

Fundamentals & Secrets of Deposing a Corporate Representative

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The great Joe Jamail once said, “[f]or many years, I have been asked by other lawyers how to do certain things. I can tell them nothing of any value that would help them directly. Every case is unique, every jury is unique.” In fact, so much of what we do is personal, done by feel. Thus, when I set out to write and present *The Fundamentals and Secrets of Deposing a Corporate Representative*, ostensibly a “how-to” presentation, I found myself stuck between (1) presenting a vanilla CLE paper exploring rules and case law updates; and (2) trying to teach techniques that simply aren’t applicable or even useful to many trial lawyers.

So I took a different approach, something in the middle of the proverbial rock and hard place. I took an approach based upon the strategical thoughts and opinions of others, specifically, the opposition. I polled and interviewed a dozen defense lawyers and in-house counsel about what concerns them when selecting, preparing, and presenting corporate representatives for deposition or trial. Additionally, I asked each of them: What do you respect about Plaintiffs’ lawyers when they depose your corporate representative and, on the flip-side, what makes you roll your eyes? Each lawyer I spoke with I have either battled against or alongside (I have even hired a few of them), has at least 18 years of experience defending companies in high-stakes litigation, and has extensive experience in identifying, preparing, and presenting corporate representatives in deposition and trial.

Next, I plugged some of the feedback I received into a basic outline of the fundamental steps I have learned to execute when preparing for and deposing a corporate representative, so that you might have a practical guide to consider when preparing for and deposing a corporate representative in today’s legal climate.

Consider the story of Fancy Trial Lawyer. FTL rolls into town and, with his cigar in hand and boots shined bright, checks into the Ritz. FTL heads straight to the bar, orders a scotch and, four of five drinks’ worth of war stories later, pronounces he is going to “cross examine the s*%@” out of a corporate representative in the morning. He doesn’t need rules or discovery, he just needs a court reporter. Look closer, and John Hill is the Chief Justice for a 9-Democrat Texas Supreme Court. And, as just announced by Casey Kasem, Whitney Houston, George Harrison, George Michal, Michael Jackson, and INXS are amongst the year’s top 10 hit makers.

It is now 2018, not 1988, and FTL’s approach to deposing a corporate representative shares the same present-day viability as Mr. Kasem and those Top 10 artists. We have blind pundits calling for “tort reform” without even understanding its meaning; and we have 9 Supreme Court justices who know *exactly* what it means. Whether we like it, we are in a litigation universe dominated by discovery and dispositive motions; a pre-trial world full of minute technicalities and landmines. “Winging it” just doesn’t cut it any more. Today’s version of a successful corporate representative deposition begins with the filing of your original petition, and ends when you settle or

¹ This paper is only intended to address corporate representative depositions in Texas State Court proceedings, pursuant to Tex. R. Civ. P. 199.2, and does not address corporate representative depositions under Fed. R. Civ. P. 30(b)(6).

have your judgment affirmed by an appellate court, with constant thorough work and attention to detail in between. In short, preparation is the key.

Honestly, I hate presenting witnesses to well-prepared Plaintiffs' lawyers. I hate it so much I pay them more. Show me, don't tell me, you know what you're doing and understand the issues. That changes the dialogue.
- *Defense counsel*

A corporate representative deposition should not be viewed as a “discovery tool,” or an “opportunity to poke around” or “see what they’ll say.”² A corporate representative deposition, and the process it entails, is one of the most powerful tools we have as Plaintiffs’ lawyers. It is a product of meticulous preparation, culminating in a well-planned attack. It is the foundation of your case against the corporation, and your centerpiece at trial.

Why a “Corporate Representative” Deposition? A corporation representative deposition “tests the knowledge of the company itself, though it designated witness,” and the deponent’s testimony is “binding on the company.”³

The ultimate effect of corporate representative admissions is often debated. Many courts treat such testimony as binding judicial admissions, leaving defendants without the opportunity to admit contrary evidence at trial. Additionally, a corporate representative’s testimony should procedurally prevent contrary evidence, otherwise in favor of summary judgment for the defense, from being introduced in the pre-trial phase. Regardless of whether corporate testimony is deemed an un rebuttable admission in a specific case, it no doubt constitutes an evidentiary foundation that the defendant is forced to adopt from a practical standpoint at trial, or face ugly cross-examination for changing its story midstream. Simply put, it buries the company’s feet, whether in concrete or quicksand.

The Notice. Under Texas law, a corporate representative notice must: (1) name the organization as a witness; and (2) describe with particularity the matters on which examination is requested. Tex. R. Civ. P. 199.2(b)(1).⁴ The issuance of a corporate representative notice triggers a defendant’s obligation to designate one or more people to testify on behalf of the entity on each topic contained in the original notice. *Id.*⁵

Thus, when drafting topics for a corporate deposition, it is advisable to closely track your allegations against, and your key interrogatories to, the company defendant. Note that you are not limited in the number of topics identified in a notice. Further, before you begin drafting a notice, you should spot the upcoming legal issues, and

² There are, of course, exceptions to this rule depending on each case. One such exception is the identification of additional witnesses, discussed below.

³ krcl.com.

⁴ One example is the attached **Attachment A**.

⁵ Each person designated by an organization is a separate witness for purposes of time limitations. Tex. R. Civ. P. 199, COMMENT 2.

understand the elements of, and hurdles to, meeting your burden of proof. This includes discovery of affirmative defenses.⁶ Identifying the legal issues and technicalities prior to drafting a corporate representative notice permits a detailed, precise list of topics leaving little wiggle room for the defendant or its counsel.

So many lawyers are sloppy, and some just haven't thought about what they need or who to get it from. You can tell a lot from a corporate rep notice. Sometimes I get a notice, and it looks like a form they've used in other cases. My impression is the other side doesn't understand what the case is about.

- *In-house litigation counsel*

Subpoena Duces Tecum. A notice may include a document request in the form of a subpoena duces tecum (NOTE: any document request is subject to TEX. R. CIV. P. 196, i.e. the 30-day deadline for responses). TEX. R. CIV. P. 199.2(b)(5); COMMENT 1.

In practice, a notice *should* include a document request in the form of a subpoena duces tecum. While Rule 199.2(b)(5) contemplates the witness shall produce documents or tangible things “at the deposition,” the same rule states “[w]hen the witness is a party or subject to the control of a party, document requests under this subdivision are governed by Rules 193 and 196” (i.e. Tex. R. Civ. P. 196.3, specifically the manner, time and location of the production of tangible items pursuant to a traditional request for production). Thus, when served in proper advance of the deposition, the subpoena duces tecum should specify a date and location for the production of documents ample time *in* advance of the deposition so that the materials can be properly utilized *during* the deposition.⁷

The Witness. The type of witness(es) a defendant is required to tender under 199.2 is often misunderstood. Contrary to wide belief, a defendant is *not* required to produce witnesses with “personal knowledge” or “the most knowledge” of any particular subject matter, but only a person reasonably prepared to address the identified subject matters. There is, however, a requirement that the designated representative(s) provide answers based upon matters not only “known” to the defendant, but those deemed “reasonably available” to it as well. Tex. R. Civ. P. 199.2(b)(1). This broad language presents, by far, the biggest quandary for defense lawyers in the corporate representative deposition process.

The defendant can designate anyone of its choosing to speak for the company, including employees, former employees, and even a third party. While the corporate representative is not required to have personal knowledge or even the most knowledge

⁶ Practice Tip: A good way to accomplish this task is to draft your jury charge immediately following the receipt of defendant’s answer.

⁷ Practice Tip: Utilize the subpoena duces tecum to repeat or tweak any requests for production that defendant has legitimately objected to during earlier discovery. In my experience, defendants pay little attention to a subpoena duces tecum and unknowingly waive their objections to the production of requested documents.

of any given topic, the witness locks the company in, whether in concrete or quicksand (see above), on each subject matter he/she is designated to speak on.

When the issues in the case have not been discovered in previous litigation, I've found myself stuck with all "virgin" witnesses. I avoid a first-time witness if at all possible, even if it means going outside the company to get one.

- ***Defense Counsel***

Remember, a corporation is required to disclose the identity its corporate representative witness(es) "a reasonable time before the deposition." Tex. R. Civ. P. 199.2(b)(1). By following up and requiring a defendant to disclose their designation(s), you are afforded the opportunity to tap into list serves and databases for valuable intel on, and previous testimony by, each witness in advance of the deposition.

Often times, a company will produce a trained testifier, a witness whose institutional knowledge is gained only by the documents fed to him/her by the defense lawyer in preparation for deposition. While producing a talented and experienced testifier might allow some relief to the corporate defendant, cross-examination of the witnesses selected regarding the source of his/her knowledge can be devastating.

A big mistake Plaintiffs' lawyers make is not carefully questioning the deponent about the source of their knowledge on the designated topics.

- ***Defense counsel***

The best Plaintiffs' lawyers really hit the witness on his/her firsthand knowledge of each topic. There is usually someone else within the organization that knows a whole lot more about the subject matter, and chances are that person is not a very good witness. Trust me, the defendant is hiding that witness for a reason.

- ***In-house litigation counsel***

I had a case focused on a very particular set of communications. My client insisted on using a guy as their corporate rep that hadn't even applied for a job at the company when the communications took place. He only knew what the lawyers taught him, and the Plaintiffs' lawyer blew him up. Not a good look.

- ***Defense counsel***

Also, when a corporate representative testifies on a designated topic, the usually innocuous "I don't know" answer becomes a troublesome quandary for the corporate defendant. Courts have held a corporate defendant to "I don't know"-type responses by excluding contradictory and supplementary evidence at trial, and have prevented the introduction of contrary evidence by defendant at the summary judgment stage.

Whether a company is truly bound by "I don't know" at trial, there is no dispute that questioning a witness on his/her selection as the corporate representative, to the exclusion of others, is fair game. Thus, at a minimum, "I don't know" from a specifically-

designated, hand-chosen witness is a terrible look. Further, each “I don’t know” answer is a step closer to a second bite at the deposition apple, or even sanctions.

“I don’t know.” The first couple of times, you let it go. After that, it starts to get uncomfortable. When I hear it too many times, I want to crawl under the table. Now I’ve got to start thinking about a second deposition with a different witness on the same topic. Not ideal.

- *Defense counsel*

The Deposition. First, all corporate representative depositions should be video recorded.⁸ From a strategic standpoint, a video recorded deposition allows Plaintiffs to play precise cuts of key admissions in their case-in-chief, with greater assurance the jury retains the information.⁹ From a practical standpoint, video captures the witness’s eyes, hands, and hesitations a transcript doesn’t capture.

Video the deposition. Sometimes I video my prep sessions and cringe when I see how my witness appears on camera. Use their hesitations, facial tics, nervous laughter, etc... against them on a big screen right in front of the jury. Juries pick up on the non-verbal stuff and, once it’s on film, there’s nothing I can do about it.

- *In-house litigation counsel*

On game day, at the outset of the deposition, confirm with the witness, on the record, each topic he/she is designated for, and dig deeper for additional names of persons knowledgeable, or even more knowledgeable than the witness, on the identified topics.^{10,11}

So many Plaintiffs’ lawyers don’t nail down what the person is there to give testimony on. The best ones thoroughly vet the witness as to which topics he/she is covering. Once a witness is locked in on the subject matter, the good Plaintiffs’ lawyers dig deeper for more names.

- *Defense counsel*

⁸ Tex. R. Civ. P. 199.1(c) requires at least five days’ notice prior to video recording a deposition. It is best to provide this notice in your original deposition notice.

⁹ Video clips also offer an effective visual element to cross-examining a corporate representative or expert that attempts to take a position contrary to the admissions of the corporate representative, should your Judge, or you, decide to allow the contradicting testimony.

¹⁰ Practice Tip: Mark the corporate representative deposition notice as the very first exhibit to the deposition, and make the witness clearly identify, by initialing, circling, or underlining, the specific topics from your notice on which he/she is there to speak on behalf of the company for.

¹¹ It is also helpful to attach, as a deposition exhibit, any correspondence from defense counsel identifying, by topic, the company’s designee(s) as required by 199.2(b)(1).

Once you have the deponent locked in, use the evidence you've gathered, most importantly the company's documents, to prove your case, element by element.¹² If drafted with the thought and precision suggested, you should be able to use your petition, jury charge, and thus your deposition notice and subpoena duces tecum as a road map. There are few more powerful tools in closing argument, as you walk the jury through the charge, than using the company's own admissions to check the liability boxes, line by line.¹³

We prep witnesses on our themes, our story, but often times, not the technical elements of a Plaintiff's case. The best Plaintiffs' lawyers I've seen can use a corporate rep to prove their case, element by element.

- ***In-house litigation counsel***

A fundamental practice in taking a corporate representative deposition, or any other deposition for that matter, is to simply *listen*. So often we are married to outlines or hearing ourselves *talk*, and we forget to attentively *listen*. You will be surprised what you will hear. Non-responsive answers from a corporate representative can open up doors you never even knew were there.

I'm always pleasantly surprised when my witness won't shut up, and I look over and the Plaintiffs' lawyer has his head in his outline looking for the next question.

- ***Defense counsel***

And now we're back to Mr. Jamail's quote. Every *case* is unique, and every *jury* is unique. And, every *lawyer* is unique. It is up to you, a trained litigator, to conduct the deposition with your own personal feel. Rather than try to imitate or emulate a style, do what is comfortable for you. There is only one you, and people, including juries, respond to authenticity.

Some lawyers try to act like big dogs that aren't big dogs. You want to know what makes me roll my eyes? That.

- ***Defense counsel***

Whatever your style, execute it with confidence. By definition, there can only be one alpha in the room, and the corporate representative is far more nervous than he/she lets on. You have the upper hand: you are technically sound, you are prepared, you believe in your case, and you have been chosen to battle a corporation for a family that cannot speak for themselves. Always be confident in that.

Good luck.

¹² Practice Tip: Make sure to prove up the documents during the deposition as either (1) not hearsay; or (2) an exception to the hearsay rule to avoid hassle at pre-trial/trial.

¹³ Practice Tip: Convert the corporation's request for admission responses into testimony so that the admissions may be used against any party at the time of trial, regardless of the parties remaining.

ATTACHMENT A

CAUSE NO. C-2508-13-I

JORGE AGUILAR, INDIVIDUALLY AND AS §
NEXT FRIEND OF MARIA DE LOURDES §
AGUILAR, INCAPACITATED §

IN THE DISTRICT COURT OF

HIDALGO COUNTY, TEXAS

VS.

FORD MOTOR COMPANY AND §
MARIA ROSA MATIAS §

398th JUDICIAL DISTRICT

PLAINTIFFS' NOTICE OF THE DEPOSITION OF
DEFENDANT FORD MOTOR COMPANY

TO: Ford Motor Company, by and through its attorneys of record, Jaime Saenz and
Trey Colvin, Colvin, Chaney, Saenz & Rodriguez, L.L.P., 1201 East Van Buren,
Brownsville, Texas 78520.

Please take notice that the following oral and videotaped deposition will be taken
by the undersigned attorneys:

(1) The witness is: **FORD MOTOR COMPANY**

The deposition will concern the following matter(s):

- (a) Product planning, design, development, testing, and/or release of the EN114 (specifically model years 1995-2001) and FN145 (specifically model years 1998-2001) platforms from a side-impact crashworthiness standpoint;
- (b) Engineering Specifications, System Design Specifications, Worldwide Design Guidelines, and all other Ford side-impact performance specifications applicable to the 2001 Mercury Grand Marquis, including any deviations thereto;
- (c) FMVSS 214 as applicable to the 2001 Mercury Grand Marquis;
- (d) Blueprints, design drawings, component-level drawings, assembly drawings, and other engineering drawings concerning all versions of the side-impact airbag system(s) available on the FN145 platform from model years 1998-2001, including any changes thereto;
- (e) Engineering Specifications, System Design Specifications, Worldwide Design Guidelines, and all other Ford side-impact performance specifications applicable to the 1998-2001 FN145, including any deviations thereto, if any;

- (f) Engineering Specifications, System Design Specifications, Worldwide Design Guidelines, and all other Ford design and/or performance specifications applicable to side-impact airbags in Ford vehicles from model years 1998-2001;
 - (g) Design, development, and testing of side-impact airbags for use in Ford vehicles prior to June 14, 2001;
 - (h) Testing, including design and developmental testing, or any other type of testing or demonstration performed by, on behalf of, for the benefit of, for review by, at the request of, or made available to Ford that tested, examined, demonstrated, or documented the performance of side-impact airbags at any point prior to June 14, 2001;
 - (i) The identity (by year, make, and model) of each Ford production vehicle, model year 2001 or earlier, manufactured with a side-impact airbag system; whether the system(s) were standard or optional equipment on each such vehicle; and the type of system in each; and
 - (j) The contents of documents identified in "Exhibit A" attached hereto.
- (2) The deposition will begin at **10:00 a.m. on August 18, 2015**, and will continue from day to day until the deposition has been completed.
- (3) The location of the deposition will be as follows:
- Bienenstock Court Reporting**
211 W. Fort St., Suite 1611
Detroit, MI 48226
(248) 644-8888
- (4) The deposition will be taken upon oral examination before a court reporter authorized by law to take depositions.
- (5) The deposition will be recorded stenographically and will be videotaped.
- (6) The deposition may be used against any and all defendant(s) or any other party to this action, or any related action, at the time of trial.
- (7) Pursuant to Texas Rule of Civil Procedure 199.2(b)(5), the following documents and tangible things are hereby designated to be produced by Defendant Ford Motor Company at Craft Law Firm, P.C., 2727 Allen Parkway, Suite 1150, Houston, Texas 77019 at least 14 days prior to the commencement of the deposition, to the extent they have not been previously produced in this case.
- (a) All documents in Ford's possession, custody, or control relating to the subject matter of Paragraphs (1)(a)-(i) herein, including the items identified in the attached "Exhibit A"; and

- (b) A curriculum vitae for the person(s) designated to testify on behalf of Defendant Ford Motor Company or a job description of said person(s), including a listing of all educational, training and/or other courses said person(s) have taken part in regarding their area of work, in addition to their complete employment history with Ford.

Respectfully submitted,

CRAFT LAW FIRM, P.C.

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**ATTORNEYS FOR PLAINTIFFS JORGE AGUILAR,
INDIVIDUALLY AND AS NEXT FRIEND OF
MARIA DE LOURDES, INCAPACITATED, JORGE
EDUARDO AGUILAR, AND DAVID ALEJANDRO
AGUILAR**

“Exhibit A”

1. Documents generated as a result of the product planning, design, development, testing, and/or release of the EN114 (specifically model years 1995-2001) and FN145 (specifically model years 1998-2001) platforms from a side-impact crashworthiness standpoint.
2. All versions of Engineering Specifications, System Design Specifications, Worldwide Design Guidelines, and all other Ford side-impact performance specifications applicable to the 2001 Mercury Grand Marquis, including any deviations thereto, if any.
3. FMVSS 214 as applicable to the 2001 Mercury Grand Marquis.
4. Blueprints, design drawings, component-level drawings, assembly drawings, and other engineering drawings concerning all versions of the side-impact airbag system(s) available on the FN145 platform from model years 1998-2001, including any changes notices relating thereto.
5. All versions of Engineering Specifications, System Design Specifications, Worldwide Design Guidelines, and all other Ford side-impact performance specifications applicable to the 1998-2001 FN145, including documents evidencing any deviations thereto.
6. All versions of Engineering Specifications, System Design Specifications, Worldwide Design Guidelines, and all other Ford design and/or performance specifications applicable to side-impact airbags in Ford vehicles from model years 1998-2001.
7. Documents evidencing the design, development, and testing of side-impact airbags for use in Ford vehicles generated prior to June 14, 2001.
8. Documents generated as a result of any testing, including design and developmental testing, or any other type of testing or demonstration performed by, on behalf of, for the benefit of, for review by, at the request of, or made available to Ford that tested, examined, demonstrated, or documented the performance of side-impact airbags at any point prior to June 14, 2001.