that it was "designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information." The Committee observed that "[i]t therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used." The Committee explicitly rejected cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), which authorize adverse inference instructions upon a showing of negligence or gross negligence, rather than intent, pursuant to a court's inherent authority.

Imposing an intent requirement for the imposition of severe sanctions for the spoliation of electronic information represents a significant change in the law in several circuits. The First, Fourth, and Ninth Circuits all permit severe sanctions pursuant to a court's inherent authority based on a showing of severe prejudice, even in the absence of intentional misconduct.[1] And, like the Second Circuit, the D.C. Circuit and the Sixth Circuit permit an adverse inference instruction upon a showing that the spoliator was merely negligent.[2]

The imposition of a different rule for electronic information leads to a rather odd outcome in those jurisdictions: a party can be subject to severe sanctions for the loss of electronic information only if that party engaged in *intentional* misconduct, but may be subject to those severe sanctions for the loss of any *other* type of evidence upon a showing of mere negligence or gross negligence. It will be interesting to see if those circuits move toward an intentional "bad faith" requirement across the board, which is already the rule followed in most other federal circuits.

Of course, there is another possibility as well: courts may ignore the Advisory Committee Notes and continue to impose sanctions under their inherent authority, even when sanctions would not otherwise be permissible under Rule 37(e). A couple of decisions so far have suggested that approach.[3] However, most courts that have considered the issue have recognized that new Rule 37(e) is the only game in town when it comes to the spoliation of electronic information.[4]

(Endnotes)

1 *See Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001); *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993).

2 *See Talavera v. Shah*, 638 F.3d 303, 311-12 (D.C. Cir. 2011); *Stocker v. U.S.*, 705 F.3d 225, 235 (6th Cir. 2013).

3 *See Cohn v. Guaranteed Rate, Inc.*, 318 F.R.D. 350, 354 (N.D. Ill. 2016) ("The Court also has broad, inherent power to impose sanctions for failure to produce discovery and for destruction of evidence, over and above the provisions of the Federal Rules."); *Internmatch, Inc. v. Nxtbigthing, LLC*, 2016 WL 491483, at *4 n.6 (N.D. Cal. 2016) ("Whether a district court must now make the findings set forth in Rule 37 before exercising its inherent authority to impose sanctions for the spoliation of electronic evidence has not been decided.").

4 *See, e.g., Citibank, N.A. v. Super Sayin' Publishing, LLC*, 2017 WL 462601, at *2 (S.D.N.Y. Jan. 17, 2017) (collecting cases).

What is "Known or Reasonably Available" to an Organizational Deponent?

By David B. Markowitz and Joseph L. Franco

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An organizational deposition under Federal Rule 30(b)(6) or Oregon Rule 39 C(6) is an excellent tool for the noticing party, and a potential hazard for the deponent, because of the requirement that the designee testify to information "known or reasonably available" to the organization. *See* FRCP 30(b)(6); ORCP 39 C(6). The quoted language imposes a requirement that the designee be prepared to testify as to the organization's knowledge on each of the topics identified in the deposition notice. *See Bd. of Tr. of the Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253 FRD 524, 526 (C.D. Cal. 2008) (holding that Rule 30(b)(6) requires the designee to review matters known or reasonably available to the organization in preparation for the deposition).

It is crucial that the organization take seriously its obligation to prepare, as courts frequently impose sanctions when the designated witness is inadequately prepared to testify. Many courts have held that the failure to produce a witness prepared to testify on the designated topics constitutes a non-appearance at the deposition, triggering sanctions under Rule 37(d). *See e.g. Resolution Trust Corp. v. S. Union Co., Inc.*, 985 F2d 196, 197-198 (5th Cir. 1993); *Black Horse Lane Assoc., L.P. v. Dow Chemical Corp.*, 228 F3d 275, 303-304 (3rd Cir. 2000). Indeed, one court recently imposed a sanction of $850,000 on a non-party organization due to its failure to properly prepare a Rule 30(b)(6) witness. *See Sciarretta v. Lincoln Nat. Life Ins.*, 778 F3d 1205, 1213 (11th Cir. 2015). In Sciarretta, the non-party organizational deponent selectively prepared its Rule 30(b)(6) designee in a one-sided fashion – preparing the witness with information helpful to the organization, and omitting information that was harmful to its position. *Id.* The organization crafted "a perfect witness for its interests: one who was knowledgeable about helpful facts and dumb about harmful ones." *Id.* After this "perfect witness" testified in deposition and at trial, the Court, on its own initiative, imposed an $850,000 sanction. *Id.* at 1213-1214. The Eleventh Circuit upheld this sanction.

While the enormity of the sanction imposed in *Sciarretta* was due to its unique facts, the case does underscore the importance of thoroughly preparing the Rule 30(b)(6) witness with all information "known or reasonably available" to the organization. Accordingly, it is important to know what courts may consider to be "known or reasonably available" to an organizational deponent.

I. Information in the Possession of the Organization or Known by Current Employees.

As a starting point, a Rule 30(b)(6) or ORCP 39 C(6) designee must be prepared to testify about information presently known within the organization. While this may seem obvious, organizations frequently fail to do so. Often, the organization will prepare at a superficial level and then claim during the deposition that the amount of detail desired by the noticing party is too burdensome. This is a bad strategy, because "[e]ven if the documents are voluminous and the review of those documents would be burdensome, the deponents are still required to review them in order to prepare themselves to be deposed." *Calzaturficio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co., Inc.*, 201 FRD 33, 37 (D. Mass. 2001). An after-the-fact contention that the topics were too burdensome will not excuse a poorly prepared witness.

At a minimum, the designee must prepare by reviewing internal company documents, speaking with key company employees, and reviewing any prior witness testimony and deposition exhibits. *U.S. v. Taylor,* 166 FRD 356, 362 (M.D. N.C. 1996). If called for in the deposition notice, the witness must also be prepared to testify as to the organization's interpretation of documents and events, subjective beliefs and opinions, and its "position" as to matters in dispute in the case. *Id.* at 361; *see also In re Vitamins Antitrust Litigation,* 216 FRD 168, 173 (D. D.C. 2003). This may require extensive preparation with counsel, so that the designee will be able to articulate the organization's legal positions on key components of the case.

II. Information Possessed by Former Employees, and Historical Information Susceptible to Research.

An organization's obligation to prepare a witness for a Rule 30(b)(6) or ORCP 39 C(6) deposition is not discharged because the designated topics concern facts from the distant past about which no current employees have knowledge. *Great Am. Ins. Co. of N.Y. v. Vegas Const. Co., Inc.,* 251 FRD 534, 539 (D. Nev. 2008). "Faced with such a scenario, a corporation with no current knowledgeable employees must prepare its designees by having them review available materials, such as fact witness deposition testimony, exhibits to depositions, documents produced in discovery, materials in former employees' files and, if necessary, interviews of former employees or others with knowledge." *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 FRD 676, 689 (S.D. Fla. 2012). If the organization possesses, or can obtain, historical information that would allow it to educate a witness on the designated topics, it must do so. Even if such information is equally available to the other party, it will not excuse the organization's obligation to use it to prepare a witness. *Great Am.,* 251 FRD at 541.

III. Information Known by Parent, Subsidiary or Sister Organizations.

Under some circumstances, courts may consider information known by affiliated organizations to be "reasonably available" to an organizational deponent. A number of courts have held that when a party organization has legal control over an affiliate, or as a practical matter has access to an affiliate's documents, then the party organization may be required to testify in a Rule 30(b)(6) deposition as to matters known by the affiliate. In *Murphy v. Kmart Corp.*, 255 FRD 497, 508-509 (D. S.D. 2009), the court ordered Kmart to testify in a Rule 30(b)(6) deposition as to matters known by Kmart's parent, Sears Holdings Corporation, and sister company, Sears, Roebuck and Company. The court reasoned that the evidence showed Kmart had "sufficient control over or access to" its parent and sister companies' information. *Id.* at 509. In *Ethypharm S.A. France v. Abbott Laboratories*, 271 FRD 82, 96 (D. Del. 2010), the court required a parent company to testify in a Rule 30(b)(6) deposition as to information possessed by its wholly owned subsidiary because the parent had "legal control" over the subsidiary.

The court in *Sanofi-Aventis v. Sandoz, Inc.*, 272 FRD 391 (D. N.J. 2011) addressed this same issue on a more nuanced factual record. In that case the plaintiff pharmaceutical manufacturer, Sanofi-Aventis, sought a Rule 30(b)(6) deposition of defendant Sandoz, Inc. regarding information known by Sandoz' foreign sister company, Lek Pharmaceuticals. *Id.* at 393. Earlier in the case, Sandoz demonstrated the ability to produce documents and even witnesses from Lek when it suited Sandoz' purposes. Nevertheless, Sandoz refused to prepare its own corporate witness to testify about information known by Lek. *Id.*

In analyzing the issue, the court considered the "control" standard that governs the scope of Rule 34(a) document production. Under that standard, the court noted that "control" by the deponent organization over its affiliate could be established in one of two ways. First, control may exist if the deponent has the "legal right, authority or ability to obtain documents upon demand." *Id.* at 394. Second, "control" may also be shown "when the litigating corporation either can secure documents from the related entity to meet its business needs *or acted with it in the transaction that gave rise to the suit*." *Id.* (emphasis in original). The court held that the legal right to obtain information upon demand was not required. *Id.* at 395. As to the second way control could be shown, the court concluded that Sandoz had demonstrated an ability to secure documents from Lek, and that Sandoz and Lek acted together in the transaction at issue in the lawsuit. *Id.* at 395-396. Accordingly, the court compelled Sandoz to produce a Rule 30(b)(6) witness prepared to testify about information possessed by its foreign sister company Lek. *Id.* at 396.

Because it is not the norm for an organizational deponent to be required to testify about the knowledge of an affiliate, if the noticing party wants such information, it should make the request explicit in the topics contained in the deposition notice. Conversely, if an organization receives a notice that may call for information from an affiliate, the organization should seek clarification from the noticing party well before the deposition. If the parties cannot agree upon the proper scope of the deposition, a protective order may be necessary since mere written objections offer no protection.

IV. How to Handle a Notice That is Too Broad.

Given the scope of information that may be encompassed by the "known or reasonably available" standard, it is not uncommon for a party who receives an organizational deposition notice to believe some aspect of the notice is too broad. In that event, do not make the mistake of merely serving written objections under the misapprehension that they will excuse the obligation to fully prepare for each of the noticed topics. Instead, counsel should narrow the notice through the conferral process, and if that does not work, move for a protective order. "The proper procedure to object to a Rule 30(b)(6) deposition notice is not to serve objections on the opposing party, but to move for a protective order." *Beach Mart, Inc. v. L & L Wings, Inc.*, 302 FRD 396, 406 (E.D. N.C. 2014). The authors discuss this topic in detail in a previous article. *See* David B. Markowitz and Joseph L. Franco, *Preparing, and Responding to, the Rule 30(b)(6) Notice*, OREGON STATE BAR LITIGATION JOURNAL, Spring 2015, at 14-16.

V. Conclusion

The obligation to prepare a Rule 30(b)(6) or ORCP 39 C(6) designee with information "known or reasonably available" to the organizational deponent should be taken seriously. Compliance with that standard may require preparation from sources within and without the organization. Counsel for the recipient of an organizational deposition notice should promptly confer with opposing counsel to clarify any ambiguities in the notice, and attempt to limit topics that are overly broad or unduly burdensome. Normally counsel can come to an agreement. If not, then counsel for the organizational deponent should promptly move for a protective order.

Recent Significant Oregon Cases

By Stephen K. Bushong

Honorable
Stephen K. Bushong

Multnomah County Circuit Court

Claims and Defenses

Smith v. Providence Health & Services, 361 Or 456 (2017)

Plaintiff suffered permanent brain damage from a stroke. He sued his doctors, alleging that they negligently failed to take proper steps to address his complaints of stroke symptoms, causing him to lose a chance for treatment that, in one-third of the cases, reduced or eliminated complications following a stroke. The trial court granted defendants' motion to dismiss. The Supreme Court reversed. The court concluded, on an issue of first impression, that "a loss of a substantial chance of a better medical outcome can be a cognizable injury in a common-law claim of medical malpractice in Oregon." 361 Or at 485. The court explained that plaintiff's loss-of-chance theory was not foreclosed by *Joshi v. Providence Health System*, 342 Or 152 (2006), because this case involved a claim for common-law medical malpractice, while *Joshi* presented a wrongful death claim governed by ORS 30.020. *Id.* at 464. After reviewing the conflicting results in other states, the court concluded that "a limited loss-of-chance theory of recovery should be recognized in common-law negligence cases involving medical malpractice in Oregon." *Id.* at 482.

Robbins v. City of Medford, 284 Or App 592 (2017)

Plaintiff was seriously injured when he was hit by a car while crossing a street in the crosswalk. He alleged that the City of Medford negligently placed the crosswalk in that location and omitted safety features from the intersection's design. The trial court granted the city's motion for summary judgment, concluding that the discretionary immunity provision of the Oregon Tort Claims Act, ORS 30.265(6)(c), bars plaintiff's claims. The Court of Appeals affirmed in part and reversed in part. The court first explained that, to resolve the immunity issue, it must "consider the city's entitlement to discretionary immunity with respect to each act or omission alleged to be negligent." 284 Or App at 596. The court concluded that there were genuine issues of material fact regarding two specifications of negligence related to the crosswalk location, so the city is not entitled to summary judgment on discretionary-immunity grounds on those specifications. *Id.* at 600. The court further concluded that the city was entitled to summary judgment on immunity grounds on three specifications of negligence related to the intersection's design because the uncontroverted evidence in the record "establishes that the crosswalk's design—including the safety features that it does and does not have—is the product of a policy decision" made by the city's public works director. *Id.* at 601.