When Can You Use Your Client's 30(b)(6) Deposition at Trial?

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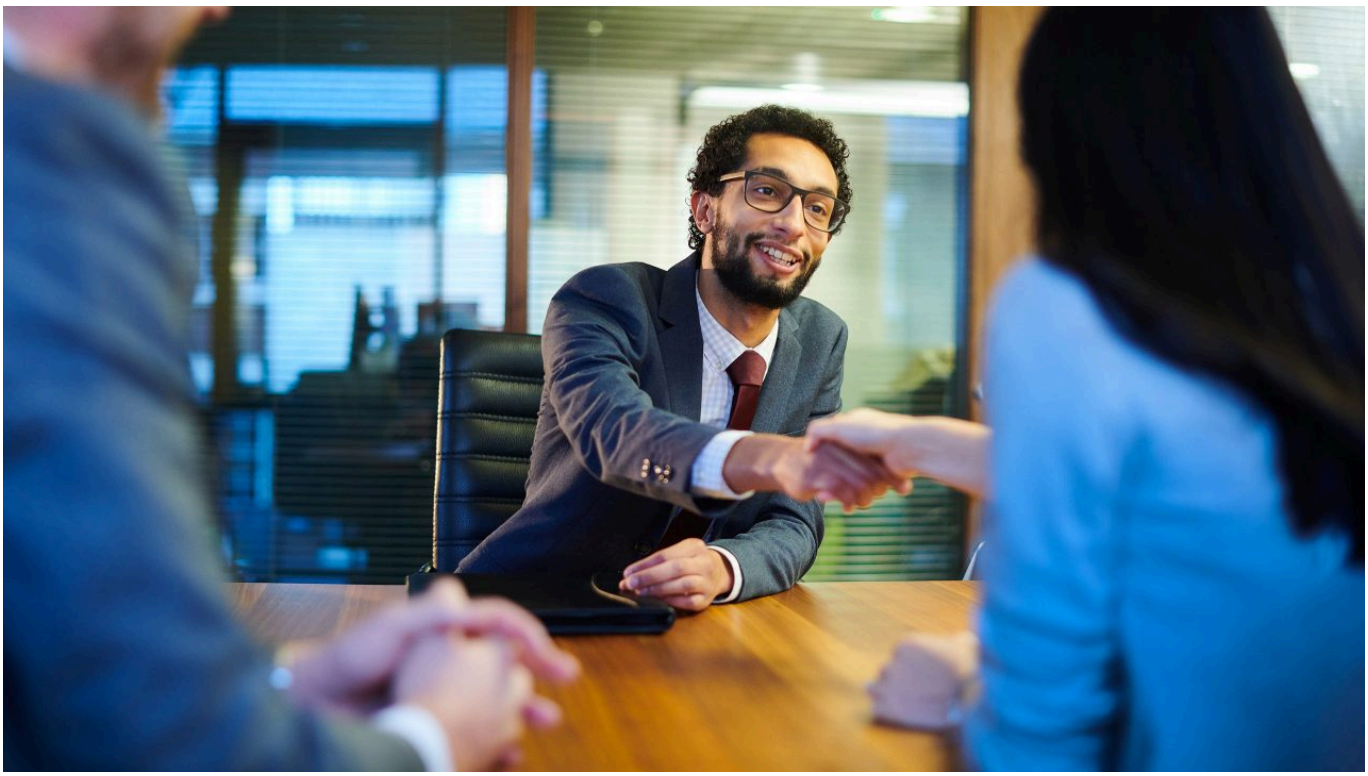
Summary

- Parties commonly designate portions of the depositions of their adversaries or of third parties to be used at trial.
- But what happens when a party wants to use deposition testimony from its own witness?
- In particular, what if that witness was a corporate party's designee under Rule 30(b)(6) of the Federal Rules of Civil Procedure?
- This article explores when, and to what extent, a party may use its own 30(b)(6) deposition testimony at trial.



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Background—Admissibility of Deposition Testimony

Deposition testimony is inadmissible hearsay unless it falls into an exception under Rule 32 of the Federal Rules of Civil Procedure or a hearsay exception under the Federal Rules of Evidence.

Rule 32 of the Federal Rules of Civil Procedure governs the use of deposition testimony at trial. Rule 32 creates an exception to the hearsay rule and allows the use of deposition testimony at trial when (A) the opposing party was present or represented at the deposition or had reasonable notice of it; (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and (C) the use is allowed by another sub-part of the rule. Those sub-parts include using the deposition of an adverse party for any reason, as well as using deposition testimony for impeachment and when the witness is unavailable. For purposes of Rule 32, a witness is unavailable if that witness (a) is dead; (b) lives more than 100 miles from the place of trial, unless it appears that the witness's absence was procured by the party offering the deposition; (c) the witness cannot attend because of age, illness, infirmity, or imprisonment; (d) the party offering the deposition could not procure the witness's attendance by subpoena; or (e) "exceptional circumstances make it desirable" to allow the deposition to be used.

Rule 804 of the Federal Rules of Evidence provides a similar exception allowing for the introduction of deposition testimony. Under Rule 804, there is an exception to the prohibition on hearsay when the declarant is unavailable. Under this rule, a witness is "unavailable" in the following scenarios:

- The witness is exempted from testifying because the subject matter of the testimony is privileged.
- The witness refuses to testify despite a court order compelling the testimony.
- The witness testifies to not remembering the subject matter.

- The witness cannot be present due to death, infirmity, or illness.
- The witness is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance.

Affirmative Designations of 30(b)(6) Testimony

There are two primary hurdles for a corporate party seeking to introduce deposition testimony from its 30(b)(6) witness at trial. The first hurdle is that the corporate party must show that the deposition is admissible under Rule 32 of the Federal Rules of Civil Procedure or Rule 804 of the Federal Rules of Evidence. Next, the party must show that the witness's 30(b)(6) testimony sought to be admitted was based on that witness's personal knowledge (rather than company knowledge).

Parties seeking to introduce portions of their own witnesses' 30(b)(6) deposition testimony most commonly rely on Rule 32(a)(4)(B), which provides that a party may use the deposition if the court finds that "the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition." The burden of showing the witness's unavailability rests with the party seeking to introduce the deposition. *Jauch v. Corley*, 830 F.2d 47, 50 (5th Cir. 1987). And courts have "broad discretion" to determine whether the proponent has "use[d] reasonable diligence to secure the witness's presence" under this rule. *Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 308 (7th Cir. 2010).

Some courts apply Rule 32(a)(4)(B) as it appears on its face—i.e., a witness is "unavailable" (and thus that witness's deposition testimony is admissible) if the witness is more than 100 miles from the place of trial. For example, in *Mazlum v. District of Columbia Metropolitan Police Department*, the district court denied the plaintiff's motion in limine to exclude portions of deposition testimony from a witness who testified as one of the defendant's 30(b)(6) witnesses. 248 F.R.D. 725, 726–27 (D.D.C. 2008). The plaintiff argued that the witness was an officer of the corporate defendant and therefore was "available" even though the witness lived more than 100 miles from the trial site. The district court rejected the plaintiff's argument, explaining that there was "no ambiguity in Rule 32 on this point," and allowing the corporate defendant to rely on the deposition testimony.

Other courts use their discretion to narrow the circumstances under which a corporate party may argue that its own witness is "unavailable." For example, in *VIV Healthcare Co. v. Mylan Inc.*, the district court denied the plaintiffs' request to submit the testimony of two fact witnesses who served as 30(b)(6) deponents even though both witnesses lived more than 100 miles from the site of the trial. No. 12-cv-1065-RGA, 2014 WL 2195082, at *2 (D.

Del. May 23, 2014). The court explained that the plaintiffs failed to show why they were unable to procure their own witnesses for trial, and the court noted in dicta that "if the testimony is truly important to their case, they have the capability of getting both witnesses to appear in person." *Id.*

Even if the court finds that the witness is "unavailable" such that the testimony is admissible under Rule 32, the proponent still must show that the witness's deposition testimony was based on that witness's "personal knowledge" to satisfy Rule 602 of the Federal Rules of Evidence. However, courts also differ in applying Rule 602 to testimony from a Rule 30(b)(6) witness.

In *Sara Lee Corp. v. Kraft Foods Inc.*, the district court addressed the tension between Rule 30(b)(6) of the Federal Rules of Civil Procedure and Rule 602 of the Federal Rules of Evidence. The court noted that "strictly imposing the personal knowledge requirement would only recreate the problems that Rule 30(b)(6) was created to solve." Adopting a split-the-difference approach, the district court held that the 30(b)(6) deposition testimony would be admissible to explain corporate policies and the extent to which the corporation believed the policies were violated, but that if the plaintiff sought to introduce other portions of the deposition, the court would consider whether the "underlying corporate knowledge is sufficiently reliable to substitute for personal knowledge." 276 F.R.D. 500, 502–4 (N.D. Ill. 2011).

Other courts consider the 30(b)(6) deponent's position and experience to evaluate whether that witness satisfies the "personal knowledge" requirement of Rule 602. In *McGriff Insurance Services, Inc. v. Madigan*, the district court determined that the defendant could designate portions of its own 30(b)(6) deposition at a preliminary injunction hearing, rather than call the witness live. In doing so, the court noted that because the deponent was a "a high-ranking executive with direct knowledge of many aspects of the organization and management," the court "saw little need to investigate the company's knowledge, as distinguished from his own, in preparing to address the 30(b)(6) deposition topics." No. 5:22-cv-05080, 2022 WL 16709050, at *1 (W.D. Ark. Nov. 4, 2022). The court also relied on the fact that the questions asked during his deposition differentiated between the witness's own knowledge and the entity's knowledge of specific topics. *Id.* However, the court excluded some portions of the designations because of "speculation" or because the witness's "knowledge is necessarily dependent on hearsay that the Court does not find sufficiently reliable." *Id.* at *2.

Counter-Designations of 30(b)(6) Testimony

Even if you cannot affirmatively designate deposition testimony from your Rule 30(b)(6) witness, if another party designates testimony from that witness, you may be able to

counter-designate testimony to be introduced into evidence along with the testimony designated by the other party. Rule 32(a)(6) provides that "[i]f a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts." It is under this section that courts often allow parties to counter-designate portions of their witness's deposition to prevent the adverse party from misconstruing testimony or relying on cherry-picked testimony that requires context.

But courts do not automatically allow parties to counter-designate from their own 30(b)(6) depositions at trial. The party attempting to designate its own witness's deposition testimony bears the burden of showing that "fairness" requires the counter-designations to be admitted. *Garcia-Martinez v. City & Cty. of Denver*, 392 F.3d 1187, 1191 (10th Cir. 2004).

Some courts read the fairness rule narrowly and will readily exclude any testimony not clearly required to avoid confusion or misrepresentation. For example, in *Chevron Mining Inc. v. United States*, the district court struck the government's counter-designations of its own witnesses' testimony, finding that they were "not necessary to avoid misinterpretation of the evidence or for completeness based on Chevron's affirmative designations." No. 1:13-cv-00328-PJK-JFR, 2021 WL 5742987, at *1 (D.N.M. Dec 2, 2021). In *Carroll v. Trump*, the district court rejected the defendant's contention that he was permitted to counter-designate "any other parts" of a deposition from which parts were offered by his adversary, explaining that the rule only extends to portions that need to be admitted "in the interest of completeness." No. 22-cv-10016 (LAK), 2023 WL 3071966, at *1 (S.D.N.Y. Apr. 25, 2023).

Some courts have gone so far as to say that no counter-designations are necessary if the party can bring its own witnesses to clear up any misunderstandings from the designated testimony at trial. In *Martinez v. Continental Tire the Americas, LLC*, a district court judge explained that while Rule 32 offers a mechanism to admit some deposition testimony, "[t]he deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand." No. 1:17-cv-00922-KWR-JFR, 2022 WL 2788068, at *2 (D.N.M. July 16, 2022). The *Martinez* court excluded all the counter-designations because the witnesses could testify live at trial. *Id.*

Conclusion

Generally speaking, if a party can show that the witness is unavailable at trial and that the witness's testimony was based on personal, rather than corporate, knowledge, the party may use its own witness's 30(b)(6) deposition testimony at trial. And if not, the testimony may still be admissible via counter-designations.

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