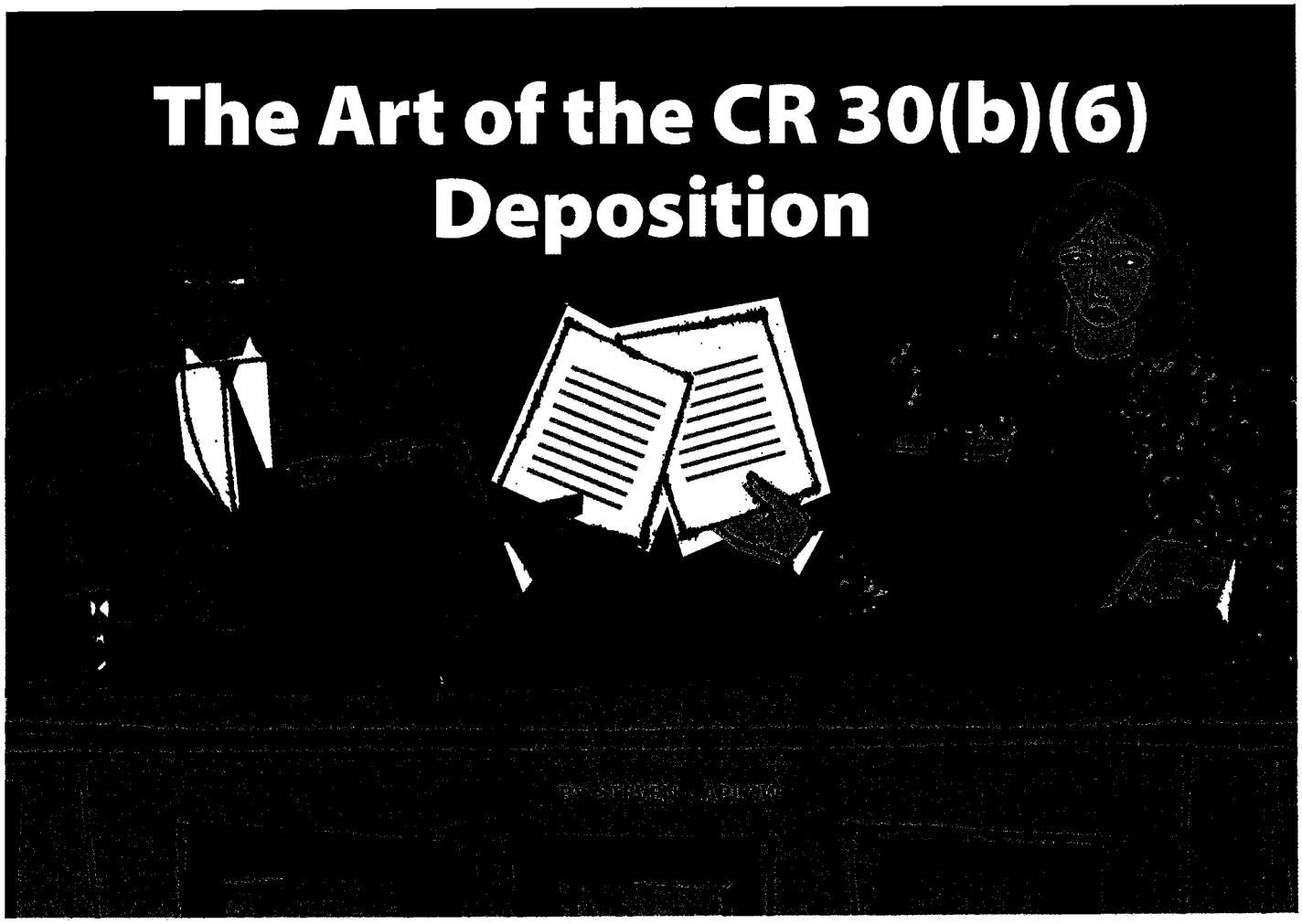
The Art of the CR 30(b)(6) Deposition



Barbie, tortillas, and CR 30(b)(6) subpoenas

Thomas Forsythe created a series of photographs using Barbie dolls "juxtaposed with vintage kitchen appliances." One photograph in the series depicts four Barbie dolls wrapped in tortillas covered with salsa. Notwithstanding what the 9th Circuit dryly describes as Forsythe's limited market success, the Mattel Corporation filed suit alleging that the Barbie photographs infringed on its intellectual property. See *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003).

Forsythe defended the claim by retaining an expert to explain his photographs in the context of 20th century art. Mattel in turn issued a broad CR 30(b)(6) subpoena to the expert's employer, the San Francisco Museum of Modern Art. The district court concluded that Mattel's subpoena, which included topics that went beyond impeaching Forsythe's expert, had been issued for the improper purpose of persuading the museum to exert pressure on its employee not to testify as an expert in the lawsuit. The 9th Circuit subsequently affirmed the district court's decision quashing the subpoena and awarding the museum its attorneys' fees.

Beyond its admonition as to the respective perils to lawyers and artists of getting involved in the world of contemporary art, the *Mattel* opinion raises an issue as to the appropriate use of a CR 30(b)(6) subpoena. To the extent the Mattel subpoena sought information to impeach the defendant's expert, the opinion serves as a reminder of the many ways that a CR 30(b)(6) notice can be used properly. At the same time, the case illustrates how the rule's extraordinary power to compel an organization to assemble information may be abused.

Washington's appellate courts seldom discuss CR 30(b)(6). Indeed, only two published opinions discuss the rule substantively: *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13 (2005) and *Casper v. Esteb Enters., Inc.*, 119 Wn. App. 759, 767 (2004). Practitioners, too, sometimes overlook the possibility of using this procedural mechanism, or avoid using this tool because they do not feel comfortable with its mechanics, thereby depriving themselves of a valuable discovery device.

The application and text of CR 30(b)(6)

An organization such as a corporation is a legal fiction that may act only through its agents. CR 30(b)(6) addresses the problem associated with obtaining testimony from such entities by creating a mechanism that allows a party to compel the entity to designate an agent to testify on its behalf regarding predesignated topics. Regardless of whether, like judicial admissions, CR 30(b)(6) testimony formally binds the party — an issue that remains unresolved under Washington law — such depositions sometimes have equal or greater value as an alternative method to obtain discovery. Like any discovery procedure, in evaluating the scope of the topics in the notice, courts take into account the burden of assembling the information, the probative value of the information to the issues in dispute, and whether or not the entity subject to the notice is a party to the litigation.

The topics frequently cover historical information, organizational structure, or methods and procedures of the organization. Other topics may seek the party's collective knowledge of particular events. In

the past, a party seeking such information from a corporate entity sometimes had no choice but to engage in a sort of legal version of the classic game Battleship by blindly issuing notices to various agents of the organization with the hope of correctly identifying the person with relevant information. CR 30(b)(6) addresses this problem by placing the burden on the organization to identify an appropriate witness to testify on behalf of the organization as to the designated topics:

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

Because CR 30(b)(6) and Fed.R.Civ.P. 30(b)(6) are nearly identical, Washington courts view federal cases interpreting the federal rule as highly persuasive to interpret Washington's analog to the federal rule.

Entities within the scope of the rule

CR 30(b)(6) allows discovery of entities, including a corporation, partnership, association, or governmental agency. As was the situation in *Mattel*, by including some additional instructions to the recipient specified in the rule, the deposition notice accompanied by a subpoena can also be served on an entity that is not a party to the litigation. Like any third-party discovery, courts generally apply a different standard to assess the reasonableness of discovery served on an entity not a party to the litigation. With both parties and nonparties, the procedure cannot be used to take the deposition of an individual in her individual capacity.

Designating topics with reasonable particularity

The party issuing the CR 30(b)(6) deposition notice must designate with reasonable particularity the topics on which the examination is requested. This creates a trade-off: The party issuing the notice must provide a clear road map as to the subjects that will be addressed during the deposition, while the responding party must ensure that the designated witness is knowledgeable regarding the designated topics.

Crafting the notice deserves some attention. An overbroad notice creates an impossible task and becomes susceptible to a motion to quash or strike. For example, some courts have stricken "but not limited to" language from deposition notice categories out of concern that including this language makes the topics overbroad. On the other hand, the witness may legitimately refuse to testify in her CR 30(b)(6) capacity on topics not specified adequately in the notice. Similar to other discovery mechanisms, the party issuing the notice must strive to find the proper balance in formulating the deposition topics.

The notice must designate "subjects" not "persons"

Attorneys who practice in other jurisdictions sometimes issue notices of

deposition that purport to require the appearance of "persons most knowledgeable" or "PMK," and the use of this formulation seems increasingly common in Washington actions. Although this may be an acceptable request under Rule 30(b)(1), which allows an ordinary deposition notice to identify the deponent by his or her name or by a "general description," this formulation should not be used under Rule CR 30(b)(6), which allows a party to designate only subject matters of testimony, not particular witnesses.

While designating the PMK might seem just sloppy, in a literal sense, demanding the appearance of the PMK amounts to a request for a specific witness (the most knowledgeable person). Specifying the PMK deprives the organization from selecting a witness of its choice to testify knowledgeably on the designated subjects. Although they do not directly address this issue, federal rules decisions from other jurisdictions and Wright & Miller at Volume 8A appear consistent with an interpretation of the rule prohibiting the request of the PMK in a CR 30(b)(6) deposition notice.

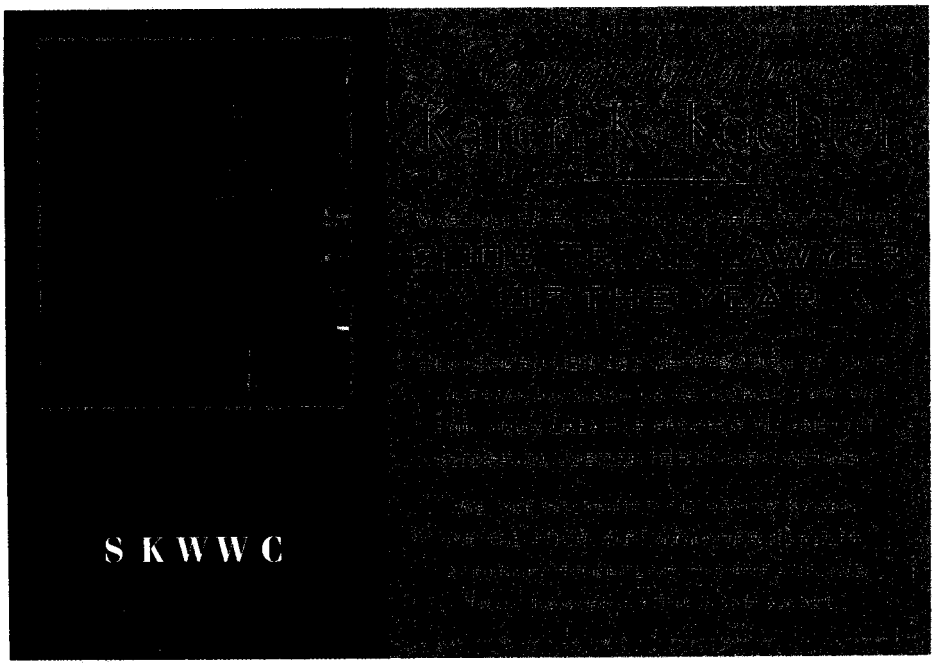
The timing of deposition under the CR 30(b)(6) notice

CR 30(b)(1) states that a party taking a deposition must give "reasonable notice" of not less than five days, while its federal counterpart simply refers to "reasonable notice." For CR 30(b)(6) depositions, given the enormous range in the amount of information that must be assembled to respond depending on the topics in the notice, courts by necessity apply a flexible standard to evaluate the reasonableness of the time stated in the notice.

The *California Practice Guide, Federal Civil Procedure Before Trial,* while acknowledging that reasonable notice will depend on the circumstances of the case, states that at least 10 days' notice is "customarily expected." Similarly, several unpublished federal district-court decisions have held that on the facts presented seven days and even 12 days was not enough time. To the extent possible, the party issuing the notice can avoid unnecessary disputes between counsel — and create a better record in the event of motion practice — by providing generous notice.

New math: counting CR 30(b)(6) depositions under the federal rules

The federal rules, absent leave of court, now limit each party to 10 depositions. See Fed.R.Civ.P. 30(a)(2)(A). There does not appear to be much guidance yet on how to count CR 30(b)(6) depositions for purposes of the rule. It seems reasonable to assume, however, that "hours," rather than "topics" or "witnesses," will eventually become the standard to measure a deposition for purposes of the rule. Until more case law develops on this point, however, practitioners should consider addressing this issue during the Fed.R.Civ. P. 26(f) conference.



Objections upon receipt of a CR 30(b)(6) notice

A party receiving a notice and/or subpoena may serve written objections. CR 37(d) states, however, that unless the party applies for a protective order under CR 26(c), the objections do not excuse compliance with the rule. Under CR 45(d), a non-party receiving a subpoena to testify, without requiring the production of documents, would also need to file a motion to quash or modify the subpoena. The party objecting to the notice or subpoena may seek to limit or exclude some or all of the topics in the notice.

Notwithstanding a party's latitude to select its discovery mechanism, courts will occasionally refuse to allow a party to conduct discovery using CR 30(b)(6). This occurs most commonly when the deposition notice is perceived as an attempt to depose opposing counsel, or when the discovery sought involves responses that necessarily require the assistance of counsel. In these circumstances, there are a number of federal decisions from other jurisdictions that quash the CR 30(b)(6) deposition and/or require the use of other discovery methods such as contention interrogatories.

Courts also struggle with the issue of deposition notices that require a party to designate a witness to testify about damages, when the organization's damages are being calculated by an expert. The nature of the damage claim and the timing of the deposition relative to expert disclosure requirements typically shape the court's evaluation of such notices.

The organization's designation of a witness

Unlike a fact witness, who testifies as to her individual knowledge and gives personal opinions, the CR 30(b)(6) deponent testifies as to the knowledge of the corporation and the corporation's subjective beliefs and opinions. If the person or persons designated by the organization do not already possess personal knowledge of the matters set out in the deposition notice, the organization may be obligated to prepare the designees so that they may give knowledgeable and complete answers for the corporation.

The entity can designate more than one person to respond to the topics in the notice and can even retain a former employee, or someone who has never

worked for the entity, to respond. The organization may designate to speak on its behalf a person who will also be testifying in the case as a fact witness.

The organization's preparation of the witness

An organization has a duty to prepare its deposition designees so they can give full, complete, and non-evasive answers. Under the rule, the designee must testify as to matters "known or reasonably available" to the entity. Parties to a lawsuit commonly dispute what information is known or reasonably available. The fact that no one currently working at the entity has personal knowledge does not in itself excuse a party from providing a witness. Federal courts commonly require corporate entities to go to considerable lengths to collect historical information about the entity from documents, deposition transcripts, past employees, and other sources. This issue takes on particular importance in lawsuits involving asbestos, pharmaceuticals, environmental contamination, and other issues in which the discovery rule extends the statute of limitations.

Taken literally, the duty to testify as to matters known or reasonably available could compel the designated agent to locate and assemble on the record a huge

number of business records, an interpretation of the rule that would provide little value relative to the expense. Although difficult to draw the line categorically, at some point, a request for production better accomplishes the purpose of such a deposition. Interrogatory discovery may provide a useful analogy to address this situation. CR 33 also requires a party to assemble information necessary to answer interrogatories. Under CR 33(c), however, if the party can demonstrate that the burden of deriving the answer from the records of the organization would be substantially the same to either party, it is sufficient to answer the interrogatory by specifying the records from which the answer may be derived. Similarly, if the burden of ascertaining information from records is substantially the same, an organization should be able to satisfy its obligation under CR 30(b)(6) by making the records available.

The binds that hold

It has not been decided clearly in Washington or the 9th Circuit whether a corporation is absolutely bound to the testimony in a CR 30(b)(6) deposition as a judicial admission that ultimately decides an issue, or if it is treated like any other testimony that may be contracted through other corporate witnesses. A recent Court of Appeals decision from Division II collects respective federal authorities, but does not reach the issue in its decision. *Casper*, 119 Wn. App. at 768 (2004). While compelling arguments can be made for treating CR 30(b)(6) testimony like any other evidence, until this issue is resolved, the witness must be prepared under the assumption that the testimony will bind the entity.

The deposition itself

At the commencement of the deposition, it helps to make the deposition notice containing the topics an exhibit and establish on the record which topics the witness has been designated to testify. Attorneys preparing the witness can save considerable time and confusion by preparing the witness to respond.

The deposition of a CR 30(b)(6) designee is not a memory contest. Although such material will likely become an exhibit to the deposition, the witness can bring and use documents of the entity or materials that she has created as aids.

A common dispute during CR 30(b)(6) depositions involves the propriety of questions outside the scope of topics identified in the subpoena. Notwithstanding the widespread confusion on this point, the rule is generally clear that once a party appears to testify, she can be questioned in her individual capacity on topics outside the scope of the notice. Care must be taken to make a clean record indicating which testimony is being given in the witness's individual capacity and which testimony is being given as the CR 30(b)(6) designee.

A second bite at the apple

An organization's candidates for potential CR 30(b)(6) designees often include persons who are also likely deponents in their individual capacity. A split in authority exists as to the propriety of using a CR 30(b)(6) to obtain a second deposition of a witness. As a general rule, CR 30(b)(6) cannot be used to obtain a second deposition of the witness that would be cumulative to the testimony already procured. If during her deposition the corporate officer testifying in her individual capacity appears unprepared or evasive, courts will not hesitate to require the organization to provide a witness capable of providing complete, knowledgeable and binding answers on behalf of the organization.

Further, if the officer is being sued in her individual capacity, a court will be more sympathetic to requiring the codefendant organization to designate a CR 30(b)(6) witness, even if the same likely designee has previously testified in her individual capacity, in order to allow the plaintiff to obtain testimony from the organization as a separate legal entity. See *supra Flowers* (reversing issuance of protective order granting second deposition).

Motions to compel and sanctions for the unprepared witness

Like any other deposition, the party issuing a CR 30(b)(6) notice can file a motion to compel, if the party receiving the notice fails to designate a witness to testify on one or more topics. CR 37(a)(2)(B) requires the moving party to file a certificate stating that a good-faith effort has been made to resolve the dispute without court action. CR 37(a)(4) allows the court to award the prevailing party its fees and expenses. Failing to adequately prepare the witness, however, risks far more drastic sanctions. Producing an unprepared CR 30(b)(6) witness is tantamount to failing to appear under CR 37(d) and is therefore sanctionable under CR 37(b)(2). In *Casper*, for example, the trial court sanctioned the defendant by binding it to "don't know" answers on key financial information requested during the CR 30(b)(6) deposition. This left the defendant unable to prove its counterclaim or respond to plaintiffs' allegation that their money had been used on other construction projects. While this harsh CR 37(b) sanction was upheld by the Court of Appeals, the far more common practice when there is a dispute over the adequacy of preparation is for the parties to meet and confer, and, failing agreement, to move to compel under CR 37(a).

Use of the rule as a compromise in lieu of dismissal of claims

The rule can also be used by courts as a discovery compromise. For example, faced with doubtful claims or counterclaims, courts on occasion have limited the discovery of the party asserting such claims to a CR 30(b)(6) deposition. This allows the party some minimum of discovery while limiting expense and controlling abuse.

CR 30(b)(6) testimony at trial

At trial, the transcript of a CR 30(b)(6) deposition can be used like the transcript of a factual witness. Further, by express rule, CR 32(a)(2), the CR 30(b)(6) transcript of a party can be used at trial for any purpose regardless of the availability of the individual witness. The deposition transcript of a nonparty designee can be used in the circumstances in which the deposition of any other nonparty witness might be used.

A February 2005 opinion from the 10th Circuit states that Fed.R.Civ.P 30(b)(6) authorizes a subpoena for deposition and not in-court testimony. Regardless, consideration should be given to videotaping the CR 30(b)(6) deposition.

Back to 20th century art

Franz Kline explained in a 1963 interview, "Paint never seems to behave the same .... There seems to be something that you can do so much with paint and after that you start murdering it." The same can be said for a CR 30(b)(6) deposition. Properly used, the procedure can be a thing of beauty; taken too far it makes a bloody mess.

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