A.M. – 5:30 P.M.
Opening Statements Workshops and Case Analysis
Jury Selection Discussion
Direct and Cross of Lay Witness Workshops

6:30 P.M. – 9:00 P.M.
Welcome Reception and Tutorial of Material Science Issues
(Location TBA)

THURSDAY, MAY 13, 2010

8:30 A.M. – 5:30 P.M.
Direct and Cross of Education and Material Science Expert Workshops

FRIDAY, MAY 14, 2010

8:30 A.M. – 5:30 P.M.
Direct and Cross of Medical Experts Workshops
Faculty Demonstration of Closing Arguments

6:45 P.M. – 9:00 P.M.
Reception and Dinner (Location TBA)

SATURDAY, MAY 15, 2010

8:30 A.M. – 2:00 P.M.
Closing Arguments Workshop Inside the Jury Room

CLER PROGRAM

(Max. Credit: 36.5 hours)
General: 36.5 hours Ethics: 6.0 hours

CERTIFICATION PROGRAM

(Max. Credit: 36.5 hours)
Business Litigation: 18.5 hours
Civil Trial: 36.5 hours
Workers' Compensation: 36.5 hours

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

TO REGISTER	ON-LINE: www.floridabar.org/CLE	MAIL: Completed form with check	FAX: Completed form to 850/561-5816

REFUND POLICY

Requests must be in writing. Registration fees are non-refundable. unless transfered to a colleague registering at the same price paid. A $50 service fee applies to refund request. No refund will be given after April 12, 2010.

Registration

ONE LOCATION: (202) UNIVERSITY OF FLORIDA, GAINESVILLE (MAY 11-15, 2010)

REGISTER BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 East Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have any questions, call 850/561-5831.

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

WPG: Course No. 1024R

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Trial Lawyers Section: $975
- ❑ Non-section member: $1,000
- ❑ Enclosed is my seperate check in the amount of $50 to join the Trial Lawyers Section.

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-5816.)

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Exp. Date: ____/____ (MO./YR.)

Signature: _____

Name on Card: _____ Billing Zip Code: _____

Card No. _____

❑ Check here if you have a disability that may require special attention or services. Please attach a general description of your needs. You will be contacted for further coordination.

For Information on the Trial Lawyers Section, please visit our website at *www.flatls.org*

Dealing With "Phone Grazers"

By Jeff Tolman

The phone rang on cue. It was 9:00 Saturday morning, the opening bell for the phone Grazers.

"Tolman, Kirk and Franz," I answered.

"I'm thinking about getting a divorce," the voice on the other end of the line said. "What kind of a deal will you give me?"

I'd been through similar conversations many times before. The caller had not given his name. He was afraid I would send him a bill for any legal advice if I knew his identity. There was no interest in establishing a long-term relationship. If, a year from now, he were injured in a car accident he would spend Saturday mornings grazing again. This time it would be, "I'm thinking about hiring a lawyer for a personal injury claim. What kind of a deal will you give me?" He was not a client I wanted.

"I'll buy you a weedeater after I finalize your third divorce through our office," I responded.

"That's stupid," the caller said and hung up, no doubt already dialing the lawyer below me in his phone book.

He was right. My answer was stupid, but so was his question. I can't imagine calling medical offices: "I'm thinking about getting a colonoscopy. What kind of a deal will you give me?" And (to use a bad pun), in the end, would I want the procedure performed by someone who I had negotiated into a modest fee? I recall that on one of the early Apollo flights the commander was asked how it felt in space. "I'm a little nervous," he responded, "being way up here in a craft built by the lowest bidder."

Despite the frequent wasting of time, I always take cold calls. Anyone who takes the time to call my office gets to talk to a lawyer, even the grazers. Once in a while a good case or client comes out of the call. There are some telltale signs, though, to watch for in callers seeking advice over the phone.

Does the caller give his name? Any caller who opens by saying "This is Sally Mulligan, I just have a quick question" gets a good answer. They aren't trying to hide anything or be deceptive. An issue she thinks may be simple is bugging her. Will I answer her question? Sure. My interest wanes immediately when the caller does not state his name, and when I ask "To whom am I speaking?" either hangs up or says "you don't know me," or, my personal favorite, mumbles and coughs, as if a *petit mal* seizure occurred the moment my question was uttered: "this is ckyel (cough) liuywe (clear throat)."

Despite the frequent wasting of time, I always take cold calls. Anyone who takes the time to call my office gets to talk to a lawyer, even the grazers. Once in a while a good case or client comes out of the call.

Does the caller want a specific answer to a general question? Recently a grazer called and asked if I knew much about homeowners' associations. "Some," I responded. "What is your question?"

"Is there a specific time homeowners association meetings need to take place?"

"It depends on what the association bylaws say," I responded. "Often a specific date and time for the annual meeting are set forth in those documents."

"Well, apparently you know a different side of Millie Guenther than I do!" the caller angrily responded. She immediately hung up, and began dialing, no doubt, another lawyer who may not side with the infamous, but unknown to me, Ms. Guenther.

Does the caller value your time? So often the grazers, since they don't plan on paying anyway, think they own your day. They will start: "This is kind of a long story, though, I'll try to make it short. Dad told me once, years ago when I was about 10, that I was conceived in the Antlers Motel in Greybull, Wyoming. My mom's pregnancy was smooth, but the delivery was long. . . ." Cut them off or feign a fire in your office. This grazer will keep you on the phone as long as you will let him, without any interest in hiring you at the end of the call. "Thanks, I appreciate your time and will get back to you," they will say when your patience finally runs out, but won't.

Does the caller think she has the right answer already and is only looking for assurance? "Last night on law talk radio I heard (already a giant red flag) that you should make 11 originals of your will and file each in a different state. Does your office do that? A grazer may ask, or say "A lawyer I just spoke with, I don't remember her name, told me . . . ." Run away screaming from this caller. Tell her the question is so complicated that she needs to come in and discuss it with you face-to-face. She won't. Or encourage her to trust the advice she just received from the no-doubt-competent attorney she just called. If you don't take an aggressive course of action, you will get dribs and drabs of information, then if you disagree with the prior attorney's advice at all you will get one final question: "Do you do malpractice? I think the last attorney I spoke with gave me bad advice!"

In the end, it's important to remember the type of clients every lawyer is after. Those with whom we can develop a long-term attorney-client relationship. Those who will refer their friends, family members, and coworkers to us. Those who won't second guess us every second. Those who won't constantly be looking for a good deal at 9:00 Saturday morning.

Jeff Tolman is a partner with Tolman, Kirk & Franz. Since 1981 he has served as district and municipal court judge pro tem. He can be reached at 360-779-5561 or jefft851@aol.com.

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ery land mines in a case until you have watched them explode at trial. When did you stop drafting long, self-serving objections and responses to interrogatories? It probably was not long after having endured an hour of listening to your opponent read them to a jury. The 30(b)(6) deposition is another one of those little challenges that arises when you move from theory to practice. There is, however, a lot of practice packed into that little sub-division of Rule 30.

Unlike a more conventional deposition notice, the 30(b)(6) notice is not directed to a person, but to an organization. Corporations can be amorphous and anonymous places in which it can be difficult to efficiently extract all types of information, such as: "Are we open on Veteran's Day?" "Why is there Pepsi in the Coke machine?" and, of course, "Who knows what about this?" The "Who" and "What" attain some urgency when the "This" takes the form of a 30(b)(6) deposition notice.

In most corporations, "deponent" is not a job description. The line for volunteers to "speak for" and "bind" the corporation is not generally any longer than it is for lawyers who want to retake the bar exam. Your 30(b)(6) witness does, however, speak for, and bind the corporation.[2] Speaking for, and binding, the corporation during the discovery process can have a variety of unintended consequences at trial, not the least of which could be limitations on the introduction of evidence that expands upon, or contradicts, the testimony from your 30(b)(6) witness.[3]

Find the Appropriate Witness

Corporations are typically full of people, piles of information, and a variety of job descriptions not always aligned in such a way as to suggest an obvious answer to the question, "Who is the person with knowledge of the subject matter of the notice?" let alone who is the person "most knowledgeable" as required by some state rules. In many corporations, jobs and job descriptions involve extensive differentiation of responsibilities, employees are advanced or rotated through departments or functions, and the passage of time, reorganization or failed memory can make it difficult to extract information requested by such a notice.

Another, not altogether cynical, way to approach the defense of a 30(b)(6) notice is to think of it as a set of contention interrogatories for the visually impaired. Your opponent may genuinely desire the information described in the notice. On the other hand, they may see the 30(b)(6) deposition as a chance to have a witness – as opposed to a lawyer – formulate the company's response to a variety of difficult questions in a format that allows little time for reflection or investigation and provides the sort of audio-visual impact that makes a video deposition superior to even the most effective contention interrogatories. Producing a witness with knowledge of the designated issues is a different exercise than preparing a witness to "speak for" the corporation when no such knowledge currently resides within the company.

Is a Rule 30(b)(6) deposition really a set of contention interrogatories for the visually impaired?

The Rule is "Explicit" and "Implicit"

The rule itself allows a party to take the deposition of a corporation by noticing the deposition and describing with reasonable particularity the matters on which the examination is requested. The organization receiving the notice then must designate someone – not necessarily an employee; "anyone" who consents to testify on its behalf will do – to testify as to matters known or reasonably available (not necessarily now known) to the organization. You, your client, your opponent, and the court will have several interesting debates about the meaning of "reasonable" and "available."

Are You With Me So Far?

Forget for the moment, the passage of time, reorganization of the corporation, mergers and acquisitions, and failed memory. It usually does not take a district judge or magistrate three paragraphs to remind all involved that your corporate client has a duty to make a "conscientious, good-faith, effort" to designate knowledgeable persons for such a deposition and to prepare them fully to "unevasively answer" questions about the designated subject matter.[4]

The absence of personal knowledge of the subject matter by your designee, or throughout the entire corporation, is not much of a speed bump, either. Courts generally conclude that because the rule *explicitly* requires a corporation to designate someone to testify on its behalf as to all matters reasonably available to it, the rule *implicitly* requires that someone review all matters known or reasonably available to the corporation in preparation for the 30(b)(6) deposition. Note again the distinction between "known" and "available," and

continued, next page

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ask yourself whether this sounds more like a memory test than a deposition of your client.

In other words, notwithstanding their lack of personal knowledge, your witness must manufacture that knowledge through a process that necessarily will involve client and counsel. Failure to prepare a witness to provide "complete, knowledgeable, and binding answers on behalf of the corporation" subjects your client to a variety of sanctions, including costs, fees, additional discovery, and/or the limitation of additional proof at trial.[5]

The testimony given by a non-responsive deponent (e.g., "I don't know") may be deemed binding on the corporation so as to prohibit it from offering contrary evidence at trial.

Yeah, But. . .

The problem is especially acute in product liability litigation involving products sold long ago or by predecessor corporations. It is not too hard to imagine cases in which no one in the company, or "available" to it, now knows, or has reason to know, about the design, manufacture, or sale of an obsolete product, sold by a predecessor, managed or owned by long retired, now deceased, or disinterested people. What do the rules require of your client when there is no obvious person with knowledge of the subject matter?

Does Your Opponent Really Expect You to Manufacture a Witness?

Of course they do. And it should not be too hard to figure out why. What would you prefer? An answer to a contention interrogatory (in all likelihood drafted by their attorneys) seeking your opponent's "position" on a disputed matter, or a live witness testifying on videotape about a matter on which they may have no personal knowledge, but will provide an answer that will "bind" the corporation as an "admission" in this and subsequent cases? You have a problem with that? Sure you do. Most courts, however, do not.

Say Hello to the Short Straw

A corporation that is in existence, but is no longer actively engaged in the activity underlying the litigation, can be compelled to produce a witness for a Rule 300(b)(6) deposition who will provide the corporation's position on the designated topic regardless of their lack of personal knowledge.[6]

Remember, you and your client must make a conscientious and good faith effort to find someone with knowledge and to prepare them to provide full, complete, and unevasive answers to the questions posed by the interrogator. The duty of preparation goes beyond matters personally known to the designee or to matters in which that designee was personally involved.[7] If necessary, the deponent must use documents, past employees, and other resources in performing this required preparation. Id.

Courts have rejected the relatively common-sense argument that Rule 30(b)(6) does not require the corporation to "educate" a witness using materials whether from documents, past employees, or other sources not within the witness's personal knowledge to provide (again, I prefer, "manufacture") testimony on the designated subject matter. Courts have gone so far as to insist that a corporation "educate" and produce a witness about actions taken by former employees of the corporation.[8]

Finally, in what can only be fairly described as a merger of the deposition and contention interrogatory, more than one court has concluded that the Rule 30(b)(6) deposition can be used to compel a corporation's "interpretation of documents and events" even if no one within the corporation has previous or personal knowledge of them."[9]

Therefore, it seems, client and counsel can be required to educate (a nicer word for "manufacture") a witness as to the designated subject matter even if neither the corporation nor its employees have present knowledge of the subject matter.

Even in situations where it is beyond dispute that neither client nor counsel knows, or can testify to, the truth of the facts described in the 30(b)(6) notice, and maintain that they cannot legitimately answer questions on the stated topics, courts have concluded that the corporation is obligated to "thoroughly educate" and produce one or more witnesses about the noticed deposition topics with respect to any and all facts known to the corporation or its counsel even if such facts are memorialized in work product or reside in the mind of counsel.[10]

This sounds a lot more like a response to a contention interrogatory than a typical deposition, doesn't it? That is exactly how one court has described it: "[Rule 30(b)(6)] requires a good faith effort. . . to collect information, review documents, and interview employees with personal knowledge just as a corporate party is expected to do in answering interrogatories."[11]

Having Fun Yet?

Consider also how, when, and by whom such witnesses are prepared. In several instances courts have also looked behind the effort and concluded that waiting "until the last minute" and devoting "no more than a morning' to the preparation effort fall short of what is required by the rule.[12]

Very little else constrains the scope of an effective preparation. A more interesting question is, can the witness be "prepared" while the question is pending?

Step across the table for a minute and ask yourself how you would conduct such a deposition. It may be easier to conduct such a deposition than defend it. That said, do you ask the witness what he/she/the corporation knows or what it contends? Do you care? Does it make a difference to the jury? What sort of instruction does the jury receive about the effect of such responses?

Better yet, what sort of reliable, probative evidence is produced from a process that can become so convoluted and artificial? Once you connect a blissfully ignorant witness to litigation long ago and far away and then compel them to speak with authority (and, perhaps, conclusively) about facts or contentions – we still have not resolved that one, have we? – it is pretty easy to see who drew the short straw, isn't it?

William S. Ohlemeyer is Vice Presi-

dent and Associate General Counsel, Altria Group, Inc. Before joining Altria Group, Mr. Ohlemeyer was a partner with Shook, Hardy & Bacon. The opinions of the author are his own and not necessarily those of his employer.

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Endnotes:

1 Fed R. Civ. P. 30(b)(6) provides, in its entirety:

A Party may in the party's notice and in a subpoena name as the deponent a public or private corporation or 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 the person 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 the 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 *Icardi v. Lorillard,* 1991 WL 158911 (E.D.Pa 1991); *in re Vitamins Antitrust Litigation,* 216 F.R.D. 168 (D.D.C. 2003).

3 *Wilson v. Lakner*, 228 F.R.D. 524, 530 (D.Md. 2005).

4 *Payless Shoesource Worldwide, Inc. v. Target Corporation,* 2007 WL 1959194 at *I (D.Kan. June 29, 2007).

5 *Wilson*, 228 F.R.D. at 530.

6 *W.R. Grace & Co. v. N & M Inc.,* 2006 WL 3694595 (S.D.Miss. Dec. 13, 2006).

7 *Briddell v. Saint Gobain Abrasives Inc.*, 233 F.R.D. 57, 60 (D.Mass 2005).

8 *Id.*

9 *See e.g., Vitamins Antitrust Lit.*, 216 F.R.D. at 173.

10 *Id*. at 172.

11 *Wilson*, 228 F.R.D. at 528-529.

The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300