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Champions for Justice

16. Taking Killer Corporate Representative Depositions under FRCP 30 (b)(6) and Rule 4:5 (b)(6)

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CORPORATE DEPOSITIONS IN VIRGINIA

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I. Summary

The ability to take the deposition of a corporate representative is a powerful weapon in your hands. This paper will explore the rules that govern corporate depositions in Virginia; discuss when, why and under what circumstances you might want to take the deposition of a corporate representative; and describe the mechanics of taking the deposition of a corporate representative in state and federal courts.

II. Corporate Entities

Procedural rules in state and federal court rules allow litigants to take the deposition of any corporate entity which is not a living, breathing person. Corporate entities that can be deposed under these rules include nonprofit organizations, government agencies, small companies, mid-size companies and multi-national corporations.[1] A corporate entity may be deposed regardless of whether it is a party or a nonparty to the litigation.[2]

III. Overview of the Rules

A. Similarities Between State and Federal Court Rules

Corporate depositions are primarily governed by Virginia Supreme Court Rule 4:5 and Federal Rule of Civil Procedure 30. Virginia's rule is closely modeled on the federal rules. Although the Supreme Court of Virginia has not expressly held that it is appropriate to rely upon federal precedent regarding corporate depositions, it has considered federal case law when resolving discovery disputes in other contexts where the state rules and federal rules were closely aligned.[3] Also, at least one circuit court has observed that although federal case law is not binding upon Virginia courts, it is appropriate to consider federal law when evaluating the scope and purpose of the state rule that allows corporate depositions.[4]

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[1] Va. Sup. Ct. R. 4:5(b)(6); Fed. R. Civ. P. 30(b)(6).
[2] *Id.*
[3] *See Brown v. Black*, 260 Va. 305, 314, 534 S.E.2d 727, 731 (2000).
[4] *See Staples Corp. v. Washington Hall Corp*., 44 Va. Cir. 372 (Fairfax 1998) (Klein, J.); see also *Friedman v. Five Guys Enters., LLC*, 91 Va. Cir. 457 (Fairfax 2016) (Tran, J.); *Martin v. Nordic Group of Cos*., 61 Va. Cir. 13 (Fairfax 2003) (Vieregg, J.).

B. Rules that Govern the Deposition of Corporate Designees

A side-by-side comparison of Virginia Supreme Court Rule 4:5(b)(6) and Federal Rule of Civil Procedure 30(b)(6) reveals how similar they are to each other.

Va. Sup. Ct. R. 4:5(b)(6)	Fed. R. Civ. P. 30(b)(6)
A party may in his notice *name as the deponent a public or private corporation* or *a partnership* or *association* or *governmental agency* and designate *with reasonable particularity the matters* on which *examination* is requested. *The organization* so named shall *designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf*, and *may set* forth, for each person designated, *the matters on which* he *will testify*. *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*.	In its notice or subpoena, *a party may name as the deponent a public or private corporation, a partnership*, an *association*, a *governmental agency*, or other entity and must describe *with reasonable particularity the matters* for *examination*. *The* named *organization* must then *designate one or more officers, directors, or managing agents, or* designate *other persons who consent to testify on its behalf*; and it *may set* out *the matters on which* each person designated *will testify*. A subpoena must advise a nonparty organization of its duty to make this designation. *The persons designated* must *testify* about information *known or reasonably available to the organization. This* paragraph *(6) does not preclude a deposition by any other procedure* allowed by *these rules*.

In broad terms, Virginia Supreme Court Rule 4:5(b)(6) and Federal Rule of Civil Procedure 30(b)(6) allow a party to depose a corporate representative if: (1) the party issues a deposition notice that identifies the time and location of the deposition; and (2) provides the corporate entity with a list of topics that will be explored at the deposition. The party desiring the corporate deposition must describe the topics with "reasonable particularity."

Upon receiving the notice, the corporate entity must: (1) identify one or more individuals to testify on its behalf; and (2) prepare the individual(s) to testify regarding the designated topics. The corporate representative must then testify about the matters "known or reasonably available to the corporation."

C. Rules that Govern the Depositions of Corporate Officers and Representatives

It is important to recognize that Virginia Supreme Court Rule 4:5(b)(6) and Federal Rule of Civil Procedure 30(b)(6) are not the only rules that permit parties to take the deposition of a corporate entity. In fact, both rules expressly provide that they are *not* the only method by which a corporate entity can be deposed.

Other important rules are Virginia Supreme Court Rule 4:5(a1) and Federal Rule of Civil Procedure 30(a)(1), which allow a party to take the deposition of any person including corporate officers, directors, managing agents, or any other person whose testimony would bind the

corporation. Similarly, Virginia Supreme Court Rule 4:5(b)(1) and Federal Rule of Civil Procedure 30(b)(1) allow parties to depose "any person" as long as the party identifies the person by name **or** by a "general description sufficient to identify" the person "or the particular class or group" to which the person belongs.[5] Under subsection (b)(1), a party can notice the deposition of any individual who is most knowledgeable about one or more topics relating to the corporation.

The essential difference between these rules is that subsection (b)(6) permits the discovery of *corporate knowledge* through the entity's designated representative(s) and require advance notice of the topics that will be explored at the deposition. The corporation chooses the individual or individuals who will testify on its behalf. The representative has a duty to investigate the topics listed on the deposition notice, and his or her testimony is binding upon the corporation and cannot easily be changed. In contrast, subsections (a)(1) and (b)(1) permit parties to discover the *personal knowledge* of *specific individuals* within the corporation. Testimony given pursuant to these subsections might (or might not) bind the corporate entity, depending upon the specific individual's role within the corporation. If the individual is a corporate officer, director, or managing agent, the testimony is binding. The party asserting that the deponent's testimony is binding has the burden to establish that the deponent has one of these roles or serves one of these functions within the organization.[6]

D. Important Differences between State and Federal Rules

Although the state and federal rules are similar, there are some important differences that practitioners should note.

- **Number of depositions.** State court does not limit the number of depositions that can be taken in a case unless the court finds good cause to impose limitations.[7] In contrast, parties in federal court are limited to ten depositions each, unless they obtain leave of court to take more.[8]

- **Timing.** In state court, parties are generally permitted to take depositions any time after the action is commenced.[9] Plaintiffs must seek leave of court only if they wish to take a deposition before the action is commenced[10] or before the defendant's deadline to file a responsive pleading.[11] In federal court, parties are generally prohibited from taking

[5] Va. Sup. Ct. R. 4:5(b)(1); Fed. R. Civ. P. 30(b)(1).
[6] *Maggard v. Essar Glob. Ltd.*, Civil Action No. 2:12cv00031, 2013 U.S. Dist. LEXIS 166868, at *3-6 (W.D. Va. Big Stone Gap Nov. 25, 2013) (Sargent, J.); aff'd *Maggard v. Essar Glob. Ltd*., Civil Action No. 2:12cv00031, 2013 U.S. Dist. LEXIS 174527 (W.D. Va. Big Stone Gap Dec. 13, 2013) (Jones, J.) (citing *In re Honda Am. Motor Co*, 168 F.R.D. 535 (D. Md. 1996); *Founding Church of Scientology of Wash., D.C. v. Webster*, 802 F.2d 1448, 1452 n.4, 256 U.S. App. D.C. 54 (D.C. Cir. 1986)).
[7] Va. Sup. Ct. R. 4:6A.
[8] Fed. R. Civ. P. 30(a)(2).
[9] Va. Sup. Ct. R. 4:5(a).
[10] Va. Sup. Ct. R. 4:2.
[11] Va. Sup. Ct. R. 4:5(a).

depositions until they have met and conferred as required by Federal Rule of Civil Procedure 26(f) (the "Rule 26(f) conference").[12]

- **Location of party depositions.** In state court, party depositions are taken in the county or city in which suit is pending, in an adjacent county or city, at a place upon which the parties agree, or at a place that the court in such suit may designate for good cause. Good cause may include the expense or inconvenience of a non-resident party defendant who, who cannot easily or conveniently appear in one of those locations.[13] In federal court, plaintiffs are typically deposed where the suit is pending, but defendants are deposed where they reside or have their principal place of business.

- **Location of non-party depositions.** In state court, non-party witness depositions shall be taken in the county or city where the non-party witness resides, is employed, or has a principal place of business; at a place upon which the witness and the parties to the litigation agree; or at a place that the court may, for good cause, designate.[14]

	State Court	**Federal Court**
Location (Parties)	County or city in which suit is pending, in an adjacent county or city, at a place upon which the parties agree, or at a place that the court in such suit may designate for good cause. **Va. Sup. Ct. R. 4:5(a1)(ii)**	Plaintiff: jurisdiction where the suit is pending Defendant: jurisdiction of the corporation's principal place of business; within the state where the person resides, is employed or regularly transacts business in person **Fed. R. Civ. P. 45(c)(1)(B)** ***Botkin v. Donegal Mut. Ins. Co.*, Civil Action No. 5:10cv00077, 2011 U.S. Dist. LEXIS 63871 (W.D. Va. Harrisonburg June 15, 2011)**
Location (Non-Parties)	County or city where the non-party witness resides, is employed, or has a principal place of business; at a place upon which the witness and the parties to the litigation agree; or at a place that the court may, for good cause, designate. **Va. Sup. Ct. R. 4:5(a1)(ii)**	Within 100 miles of where the person resides, is employed, or regularly transacts business in person. **Fed. R. Civ. P. 45(c)(1)(A)**

[12] Fed. R. Civ. P. 26(d).
[13] Va. Sup. Ct. R. 4:5(a1)(ii).
[14] Va. Sup. Ct. R. 4:5(a1)(ii).

	State Court	Federal Court
Number	Unlimited **Va. Sup. Ct. R. 4:6A**	Ten **Fed. R. Civ. P. 30(a)(2)**
Timing	Any time after the defendant's deadline to file a responsive pleading **Va. Sup. Ct. R. 4:5(a)** **Va. Sup. Ct. R. 4:2**	Not before the 26(f) conference **Fed. R. Civ. P. 26(d)**
Duration	No limit	One 7-hour day **Fed. R. Civ. P. 30(d)(1)**
Subpoena duces tecum	Permitted **Va. Sup. Ct. R. 4:5(b)(1)** **Va. Sup. Ct. R. 4:5(b)(5)** **Va. Sup. Ct. R. 4:9**	Permitted **Fed. R. Civ. P. 30(b)(2)** **Fed. R. Civ. P. 34**
Method of Recording	Telephone, video conferencing or teleconferencing (must be taken before an appropriate officer in the locality where the deponent is present) **Va. Sup. Ct. R. 4:5(b)(7)**	Telephone and remote depositions are permitted. Deposition is deemed to take place where the deponent is located. **Fed. R. Civ. P. 30(b)(4)** Audio, audio-visual and stenographic Noticing party bears the costs **Fed. R. Civ. P. 30(b)(3)**
Use of Depositions	Any purpose including impeachment, but not for a motion for summary judgment or to motion to strike the evidence against the plaintiff, unless all parties agree. **Va. Sup. Ct. R. 4:7(a)** **Va. Sup. Ct. R. 4:7(e)** **Va. Code § 8.01-420**	Any purpose, including impeachment, substantive evidence, and motions for summary judgment. **Fed. R. Civ. P. 32(a)** *See also* **Fed. R. Civ. P. 56(c)(1)(A)**

IV. Why Corporate Depositions Are Important

The obvious purpose of taking a discovery deposition is to learn information that is, or might be, relevant to your case. But depositions serve other important purposes as well. It is important to depose an adverse party in order to:

- Discover and obtain substantive evidence;
- Discover the adverse party's version of events;
- Learn how the adverse party might be perceived by the jury or judge at trial;
- "Lock down" the adverse party's testimony, so that you can impeach him or her if his/her testimony at trial differs from what he/she said during the deposition; and,
- Obtain party admissions that can be used affirmatively or defensively in motions or at trial.

It is generally a good idea to take the deposition of an adverse party. This is particularly true when you need substantive evidence from your adversary in order to support your position, and/or when you expect the adverse party to oppose you in the litigation or at trial.

The considerations outlined above are especially important when the adverse party in your case is a corporate entity. If you do not depose the proper person, the corporation can frustrate your efforts to prosecute your case successfully by obscuring your access to evidence, evading your efforts to learn its position in the case and to pin down its testimony, and/or by preventing you from obtaining party admissions.

A. Obtaining Evidence: Personal Knowledge vs. Corporate Knowledge

There is a very real and important difference between testimony from a fact witness and testimony from a corporate designee. Fact witnesses are individuals who are deposed as to their personal knowledge on the date of the deposition. They include corporate officers, directors, managing agents, current employees, former employees, or any other person with relevant knowledge. Fact witnesses are not required to prepare for the deposition in advance, and they are generally not entitled to notice of the topics that will be explored at the deposition.

Fact witnesses have several options when answering questions during a deposition. They can and should answer the question if they have personal knowledge. However, if they do not know or remember the requested information, they are permitted to answer "I don't know" and "I don't remember." Subject to the court's discretion, fact witnesses are permitted to refuse to answer questions that request privileged information, violate their right to be free from self-incrimination under the Fifth Amendment of the Constitution, or impermissibly disclose trade secrets or other protected information.

"I don't know" and "I don't remember" answers are problematic because they prevent the noticing party from discovering evidence in the case. If your goal is to discover information

about the corporation, deposing fact witnesses, alone, might not be sufficient because it is unlikely that any single fact witness will have personal knowledge of everything that the corporation "knows" or "did", or every document that the corporation received, reviewed, or drafted. If you rely upon fact witness testimony alone, you might find yourself deposing numerous individuals in a fruitless attempt to discover the information that you seek. You might keep getting "I don't know" and "I don't remember" answers to your questions, only to find that despite your efforts, you do not have the evidence that you seek before the discovery deadline in your case expires.

Another problem with "I don't know" and "I don't remember" answers is that they can result in unfair surprise if, when you get to trial: (1) the fact witness "suddenly" knows or remembers the answer to your question; (2) the corporation produces a witness who is able to answer questions that the deponent was unable to answer when they were deposed; or (3) the corporation finds a witness who testifies differently from the deponent.

The bottom line is that when you deal with corporations, it can be risky to rely upon the personal knowledge of fact witnesses alone because their personal knowledge is not the same as corporate knowledge and is subject to change over time.

Fortunately, Virginia Supreme Court Rule 4:5(b)(6) and Federal Rule of Civil Procedure 30(b)(6) seek the discovery of *corporate knowledge*, not the personal knowledge of any deponent.[15] In doing so, these rules prevent corporate entities from "hiding the ball", surprising their adversaries at trial, or engaging in inadvertent (or advertent) gamesmanship. These rules impose duties upon corporate designees that are materially greater than those imposed upon any individual deponent because they require the corporate designee to be prepared to testify on the corporation's behalf as to "all matters known or reasonably available to [the corporation] and, therefore, implicitly requires such persons to review all matters known or reasonable available to it in preparation for the Rule 30(b)(6) deposition." If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give complete, knowledgeable, non-evasive, and binding answers for the corporation.[16]

Why does this matter?

Because Virginia Supreme Court Rule 4:5(b)(6) and Federal Rule of Civil Procedure 30(b)(6) force the corporate entity and its lawyers to work for *you*. In lieu of wading through volumes of documents and deposing an endless stream of fact witnesses in an attempt to find the "right person" who has the information that you seek, you can simply describe what you want to know on the deposition notice. As long as the topic is relevant and you describe it with reasonable particularity, the corporate entity is obligated to investigate the question and be prepared to testify about it at the deposition.

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[15] *Martin v. Nordic Group of Cos*., 61 Va. Cir. 13 (Fairfax 2003) (Vieregg, J.).

[16] *Friedman v. Five Guys Enters., LLC*, 91 Va. Cir. 457 (Fairfax 2016) (citing *Spicer v. Universal Forest Prods*., 2008 U.S. Dist. LEXIS 77232, *10 (W.D. Va. Roanoke Oct. 1, 2008) (Urbanski, J.)).

Preparing for a corporate designee deposition can be burdensome, but the fact that such preparation "requires many hours of work and review of voluminous documents does not relieve the corporation of its responsibility to adequately prepare."[17] Corporate designees have a duty to investigate the information described on the deposition notice by identifying and speaking to relevant individuals, digging through old files, reviewing documents, or by any other means. It is not enough for the corporate designee to merely talk to counsel, and do nothing else.[18] If a corporation designates a representative who is not prepared to testify at the deposition, and whose preparation for the deposition is limited to speaking with counsel, the corporation can, and probably will, be admonished or sanctioned by the court.[19]

The moral of the story is this – don't go on a wild goose chase. Make the corporate entity do the legwork for you. Issue a Rule 4:5(b)(6) or Rule 30(b)(6) deposition notice that asks what you want to know. Be specific. When you do, the corporate entity must investigate the answer to your question and report back to you or else risk being sanctioned by the court.

B. Obtaining Party Admissions and Material for Impeachment

Corporate entities sometimes engage in tactics to frustrate their opponents and limit their access to information. A common tactic that corporate entities employ is to argue that the individual who was deposed did so as a fact witness only, and that his or her testimony does not bind the corporation. Unless the noticing party can demonstrate that the individual was a corporate representative at the time of the deposition, the corporate entity can disavow the testimony of the fact witness, produce a different witness at trial, change its story or position, avoid impeachment, and assert that the testimony of the fact witness is inadmissible hearsay and not a party admission.

Therefore, when taking a deposition, it is essential to know whether the deponent's testimony will bind the corporation. Clearly, any person that a corporation designates in response to a notice issued under Virginia Supreme Court Rule 4:5(b)(6) or Federal Rule of Civil Procedure 30(b)(6) is a corporate representative whose testimony binds the corporation. This is true even if the person designated is not currently employed by the corporate entity, was never employed by the corporate entity, or is a "low-level" employee. Corporate designees are considered parties, and their testimony constitutes party admissions.[20]

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[17] *Id.*

[18] *Spicer v. Universal Forest Prods.*, 2008 U.S. Dist. LEXIS 77232 at *6-7 (sanctions against Universal).

[19] *See Friedman v. Five Guys Enters., LLC*, 91 Va. Cir. 457 (Fairfax 2016) (citing *Martin v. Nordic Grp. of Cos*., 61 Va. Cir. 13, 23 (Fairfax 2003)); *see also Am. Safety Cas. Ins. Co. v. C.G. Mitchell Constr*., 268 Va. 340, 601 S.E.2d 633 (2004) (holding that the trial court did not abuse its discretion when it entered judgment against a defunct corporation as a discovery sanction where the defunct corporation offered two witnesses in their individual capacities, and refused to designate a representative, because fact witness depositions are not the same as – and do not substitute for – corporate depositions under Rule 4:5(b)(6)); *Musick v. Dorel Juvenile Grp., Inc.*, 847 F. Supp. 2d 887, 892 (W.D. Va. Abingdon Mar. 22, 2012) (Jones, J.) (imposing sanctions against corporate defendant whose corporate representative attempted to change his testimony by later claiming that he "forgot" certain documents existed).

[20] *See Samsung Elecs. Co. v. NVIDIA Corp*., 2016 U.S. Dist. LEXIS 10309, 2016 WL 356083 (E.D. Va. Richmond Jan. 27, 2016) (Payne, J.) (ruling that defendant the defendant could not add another witness to testify as a corporate representative after its 30(b)(6) deposition testimony had already been taken).

Determining whether someone is a corporate representative can become more complicated when the individual is deposed under subsections (a)(1) and (b)(1) of the rules. If the deponent is an officer, director or managing agent, then they are deemed to speak for the organization, and the noticing party is not required to issue a subpoena to compel the testimony.[21] Knowing whether an individual is an officer or director is generally straightforward. However, it can be complicated to determine whether an individual is a "managing agent" under the rules.

The determination of whether an individual is a "managing agent" of a corporation must be made at the time of the deposition.[22] The burden of proving that an individual qualifies as a managing agent rests with the party seeking discovery, and doubts about an individual's status as such at the pre-trial discovery stage are resolved in favor of the examining party.[23] If an examining party fails to meet its burden of showing that an individual is, in fact, a managing agent, then the individual cannot be compelled to testify without a subpoena.[24]

Courts have held that the test for determining who may be properly designated a managing agent is a functional one that must be made on a case-by-case basis.[25] Some of the controlling factors that courts generally agree are used in deciding whether an individual is a managing agent of a corporation include:

(1) Whether the corporation has invested the person with discretion to exercise his judgment;

(2) Whether the employee can be depended upon to carry out the employer's directions; and,

(3) Whether the individual can be expected to identify himself or herself with the interests of the corporation as opposed to the interests of the adverse party.[26]

Courts also have been known to consider:

(1) The degree of supervisory authority which a person is subject to in a given area; and,

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[21] Va Sup. Ct. R. 4:7; *see also Staples Corp. v. Washington Hall Corp.*, 44 Va. Cir. 372 (Fairfax 1998) (Klein, J.) (finding that the corporate officers were parties that could be deposed under Rule 4:5(a1), and that their testimony would bind the corporation because they were officers, directors or managing agents); *Maggard v. Essar Glob. Ltd.*, Civil Action No. 2:12cv00031, 2013 U.S. Dist. LEXIS 166868, at *3-6 (W.D. Va. Big Stone Gap Nov. 25, 2013) (Sargent, J.); aff'd *Maggard v. Essar Glob. Ltd*., Civil Action No. 2:12cv00031, 2013 U.S. Dist. LEXIS 174527 (W.D. Va. Dec. 13, 2013) (Jones, J.).

[22] *Maggard*, 2013 U.S. Dist. LEXIS 166868 at *5 (citing *In re Honda Am. Motor Co*, 168 F.R.D. 535 (D. Md. 1996); *Curry v. States Marine Corp. of Del.*, 16 F.R.D. 376, 377 (S.D.N.Y. 1954)).

[23] *Id.*

[24] *Id.* (citing *United States v. Afram Lines (U.S.A.), Ltd*., 159 F.R.D. 408, 413 (S.D.N.Y. 1994)).

[25] *Maggard*, 2013 U.S. Dist. LEXIS 166868 at *5 (citing *Honda*, 168 F.R.D. at 540).

[26] *Id.* (citing *Honda*, 168 F.R.D. at 540; *Reed Paper Co. v. Proctor & Gamble Distrib. Co*., 144 F.R.D. 2, 4 (D. Me. 1992); *Colonial Capital Co. v. Gen. Motors Corp*., 29 F.R.D. 514, 516-17 (D. Conn. 1961); *Sugarhill Records Ltd. v. Motown Record Corp*., 105 F.R.D. 166, 170 (S.D.N.Y. 1985); *U.S. v. Afram Lines, Ltd.*, 159 F.R.D. 408 (S.D.N.Y. 1994); *Indep. Prods. Corp. v. Loew's, Inc*., 24 F.R.D. 19, 25 (S.D.N.Y. 1959)); *see also Orlich v. Larus*, 1 Va. Cir. 214 (Richmond 1980) (Sheffield, J.) (finding that individual was not a managing agent because he did not have general power to exercise his judgment and discretion in dealing with the defendant's development project and therefore could not be compelled to testify on behalf of the corporation).

(2) The general responsibilities of the individual regarding the matters at issue in the litigation.

When determining whether an individual is a managing agent, "[t]he 'paramount test' is whether the individual can be expected to identify with the corporation's interests as opposed to an adversary's."[27]

Bottom line – if you issue a deposition notice under Virginia Supreme Court Rule 4:5(b)(6) or Federal Rule of Civil Procedure 30(b)(6), you do not need a subpoena to compel the designee's attendance at the deposition, and you can be assured that the testimony constitutes party admissions and is binding upon the corporation. The corporation is not permitted to change its position or testimony at trial, and if it does, you can impeach the corporation and move to exclude the "new" testimony.

If you issue a deposition notice for the testimony of a specific individual – by name or description – pursuant to Virginia Supreme Court Rule 4:5(b)(1) or Federal Rule of Civil Procedure 30(b)(1), you do not need a subpoena if the deponent is an officer, director, or managing agent of the corporation. Those individuals are considered parties, and their testimony binds the corporation to a certain degree. However, because fact witnesses testify on the basis of personal knowledge, the corporation could offer different witnesses at trial to testify differently or inconsistently with the fact witnesses who you deposed.

C. Leverage

Unless you have represented a corporate entity, you might not realize the tremendous power and leverage that the ability to depose a corporation puts into your hands. Many corporate entities do not want to be deposed and put significant pressure upon their attorneys to postpone the deposition indefinitely and/or to limit the scope of the topics that will be explored. Preparing for a corporate deposition is expensive and time-consuming. It interferes with the corporation's main priority, which is to run its business. Small companies who are not familiar with litigation are often fearful of the prospect of being deposed. Large, multi-national corporations are particularly resistant to giving depositions because party admissions obtained in one case have an infinite shelf life and can be used against them in future litigation.[28] For all these reasons, noticing the deposition of a corporate designee and/or the deposition of specific individuals within the corporation *will* get the corporation's attention and can create leverage at a crucial time in the negotiations.[29]

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[27] *Honda*, 168 F.R.D. at 541.

[28] *See Sky Cable, LLC v. Coley*, Civil Action No. 5:11cv00048, 2014 U.S. Dist. LEXIS 8689, at *6 (W.D. Va. Harrisonburg Jan. 23, 2014) (Urbanski, J.) (admitting a corporate representative's 30(b)(6) deposition testimony from a bankruptcy case against the deponent in a separate action).

[29] *See Lorillard Tobacco Co. v. Cal. Imps., LLC*, 2011 U.S. Dist. LEXIS 113400 (E.D. Va. Richmond Oct. 3, 2011) (Lauck, J.) (observing that after the defendant noticed the plaintiff corporation's 30(b)(6) deposition, the plaintiff did not provide dates, but instead asked to settle).

V. Corporate Tactics and Objections

Corporate entities often place tremendous pressure upon their counsel to eliminate to avoid the deposition or postpone it indefinitely, or to limit the scope of the topics that will be explored. This section explores issues that arise regarding corporate depositions, common defense tactics and objections, and how to deal with them.

A. Timing of Objections in the Eastern District of Virginia

In the United States District Court for the Eastern District of Virginia, a party wishing to take the deposition of a corporate entity must give at least eleven (11) days' notice.[30] Local Civil Rule 26(C) permits the noticed party to serve its objections to any requests contained in the notice of deposition fifteen (15) days after service of the notice.[31] In other words, a corporate entity that fails to object to the deposition notice within fifteen days is deemed to have waived any and all objections to the fact, time and location of the deposition notice, and to the topics listed in the deposition notice. Therefore, if any corporate entity objects to the scope of the deposition topics listed on the notice more than fifteen days after the notice is served, the noticing party can argue that the objections are untimely, and are therefore waived.

B. Relevance

Virginia Supreme Court Rule 4:1 and Federal Rule of Civil Procedure 26 allow parties to discover information that is *relevant*. Because corporate depositions impose burdens upon corporations, courts disfavor discovery requests that do not seek information that is relevant to the claim or dispute.

For example, in *Palmer v. Big Lots Stores, Inc.*,[32] Judge James R. Spencer struck several deposition topics on grounds that they were not relevant to the litigation (personal injury arising on the premises of a Big Lots store). Specifically, the judge refused to allow the plaintiff to discover information regarding:

- Insurance coverage;
- The number of customers in the store;
- Alternative procedures and the advantages and costs of following alternative procedures;
- Four topics regarding spoliation and surveillance, because there was no video of the incident and Big Lots' review of the cameras at or near the scene did not show any part of the event in issue;

[30] E.D. Va. Loc. Civ. R. 30(H) (cited by *Humanscale Corp. v. CompX Int'l, Inc*., 2009 U.S. Dist. LEXIS 120197, 2009 WL 5091648 (E.D. Va. Richmond Dec. 24, 2009) (Spencer, J.)).
[31] E.D. Va. Loc. Civ. R. 26(C); *Gray v. HSBC Bank USA, N.A.*, 2015 U.S. Dist. LEXIS 140235, *4, 2015 WL 5970444 (E.D. Va. Newport News Oct. 9, 2015) (Morgan, J.) (holding that the defendant waived its objections to the scope of the deposition notice because although the notice was onerous, the defendant failed to object within 15 days as required by rule).
[32] *Id.*, 2014 U.S. Dist. LEXIS 109926, 2014 WL 3895698 (E.D. Va. Richmond Aug. 8, 2014) (Spencer, J.).

- Video from other parts of the store, because it was not likely to lead to admissible evidence, and also because it was no longer available;

- Three topics about remedial measures; and,

- Five topics regarding feasible alternatives.[33]

C. Overbroad, Vague and Ambiguous

Virginia Supreme Court Rule 4:5(b)(6) and Federal Rule of Civil Procedure 30(b)(6) require the noticing party to identify the topics that will be explored at the deposition with "reasonable particularity." Corporations sometimes attempt to limit the scope of the deposition by objecting on the basis that the topics are not stated with reasonable particularity and by asserting that the topics are overbroad, vague and/or ambiguous. Also, if the deponent is not sufficiently prepared to address a particular topic, the corporation's attorneys might argue that the deposition notice was vague or ambiguous, and that the corporation did the best it could with the shoddy request.

Because "deposition topics should be clear," courts tend to resolve ambiguities in favor of the deponent.[34] This is because "when a topic for a Rule 30(b)(6) deposition is overbroad or vague, the responding party is unable to identify the outer limits of the areas of inquiry noticed, and designating a representative in compliance with the deposition notice becomes impossible."[35]

In *Friedman v. Five Guys Enters., LLC*, the court explained:

> Requests that identify as topics the entirety of issues in the litigation or require general knowledge of voluminous documents do not meet the reasonable particularity test. ***An attorney who purposefully sends out catchall provisions in a discovery request does so in either intentional or uniformed disregard of the Rules.*** Some argue an entitlement to issue broad discovery in an abundance of caution to defend against the improper mincing of words by opponent's stone-walling discovery. The governing rule has never been that two wrongs make a right or that discovery should be issued encumbered with the assumption that the other side will hot otherwise respond truthfully. Within the four corners of the Notice, it is abundantly clear that the Notice does not

[33] *Id.*
[34] *LifeNet Health v. LifeCell Corp*., 2014 U.S. Dist. LEXIS 154481 (E.D. Va. Norfolk Oct. 31, 2014) (Morgan, J.).
[35] *Palmer v. Big Lots Stores, Inc*., 2014 U.S. Dist. LEXIS 109926, 2014 WL 3895698 (E.D. Va. Richmond Aug. 8, 2014) (Spencer, J.).

> describe topics with reasonable particularity in violation of Rule 4:5(b)(6).[36]

Id. (emphasis added).

The noticing party should identify *specific* topics on the deposition notice. Specific requests are more likely to yield the desired information. Plus, if the topics are specific, the court will be less likely to sustain the corporation's objections.

What constitutes "reasonable particularity" depends upon the facts and circumstances of the particular case. However, it can be helpful to review decisions of courts that have ruled on these objections. For example, *Palmer v. Big Lots Stores, Inc.*[37] is a recent case arising from personal injury on the premises of a Big Lots store. In that decision, the court ruled as follows:

Overbroad and/or Unduly Burdensome	**Permissible**
Identification of persons with knowledge of the entire notice and the likely subjects of each such person's knowledge	Knowledge about the incident, how it happened, why it happened, who was responsible for the boxes falling, and Defendant's investigation of the incident are proper topics for deposition. These topics are allowed to the extent that they do not violate attorney-client privilege or the work product doctrine.
Big Lots' assertions and defenses stated in its answer and subjects covered by Palmer's interrogatories and requests for production	Information about the plaintiff, her condition, and her injuries
Topics related to other stores and incidents; specifically, the plaintiff's inquiry into every complaint or incident, without time or geographic limitation	Incidents at this specific store in the past 3 years
Topics related to other stores and incidents; specifically, the plaintiff's inquiry into every complaint or incident involving items falling from a high level	
	Ladders within the Big Lots store
	Big Lots' use of ladders
	Storage of merchandise
	Defendant's policies and procedures

[36] *Id.*, 91 Va. Cir. 457 (Fairfax 2016) (Tran, J.)
[37] *Id.*, 2014 U.S. Dist. LEXIS 109926, 2014 WL 3895698 (E.D. Va. Richmond Aug. 8, 2014) (Spencer, J.).

Overbroad and/or Unduly Burdensome	Permissible
	Defendant's best practices
	Industry standards

In *Woodcock v. O'Connell*, the court granted the plaintiff's motion to compel a topic of the Rule 4:5 (b)(6) deposition of the corporate defendant, and ordered the defendant to:[38]

- **Identify the last known home and/or other forwarding street address and telephone number, for each individual who was employed by it at any time during the relevant time period (3 weeks).**

In sum, if the deposition topic seeks relevant information, and is not unduly burdensome, the court is likely to compel its production.

D. Inappropriate for a Corporate Deposition

Corporations have also been known to object to deposition topics on grounds that they are not appropriate for a corporate deponent. Inappropriate topics are questions that seek litigation strategy, circumvent the number of allowable contention interrogatories, and seek information relating to claims of privilege.

In *Friedman v. Five Guys Enters., LLC*, the court found that the following topic was problematic:[39]

- **The Answer filed by Five Guys in response to the First Amended Complaint, including the factual basis for the denial of any allegation as well as the factual basis for any defenses asserted.**

The court found that the topic was improper because it requires the corporate designee to be prepared to explain every asserted defense, no matter how relevant or material those defenses may remain to the issues in dispute.

The court also took issue with that topic because that "listing of catchall topics for all issues raised in the pleadings … circumvents the limitations on interrogatories." The court explained that litigants appropriately use contention interrogatories to discover facts that an opposing party contends support the material issues in dispute. However, interrogatories are limited in number. Therefore, "using corporate designee topics to cover all assertions without regard to materiality and without limits to circumvent the limitations on interrogatories is improper."

[38] *Id.*, 1997 Va. Cir. LEXIS 741 (Hampton 1997) (Andrews, J.)
[39] *Id.*, 91 Va. Cir. 457 (Fairfax 2016) (Tran, J.).

The court also had an issue with the topic that asked for:

- **The summary of the facts that you believe are known by each of your witnesses.**

In the court's view, this question requires the corporate designee to identify all witnesses, including those who the corporation intends to call at trial. The court explained that the "determination of who will be witnesses at trial is one made by trial counsel, and not necessarily a corporate designee. As such, this topic is an ill-disguised effort to obtain information as to Defense counsel's strategy, which is improper."

Likewise, in *Palmer v. Big Lots Stores, Inc*.[40], the court ruled that it was improper for the plaintiff to ask defendant Big Lots' corporate designee to answer questions about:

- **Big Lots' claims of privilege.**

The court also held that such questions were duplicative, because these questions were addressed by the privilege log.[41]

E. Number of Topics

In an effort to limit the scope of the deposition, a corporate entity might object to the number of topics on the notice. However, the rules do not impose a limit on the number of topics that can be explored during a single deposition. Therefore, if the topics are relevant and are not overly burdensome, the court will probably allow the discovery to proceed.

For example, in the Eastern District of Virginia, a deposition notice with 33 topics was permissible.[42] In another case from the Eastern District, the court did not take issue with the fact that there were 60 deposition topics, but it struck a number of the topics because they sought irrelevant information.[43] At least one Virginia trial court has approved a deposition notice identifying 27 subjects.[44] This author has issued a deposition notice identifying 84 topics not including subparts in state court without repercussions.

The upper limit in each court is unknowable because the reasonableness of the requests depends upon the facts and circumstances of the particular case. That being said, the Eastern District of Virginia has found that 170 topics was too many, and ordered the parties to meet and confer regarding the scope of the deposition notice.[45] This author agrees that 170 topics are probably too many in federal court because depositions in that forum are typically limited to one 7-1/2 hour day.

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[40] *Id.*, 2014 U.S. Dist. LEXIS 109926, 2014 WL 3895698 (E.D. Va. Richmond Aug. 8, 2014) (Spencer, J.).
[41] *Id.*
[42] *Corliss Moore & Assocs., LLC v. Credit Control Servs*., 497 B.R. 219 (E.D. Va. Richmond Sept. 4, 2013) (Spencer, J.).
[43] *Palmer v. Big Lots Stores, Inc*., 2014 U.S. Dist. LEXIS 109926, 2014 WL 3895698 (E.D. Va. Richmond Aug. 8, 2014) (Spencer, J.).
[44] *Martin v. Nordic Group of Cos*., 61 Va. Cir. 13 (Fairfax 2003) (Vieregg, J.).
[45] *Flame S.A. v. Indus. Carriers*, 2014 U.S. Dist. LEXIS 190378 (E.D. Va. Norfolk April 30, 2014) (Leonard, M.J.).

F. Response Time

Another common objection asserted by corporate entities is that they do not have enough time investigate all of the issues on the notice before the scheduled deposition. Courts understand the burdens that corporate representatives face in preparing for depositions, and so if the court perceives that the corporation is being diligent, it might be sympathetic to this objection. In order to avoid this issue, the noticing party should issue deposition notices promptly in order to give the corporation a reasonable amount of time to conduct its investigation before proceeding with the investigation.

The reasonableness of response time depends upon the facts and circumstances of each case, but in Virginia, a court held that it was improper for a plaintiff to notice a corporate designee deposition with 29 topics a week and a half before the discovery deadline, with only five business days to prepare for all 29 topics.[46] In that case, the court awarded attorney's fees to the corporation for the cost of filing and arguing the motion for protective order. [47]

In order to avoid objections along these lines, the noticing party should allow the responding party a reasonable amount of time to conduct its investigation. In federal court, the noticing party should consider having a dialogue with the corporate entity's counsel regarding the nature and scope of the deposition notice during the Rule 26(f) conference.

G. Timeliness

Courts tend to sympathize with corporations that are served with corporate designee depositions notices shortly before the discovery deadline in the case. In the case discussed immediately above, the court found that it was "facially unreasonable" for the plaintiff to serve discovery one and a half weeks before the deadline "when there [was] no valid reason that it could not have been served well before the discovery deadline."[48] It further found, "The fact that … Plaintiff counsel alerted Defense counsel [several months prior] of their intent to conduct a corporate designee deposition towards the end of the discovery schedule does not render the ultimate request any less unreasonable or burdensome as Defendant cannot start its preparation until it receives the topics."[49] In some cases, the court might be willing to extend the discovery deadline and amend the scheduling order, but such leniency from the court is not guaranteed.[50] Therefore, in order to avoid issues regarding timeliness, the noticing party should make an effort to issue (b)(6) deposition notices well before the discovery deadline.

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[46] *Friedman v. Five Guys Enters., LLC*, 91 Va. Cir. 457 (Fairfax 2016) (Tran, J.).
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Lathon v. Wal-Mart Stores East, LP*, 2009 U.S. Dist. LEXIS 54682, 2009 WL 1810006 (E.D. Va. Alexandria June 24, 2009) (Lauck, M.J.) (where plaintiff issued a corporate designee notice the day before that discovery closed, the Court extended the discovery deadline and amended the scheduling order, and denied the defendant's motion, but ordered the plaintiff to pay defendant's costs in preparing the motion); *see also DE Techs., Inc. v. Dell, Inc*., Civil Action No. 7:04cv00628, 2007 U.S. Dist. LEXIS 2769, at *2 (W.D. Va. Roanoke Jan. 12, 2007) (Conrad, J.) (holding that party could not take a Rule 30(b)(6) deposition after the deadline); *see also Stretchline Intellectual Props. v. H&M Hennes & Mauritz LP*, 2015 U.S. Dist. LEXIS 118270, 2015 WL 5175196 (E.D. Va. Norfolk Sept. 3, 2015) (Jackson, J.) (denying party's request for a 30(b)(6) deposition because when the corporation kept pushing off the request, the party did not move to compel but rather "tolerated" the delays).

H. Location

Another possible area of contention is *where* the deposition will take place. Courts have broad discretion to determine the appropriate location for a deposition.[51]

In state court, party depositions are taken in the county or city in which suit is pending, in an adjacent county or city, at a place upon which the parties agree, or at a place that the court in such suit may designate for good cause. Good cause may include the expense or inconvenience of a non-resident party defendant who, who cannot easily or conveniently appear in one of those locations.[52]

In *North & South Lines, Inc. v. United States Fid. & Guar. Co*., the court denied the corporate representative's motion for a protective order and request to be deposed in Georgia, and not in Virginia, because it considered the individuals to be considered parties, and found that requiring the defendant to be deposed in Harrisonburg was not unduly burdensome because in today's society, a trip from Georgia to Virginia would not cause undue hardship on the defendant corporation or its employees.[53]

The location of party depositions is one of the few major differences between state and federal court procedure. State courts generally require parties to be deposed in the jurisdiction where the litigation is pending. Likewise, in federal court, a plaintiff's deposition ordinarily will be held in the forum district, as plaintiff in selecting the forum has consented to participating in proceedings there.[54]

However, in federal court, the deposition of a defendant might not take place in the forum jurisdiction. This is "because a non-resident defendant ordinarily has no say in selecting a forum, an individual defendant's preference for a situs for his or her deposition near his or her place of residence — as opposed to the judicial district in which the action is being litigated — is typically respected."[55]

When the defendant is a corporate entity, the initial presumption is that a corporate defendant should be deposed in the district of the corporation's principal place of business.[56] "To

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[51] *Botkin v. Donegal Mut. Ins. Co.*, Civil Action No. 5:10cv00077, 2011 U.S. Dist. LEXIS 63871, at *22 (W.D. Va. Harrisonburg June 15, 2011) (Urbanski, J.) (citing *Armsey v. Medshares Mgmt. Servs., Inc.*, 184 F.R.D. 569, 571 (W.D. Va. Big Stone Gap 1998) (Sargent, J.); *In re Outsidewall Tire Litig.*, 267 F.R.D. 466, 471 (E.D. Va. Alexandria 2010) (Ellis, J.)).

[52] Va. Sup. Ct. R. 4:5(a1)(ii).

[53] *Id.*, 46 Va. Cir. 294 (Fairfax 1998) (McGrath, J.).

[54] *Botkin v. Donegal Mut. Ins. Co.*, Civil Action No. 5:10cv00077, 2011 U.S. Dist. LEXIS 63871, at *22.

[55] *Id.* at *22-23.

[56] *Gray v. HSBC Bank USA, N.A.*, 2015 U.S. Dist. LEXIS 140235, 2015 WL 5970444 (E.D. Va. Newport News Oct. 9, 2015) (Morgan, J.) (citing *In re Outside Tire Litigation*, 267 F.R.D. 466, 471 (E.D. Va. Alexandria 2010) (Ellis, J.)); *see also Swimways Corp. v. Zuru, Inc*., 2014 U.S. Dist. LEXIS 101713 (E.D. Va. Norfolk June 6, 2014) (Leonard, M.J.) (granting defendant Chinese corporation's request to be deposed in Hong Kong and not in Virginia).

be sure, this presumption may be overcome, but only where circumstances exist distinguishing the case from the ordinary run of civil cases."[57]

Factors that may overcome the presumption and persuade a court to permit the deposition be taken elsewhere include:

(1) Location of counsel in the forum district;

(2) The number of corporate representatives to be deposed;

(3) The likelihood that significant discovery disputes will arise and necessitate resolution by the forum court;

(4) Whether the persons sought to be deposed often engage in travel for business purposes; and,

(5) The equities with regard to the nature of the claim and the parties' relationship.[58] In considering these factors, courts must analyze each case on its own facts and the equities of the particular situation.[59]

I. Multiple Depositions of Same Individual or Corporate Entity

Corporate entities might also object that the corporate deposition is unnecessary because the individual that the corporation would designate has already been deposed, and/or the corporation has already given testimony through the deposition of an officer, director, or managing agent. Without more, this objection is not well founded because courts recognize that there is a difference between the depositions under subsection (b)(6), which seeks corporate knowledge, and the deposition of a specific individual under subsection (b)(1), which is limited to that individual's personal knowledge.[60] In *Spicer v. Universal Forest Prods.*, the court held:

> The fact that four Universal employees were deposed does not relieve Universal of its obligations under Rule 30(b)(6). Providing plaintiff with discoverable information through non-30(b)(6) depositions and document production does not excuse Universal's failure to prepare its corporate designee for the 30(b)(6) deposition. The mere fact that a corporation produces all of its documents relating to an allegation does not release it of its responsibility to produce competent witnesses.[61]

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[57] *Botkin*, at *23 (citing *In re Outsidewall*, 267 F.R.D. at 472; *Salter v. Upjohn Co.*, 593 F.2d 649, 651-52 (5th Cir. 1979)).
[58] *Id.* at *23-24 (citing *Armsey*, 184 F.R.D. at 571; *Resolution Tr. Corp. v. Worldwide Ins. Mgmt. Corp.*, 147 F.R.D. 125, 127 (N.D. Tex. 1992); *Turner v. Prudential Ins. Co. of Am.*, 119 F.R.D. 381, 383 (M.D.N.C. 1988)); *accord Rapoca Energy Co., L.P. v. Amici Export Corp.*, 199 F.R.D. 191, 193 (W.D. Va. Jan. 6, Abingdon 2001) (Sargent, J.).
[59] *Id.* at *24 (citing *Rapoca Energy*, 199 F.R.D. at 193).
[60] *See Jones v. Perez (In re Jones)*, 81 Va. Cir. 52 (Chesapeake 2010) (Brown, J.).
[61] *Id.*, Civil Action No. 7:07cv462, 2008 U.S. Dist. LEXIS 77232, at *15-17 (W.D. Va. Roanoke Oct. 1, 2008) (Urbanski, J.) (citations omitted).

Similarly, in *Staples Corp. v. Washington Hall Corp.*, the court held that the plaintiff was allowed to notice a corporate deposition under Rule 4:5(b)(6).[62] Citing the Advisory Committee notes to Federal Rule 30(b(6), the court found that Rule 4:5(b)(6) supplements the "traditional method of deposing corporations" under Rule 4:5(a)(1). It observed that in federal court, Federal Rule 30(b)(6) does not preclude plaintiffs from deposing corporate officers of their choosing *in addition to* corporate officers that are designated by the corporation.

That being said, courts favor judicial economy and evaluate these objections on a case-by-case basis. For example, in *Staples Corp.*, the same court that ordered two corporate officers to be deposed sustained the defendant's objection to providing a Rule 4:5(b)(6) deposition because it found that the deposition was unnecessary. The court found that particular officer had already provided testimony about the transaction; the defendant corporation agreed to stipulate that the deposition of the witness, in his personal capacity, could be used against the corporation pursuant to Rule 4:7(a)(3); and the defendant corporation represented that the same witness would be named as the corporate designee. Under those facts, the court held that the plaintiff was not entitled to re-depose the officer.

It is worth mentioning that the rules do not limit parties to just one deposition of the corporation. Although courts are mindful of judicial economy and the burden on corporate defendants, they tend to allow corporations to be deposed more than once in a case, particular where the noticing party established a need to additional discovery in responses to "new" facts or documents that arise in a case after the corporate deposition has taken place.[63]

J. Other Discovery Methods More Appropriate

Some corporations have objected to giving a deposition on grounds that another discovery method would be more appropriate. Courts are not sympathetic to this objection, because as long as the information is relevant, parties may elect which discovery device to use.[64]

K. Questions Exceed Scope of the Notice

Corporate entities have a valid objection if the noticing party asks questions that exceed the scope of the topics described on the notice. Although corporate attorneys are not permitted to instruct their clients not to answer such questions,[65] objections to questions that exceed the scope of the deposition notice typically will be sustained.[66]

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[62] *Id.*, 44 Va. Cir. 372 (Fairfax 1998) (Klein, J.).

[63] *See Aetna Cas. & Sur. Co. v. Corroon & Black of Ohio, Inc*., 10 Va. Cir. 207 (Richmond 1987) (Hughes, J.); *Coffey v. Hartford Life & Accident Ins. Co*., Civil Action No. 5:16cv00003, 2017 U.S. Dist. LEXIS 863, at *13-14 (W.D. Va. Harrisonburg Jan. 4, 2017) (Hoppe, M.J.); *Baylor v. Comprehensive Pain Mgmt. Ctrs.*, Civil Action No. 7:09cv00472, 2011 U.S. Dist. LEXIS 37594, at *18-19 (W.D. Va. Roanoke Apr. 6, 2011) (Urbanski, J.).

[64] *Taylor v. O'Neil*, 90 Va. Cir. 400 (Norfolk 2015) (Lannetti, J.).

[65] *See Kerr Contr. Corp. v. Rector & Visitors of George Mason Univ*., 25 Va. Cir. 403 (Fairfax 1991) (Annunziata, J.).

[66] *See Tig Ins. Co. v. Robertson*, Civil Action No. 1:01cv00143, 2003 U.S. Dist. LEXIS 1481, at *10 n.7 (W.D. Va. Abingdon Jan. 31, 2003) (Jones, J.); compare *Reed v. Wash. Area Metro. Transit Auth*., 2014 U.S. Dist. LEXIS 89598, *1, 2014 WL 2967920 (E.D. Va. Alexandria July 1, 2014) (Cacheris, J.) (holding that a plaintiff was under no obligation to ask questions that exceeded the topics that the plaintiff described on the deposition notice).

VI. Conclusion

The ability to depose a corporate entity through its corporate designee or through a fact witness who is a corporate officer, director or managing agent is a powerful weapon in your hands. It yields substantive evidence, impeachment material and party admissions. It also creates leverage upon the corporation, and (b)(6) depositions force the corporate entity and its attorneys to investigate relevant questions that *you* want the answer to, on pain of sanctions. On the other hand, failure to depose the corporate entity, or to ensure that the fact witness who is deposed can bind the corporation, can create problems as the litigation progresses. This paper outlines the governing rules and some factors for practitioners to consider as they develop their deposition notices in these cases. It also includes citations to state and federal case law that discusses corporate depositions and provide guidance as to how these depositions should – and do – proceed in Virginia.

VII. Further Reading

For a comprehensive discussion of corporate depositions in federal court, and sample outlines of questions, this author recommends:

- Kosieradzki, Mark (2016). *30(b)(6): Deposing Corporations, Organizations & The Government*.

Va. Sup. Ct. R. 4:5

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Virginia Court Rules > RULES OF SUPREME COURT OF VIRGINIA > PART FOUR PRETRIAL PROCEDURES, DEPOSITIONS AND PRODUCTION AT TRIAL

Rule 4:5. Depositions Upon Oral Examination

(a) *When Depositions May Be Taken.* --After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition before the expiration of the period within which a defendant may file a responsive pleading under Rule 3:8, except that leave is not required (1) if a defendant has served a notice of taking deposition, or (2) if special notice is given as provided in subdivision (b)(2) of this Rule. The attendance of witnesses may be compelled by subpoena. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(a1) Taking of Depositions.

(i) Party Depositions. A deposition of a party, or any witness designated under Rule 4:5(b)(6) to testify on behalf of a party, shall be taken in the county or city in which suit is pending, in an adjacent county or city, at a place upon which the parties agree, or at a place that the court in such suit may, for good cause, designate. Good cause may include the expense or inconvenience of a non-resident party defendant appearing in one of the locations specified in this subsection. The restrictions as to parties set forth in this subdivision (a1)(i) shall not apply where no responsive pleading has been filed or an appearance otherwise made.

(ii) Non-party Witness Depositions. Unless otherwise provided by the law of the jurisdiction where a non-party witness resides, a deposition of a non-party witness shall be taken in the county or city where the non-party witness resides, is employed, or has a principal place of business; at a place upon which the witness and the parties to the litigation agree; or at a place that the court may, for good cause, designate.

(iii) Taking Depositions Outside the State. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or, where applicable, the law of the United States, or (2) before a person appointed or commissioned by the court in which the action is pending, and such a person shall have the power by virtue of such appointment or commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued upon application and notice

and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A commission or letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)." Witnesses may be compelled to appear and testify at depositions taken outside this state by process issued and served in accordance with the law of the jurisdiction where the deposition is taken or, where applicable, the law of the United States. Upon motion, the courts of this State shall issue a commission or letter rogatory requesting the assistance of the courts or authorities of the foreign jurisdiction.

(iv) Uniform Interstate Depositions and Discovery Act. Depositions and related documentary production sought in Virginia pursuant to a subpoena issued under the authority of a foreign jurisdiction shall be subject to the provisions of the Uniform Interstate Depositions and Discovery Act, Virginia Code §§ 8.01-412.8 through 8.01-412.15.

(b) Notice of Examination: *General Requirements; Special Notice; Production of Documents and Things; Deposition of Organization.*

(1) 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. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the Commonwealth, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the period for filing a responsive pleading under Rule 3:8, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) [Deleted.]

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 4:9 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 4:9 shall apply to the request.

(6) A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. 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.

(7) Unless the court orders otherwise, a deposition may be taken by telephone, video conferencing, or teleconferencing. A deposition taken by telephone, video conferencing, or teleconferencing shall be taken before an appropriate officer in the locality where the deponent is present to answer questions propounded to him.

(c) *Examination and Cross-Examination; Record of Examination; Oath; Objections.* --Examination and cross-examination of witnesses may proceed as permitted at the trial. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. If requested by one of the parties, the testimony shall be transcribed.

All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Any objection must be stated concisely in a nonargumentative and nonsuggestive manner. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) *Motion to Terminate or Limit Examination.* --At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county or city where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 4:1(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 4:12(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) *Submission to Witness; Changes; Signing.* --When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness

for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 21 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 4:7(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Filing by Officer; Exhibits; Copies; Notice of Filing.

(1) The officer shall prepare an electronic or digitally imaged copy of the deposition transcript, including signatures and any changes as provided in subsection (e) of this Rule, and shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. In a divorce or annulment case, the officer shall then promptly file the electronic or digitally imaged deposition in the office of the clerk, notifying all other parties of such action. In all other cases, he shall then lodge the deposition with the attorney for the party who initiated the taking of the deposition, notifying the clerk and all parties of such action. Depositions taken pursuant to this Rule or Rule 4:6 (except depositions taken in divorce and annulment cases) shall not be filed with the clerk until the court so directs, either on its own initiative or upon the request of any party prior to or during the trial. Any such filing shall be made electronically unless otherwise ordered by the judge.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) *Failure to Attend or to Serve Subpoena; Expenses.*

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

USCS Fed Rules Civ Proc R 30

Current through changes received January 17, 2017.

USCS Court Rules > Federal Rules of Civil Procedure > Title V. Disclosures and Discovery

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) *Without Leave.* A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

(1) *Notice in General.* A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) *Producing Documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request complying with Rule 34 to produce documents and tangible things at the deposition.

(3) *Method of Recording.*

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic

means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) *By Remote Means.* The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) *Officer's Duties.*

(A) Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) Conducting the Deposition; Avoiding Distortion. If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) After the Deposition. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) *Examination and Cross-Examination.* The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) *Objections.* An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) *Participating Through Written Questions.* Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction.* The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to Terminate or Limit.*

(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) Award of Expenses. Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) *Review; Statement of Changes.* On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes Indicated in the Officer's Certificate.* The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) *Certification and Delivery.* The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and Tangible Things.*

(A) Originals and Copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(B) Order Regarding the Originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) *Copies of the Transcript or Recording.* Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of Filing.* A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

History

(Amended Jan. 21, 1963, eff. July 1, 1963; March 30, 1970, eff. July 1, 1970; March 1, 1971, eff. July 1, 1971; Nov. 20, 1972, eff. July 1, 1975; April 29, 1980, eff. Aug. 1, 1980; March 2, 1987, eff. Aug. 1, 1987; April 22, 1993, eff. Dec. 1, 1993; April 17, 2000, eff. Dec. 1, 2000; April 30, 2007, eff. Dec. 1, 2007; As amended April 29, 2015, eff. Dec. 1, 2015.)

Va. Sup. Ct. R. 4:6A

Including changes received by the publisher through January 31, 2017

Virginia Court Rules > RULES OF SUPREME COURT OF VIRGINIA > PART FOUR PRETRIAL PROCEDURES, DEPOSITIONS AND PRODUCTION AT TRIAL

Rule 4:6A. Number of Depositions

There shall be no limit on the number of witnesses whose depositions may be taken by a party except by order of the court for good cause shown.

End of Document

Va. Sup. Ct. R. 4:7

Including changes received by the publisher through January 31, 2017

Virginia Court Rules > RULES OF SUPREME COURT OF VIRGINIA > PART FOUR PRETRIAL PROCEDURES, DEPOSITIONS AND PRODUCTION AT TRIAL

Rule 4:7. Use of Depositions in Court Proceedings

(a) *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 applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition taken in a civil action may be used for any purpose in supporting or opposing an equitable claim; provided, however, that such a deposition may be used on an issue heard by an advisory jury empaneled pursuant to Code § 8.01-336(E) or a hearing ore tenus only as provided by subdivision (a)(4) of this Rule.

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

(3) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 4:5(b)(6) or 4:6(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose in any action upon a claim arising at law, issue heard by an advisory jury empaneled pursuant to Code § 8.01-336(E), or hearing ore tenus upon an equitable claim if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of this Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) that the witness is a judge, or is a superintendent of a hospital for the insane more than 30 miles from the place of trial, or is a physician, surgeon, dentist, chiropractor, or registered nurse who, in the regular course of his profession, treated or examined any party to the proceeding, or is in any public office or service the duties of which prevent his attending court provided, however, that if the deponent is subject to the jurisdiction of the court, the court may, upon a showing of good cause or sua sponte, order him to attend and to testify ore tenus; or (F) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice

and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(5) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(6) No deposition shall be read in any action against a person under a disability unless it be taken in the presence of the guardian ad litem appointed or attorney serving pursuant to § 8.01-9, or upon questions agreed on by the guardian or attorney before the taking.

(7) In any action, the fact that a deposition has not been offered in evidence prior to an interlocutory decree or order shall not prevent its thereafter being so offered except as to matters ruled upon in such interlocutory decree or order; provided, however, that such deposition may be read as to matters ruled upon in such an interlocutory decree or order if the principles applicable to after-discovered evidence would permit its introduction.

Substitution of parties does not affect the right to use depositions previously taken; and when there are pending in the same court several actions or suits between the same parties, depending upon the same facts, or involving the same matter of controversy, in whole or in part, a deposition taken in one of such actions or suits, upon notice to the same party or parties, may be read in all, so far as it is applicable and relevant to the issue; and, when an action in any court of the United States or of this or any other state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the one action may be used in the other as if originally taken therefor.

(b) *Form of Presentation; Objections to Admissibility.* --A party may offer deposition testimony pursuant to this Rule in stenographic or nonstenographic form. Except as otherwise directed by the court, if all or part of a deposition is offered, the offering party shall provide the court with a transcript of the portions so offered in either form or in electronic or digitally imaged form. Except as provided in Rule 1:18 and subject to the provisions of subdivision (d) (3) of this Rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) *Effect of Taking or Using Depositions.* --A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subdivision (a)(3) of this Rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) *Effect of Errors and Irregularities in Depositions.*

(1) As to Notice. -- --All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. -- --Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition. --

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 4:6 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. -- --Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the officer under Rules 4:5 and 4:6 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(e) *Limitation on Use of Depositions.* --No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any depositions under Rule 4:5, unless such use of depositions is permitted by § 8.01-420.

(f) *Record.* --Depositions shall become a part of the record only to the extent that they are offered in evidence.

USCS Fed Rules Civ Proc R 45

Current through changes received January 17, 2017.

USCS Court Rules > Federal Rules of Civil Procedure > Title VI. Trials

Rule 45. Subpoena

(a) In General.

(1) *Form and Contents.*

(A) Requirements—In General. Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d) and (e).

(B) Command to Attend a Deposition—Notice of the Recording Method. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) Command to Produce; Included Obligations. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) *Issuing Court.* A subpoena must issue from the court where the action is pending.

(3) *Issued by Whom.* The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.

(4) *Notice to Other Parties Before Service.* If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of

premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.

(b) Service.

(1) *By Whom and How; Tendering Fees.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

(2) *Service in the United States.* A subpoena may be served at any place within the United States.

(3) *Service in a Foreign Country.* 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) *Proof of Service.* Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Place of Compliance.

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Transferring a Subpoena-Related Motion. When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional

circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

(g) Contempt. The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

History

(Amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; March 30, 1970, eff. July 1, 1970; April 29, 1980, eff. Aug. 1, 1980; April 29, 1985, eff. Aug. 1, 1985; March 2, 1987, eff. Aug. 1, 1987; April 30, 1991, eff. Dec. 1, 1991; April 25, 2005, eff. Dec. 1, 2005; April 12, 2006, eff. Dec. 1, 2006; April 30, 2007, eff. Dec. 1, 2007; April 16, 2013, eff. Dec. 1, 2013.)