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Defendants find many ways to make mischief in our enforcement cases. This article explores the special problems that arise when a defendant notices the deposition of a civil enforcement plaintiff under Fed. R. Civ. P. 30(b)(6) seeking information about the government’s case. While depositions of government agencies are explicitly permitted under Rule 30(b)(6), unique problems arise when the agency happens to be a government law office serving as trial counsel in an enforcement action and also conducted or supervised the underlying investigation. The stakes can be high: work product and other privileges are placed at risk because trial counsel is often the only person with complete knowledge of all the facts and, therefore, the only person in a position to testify or prepare a witness to testify.

The good news is that many courts refuse to permit Rule 30(b)(6) depositions of law enforcement authorities under such circumstances. Many courts recognize that such depositions “amount[] to an attempt to depose the adversary’s attorney” because they necessarily “involve the testimony of attorneys assigned to the case, or require those attorneys to prepare other witnesses to testify.” Work product can bleed into 30(b)(6) testimony because the facts are often intertwined with trial counsel’s mental processes and legal strategies. The bad news is that, over the years, sophisticated defendants have managed to carve out exceptions to the general approach of prohibiting Rule 30(b)(6) depositions of enforcement plaintiffs; other courts have required these depositions to proceed as noticed. While these courts’ reasoning varies, it usually boils down to the view that defendants have an absolute right to depose the government under Rule 30(b)(6). When faced with a Rule 30(b)(6) deposition, the likelihood of prevailing in a motion to quash or for a protective order increases if a defendant was previously provided with overlapping discovery or a less burdensome means of discovery can generate the same information. Even courts that are unwilling to rule that the Rule 30(b)(6) deposition equates to a deposition of trial counsel may be willing to view the deposition as cumulative or duplicative under Rule 26(b)(2). With careful planning, this Rule 30(b)(6) minefield can be effectively navigated and defused by expert and novice attorneys alike.

I. The Basics of Rule 30(b)(6) Depositions and Attorney Depositions.

A. The government is an “organization” subject to deposition under Rule 30(b)(6).

As an initial matter, it is beyond dispute that government offices may be deposed just like any other entity. Rule 30(b)(6) permits depositions of “organizations” and explicitly lists “government agency” as one of the entities subject to deposition:

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 government 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…

Such a rule makes sense. Government agencies should be subject to deposition where a witness must be produced, for example, to testify about an agency’s normal operations. While this aspect of Rule 30(b)(6) is likely familiar to most readers, things become trickier when the government office being deposed happens to be a law office (such as an attorney general’s office), which is prosecuting the underlying...
enforcement action that it also investigated. In the latter situation, the stakes can become high — the deposition can implicate concerns ranging from waiver of work product, attorney client, or other privileges to placing trial counsel in the untenable position of being directly deposed. None of these options play out well for the government. For this reason, it is important to have a general understanding of the rules regarding depositions of attorneys in general, and of opposing counsel in particular, before attempting to resist a 30(b)(6) deposition.

B. There is no prohibition against attorney depositions.

Contrary to popular belief, attorneys enjoy no blanket immunity from being deposed.11 The law recognizes that attorneys, including trial counsel, may be deposed just like "any person"12 under the rules of civil procedure.13 Generally, the party seeking to prevent any deposition from proceeding bears a heavy burden of demonstrating why it should not proceed.14 When the potential deponent is opposing counsel, however, the burden shifts back to the party seeking the deposition to establish its necessity.15 Litigants are often unable to carry this burden, and courts recognize such depositions can "embroil[] the parties and the court in controversies over the attorney client privilege and more importantly, involve[] forays into the area most protected by the work product doctrine— that involving an attorney's mental impressions or opinions."16 Noticing a Rule 30(b)(6) deposition where plaintiff’s counsel must effectively serve as the designee only leads to endless disputes over whether the questioning invades privilege and work product, delaying the progress of the case to the government’s detriment and the defendant’s advantage.

Depositions of opposing counsel are disfavored.17 When a deposition is directed to an attorney who is also serving as trial counsel in the underlying case, courts have recognized these circumstances can present “unique opportunities for harassment.”18 As one court observed, “because deposition of a party’s attorney is usually both burdensome and disruptive, the mere request to depose a party’s attorney constitutes good cause for obtaining a Rule 26(c), Fed. R. Civ. P., protective order, unless the party seeking the deposition can show both the propriety and need for the deposition.”19

The leading case on the standards for deposing opposing counsel is the Eighth Circuit case of Shelton v. American Motors Corporation.20 In Shelton, the court reaffirmed the widespread disfavor of attempts
to depose opposing counsel, establishing a three-part test for situations in which a deposition of opposing counsel is implicated. To take such a deposition, a party must establish that: “(1) no other means exist to obtain the sought information; (2) the information is relevant and nonprivileged; and (3) the information is crucial in the case.” The Shelton standard is difficult to meet, resulting in the prohibition of attorney depositions or their equivalents under Rule 30(b)(6) in many cases.22

II. Rule 30(b)(6) Depositions of Enforcement Authorities that Investigated the Underlying Case—The Current Landscape.

Rule 30(b)(6) requires the responding organization to designate persons who will “testify as to matters known or reasonably available to the organization.” Because an enforcement authority’s only knowledge of its enforcement case often resides exclusively with its attorneys,24 a Rule 30(b)(6) deposition of the plaintiff in an enforcement case can arguably amount to an actual or practical deposition of the government’s trial counsel. Unsurprisingly, the case law is inconsistent.

A. Many courts have held that deposing the plaintiff under Rule 30(b)(6) in a civil enforcement case constitutes the practical equivalent of deposing trial counsel.

A number of courts have granted protective orders to the government or denied defense motions to compel in cases where defendants have attempted to depose enforcement plaintiffs under Rule 30(b)(6). Several leading cases that have ruled in favor of the government are discussed below.

Securities and Exchange Commission v. Rosenfeld

In Securities and Exchange Commission v. Rosenfeld,26 the defendant served a Rule 30(b)(6) deposition notice that listed 11 categories or topics purportedly relating to the SEC’s investigation of the defendant and the resultant civil enforcement complaint. The SEC initially asked the defendant to retract the deposition notice on the grounds that the designated topics involved the SEC’s secondhand knowledge and delved into protected work product, but the defendant refused. The SEC also stressed that the defendant had not made the showing required under Rule 26(b)(3) for accessing work product because he had only conducted limited discovery, had not shown a substantial need for the deposition, nor first sought the discovery from other sources.29 The defendant argued he was not seeking to depose opposing counsel. The SEC was free to designate whomever it wished and the SEC designee was not required to have firsthand knowledge of the facts.30 The court rejected the defendant’s arguments in rather terse fashion, rebuking him for [D]isingenuously avoid[ing] the fact that this action is an SEC enforcement proceeding seeking a determination as to whether defendant has violated the security laws of this country, and that because such investigations are conducted by the SEC’s legal staff, a Rule 30(b)(6) deposition of an SEC official with knowledge of the extent of that investigative effort, amounts to the equivalent of an attempt to depose the attorney for the other side.”31

The court held that, because Rule 30(b)(6) requires the designee be prepared to answer questions fully, completely, and without evasion, a Rule 30(b)(6) deposition of the SEC would impermissibly intrude upon the SEC’s attorney’s work product:

Thus the witness designated would have to have been prepared by those who conducted the investigation and, since the investigation was conducted by the SEC attorneys, preparation of the witnesses would include disclosure of the SEC attorneys’ legal and factual theories as regards the alleged violations of the security laws of this country and their opinions as to the significance of documents, credibility of witnesses, and other matters constituting attorney work product.32 The court took the added step of examining and rejecting each topic of testimony sought by the defendant, noting that certain topics involved protected communications with the SEC’s trial counsel, could be addressed through preliminary interrogatories and document requests, or involved premature contention discovery.33 The court also held that a Rule 30(b)(6) deposition of the SEC could compromise the common prosecutorial interest it shared with the Ontario Securities Commission because certain topics sought information obtained from the latter agency.
court recognized that a Rule 30(b)(6) deposition of the SEC “would undoubtedly place an undue burden on the SEC and the court, which would have to make a multitude of otherwise unnecessary decisions about issues of attorney work product and law enforcement privilege.”

The court concluded by holding that the information the defendant sought was derived from the investigation conducted by SEC attorneys and staff working under them, and the only way that the SEC could comply with the deposition notice would be to designate its attorneys as the deponents or other personnel who would have to be taught the case by the SEC attorneys. This, the court held, would inevitably constitute an improper invasion of the attorneys’ work product, because the deposition necessarily would delve into “how the SEC intends to marshal its facts, documents, and testimonial evidence, and . . . the inferences the SEC believes can be drawn from that evidence.”

**Securities and Exchange Commission v. Buntrock**

*Securities and Exchange Commission v. Buntrock* involved a civil fraud enforcement action brought by the SEC against individual corporate officers of Waste Management, Inc. The SEC alleged that the corporate officers manipulated the stock price of the corporation over a course of five years, resulting in a $1.7 billion accounting restatement — the largest in history at the time — along with significant profits for themselves from inflated bonuses and insider trading.

During the course of discovery, one of the defendants noticed the SEC’s deposition and listed 12 topics of testimony relating to the results of the SEC’s investigation. The SEC sought a protective order arguing that the deposition effectively required it to produce its attorneys for deposition, which constituted an impermissible invasion of attorney work product and other privileges. The defendant argued that the SEC was free to designate whomever it wished, that he was only seeking “facts” underlying the SEC’s case, and that no other means existed for him to obtain the requested information.

The court noted that the SEC had already produced 200 boxes of documents, a 12-page witness list, investigative testimony and related exhibits from 49 witnesses, a seven-page explanation of the elements and calculation of the disgorgement sought from each defendant, and evidence summaries from previous investigations and proceedings involving Waste Management, Inc. The parties also agreed to a deposition list of 20 witnesses, designating five priority witnesses each. Defendants did not identify the SEC in their witness lists.

The court granted the protective order. The court held that, because the SEC and its employees conducted the investigation at the direction of attorneys, the defendant’s Rule 30(b)(6) deposition notice was “an inappropriate attempt to depose opposing counsel and to delve into the theories and opinions of SEC attorneys.” According to the judge, “the notice seeks, if not the deposition of opposing counsel, then the practical equivalent thereof.” The 30(b)(6) notice would necessarily involve the testimony of attorneys assigned to the case, or require those attorneys to prepare other witnesses to testify. The court also rejected the defendant’s attempt to distinguish the *Rosenfeld* case, holding that “here, we are dealing with the results of an attorney-conducted and -directed law enforcement investigation.”

*Buntrock* also sheds light on two common defense arguments made in Rule 30(b)(6) deposition challenges: a defendant’s claim it is merely seeking “facts,” not work product and the claim that no other means exist by which the defendant can obtain requested information. The court noted that, as to the argument that defendant was only seeking “facts,” that defendant was seeking not just “facts,” but also was seeking the SEC’s theories about the facts, how the SEC intends to marshal those facts, and the SEC’s belief as to the inferences to be drawn from those facts. The defendant’s claim that he had no other means to learn these “facts” also failed given the large volume of discovery that he had already received from the SEC.

*Buntrock* thus demonstrates that civil enforcement attorneys would do well to answer discovery requests promptly and comprehensively early in the case, especially before a Rule 30(b)(6) deposition is attempted by the defense.

**Securities and Exchange Commission v. SBM Investment Certificates, Inc.**

*Securities and Exchange Commission v. SBM Inv. Certificates, Inc.* involved an attempt by the defense to depose the SEC on 10 topics. The SEC moved for a protective order to quash the deposition. Citing Fed. R. Civ. P. 26(b)(2), the court noted that “discovery requests . . . may be limited,” and reviewed the work product standard set forth in Rule 26(b)(3). The
InEqual Employment Opportunity Commissionv. McCormick & Schmick's Seafood Restaurants, Inc., the EEOC objected to defendant's Rule 30(b)(6) notice which listed 15 topics to be covered by the deposition, seeking information about employees and witnesses, and the EEOC's allegations and policies. Relying heavily on its opinion in Securities and Exchange Commission v. SBM Inv. Certificates, Inc., and quoting Rule 26(b)(2), the court observed that,

On its own initiative or in response to a motion for protective order under Rule 26(c), a district court may limit “the frequency or extent of use of the discovery methods otherwise permitted” under the Federal Rules of Civil Procedure if it concludes that “(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit.”

The court also reviewed various defense arguments made in light of similar arguments rejected in SBM Inv. Certificates, Inc., including the judge's discussion of the work product doctrine under Rule 26(b)(3) and his reliance on Rosenfeld, and concluded that opinion work product was implicated. The court also rejected the defendant's contention that the EEOC could designate someone other than counsel, noting that the EEOC “had no independent knowledge of the events at issue and could only speak to matters known through attorney involvement in anticipation of litigation, which would inevitably invade opinion work product.” Noting that SBM Inv. Certificates, Inc. expressly rejected the argument that the deposition could proceed "subject to objections and assertions of privilege regarding individual questions because the noticed subject areas facially sought attorney work product," the court held that SBM Inv. Certificates, Inc's "persuasive reasoning applies equally here where the subjects outlined in the 30(b)(6) deposition notice on their face seek attorney work product and would require the deposition of EEOC counsel or a proxy prepared by counsel."

InEqual Employment Opportunity Commission v. Evans Fruit Co., the EEOC filed a motion for a protective order seeking to prevent the defendant's Rule 30(b)(6) deposition. The court granted the protective order and observed that the 20 “broad and wide-ranging categories of inquiry” listed in the defendant's Rule 30(b)(6) notice,

Effectively seek information regarding [the] EEOC’s interpretation or evaluation of how particular facts support or refute the allegations in the EEOC's First Amended Complaint. More fundamentally, the categories of inquiry seek information as to how and why the EEOC determined it should proceed with this case. As such, they impermissibly seek attorney work product and/or information which is subject to the government's deliberative process privilege.
Notably, the court recognized that the EEOC would suffer undue burden by “[t]he need to prepare a proxy … particularly where the underlying factual information is readily obtainable through other discovery means,” and the individual objections “would likely involve recourse to this Court and a significant burden on this Court’s time that would be lessened by other means of discovery.” The court rejected the contention that defendants were only seeking “factual information,” ruling that the defendants’ notice “does not ask for the underlying facts, but EEOC’s counsel’s interpretation of the facts and how they have chosen to proceed in preparing their case.”


In *Equal Employment Opportunity Commission v. Source One Staffing, Inc.*, the court granted a blanket protective order to EEOC on the grounds that certain topics related to the EEOC’s pattern and practice claims were not appropriate for deposition because the defendant had only recently produced its payroll data and job assignment information, which the EEOC’s expert was reviewing. “Until the process is completed, the EEOC cannot provide Source One with the information it wants.” The court also ruled that a topic geared toward ensuring the EEOC had produced all non-privileged material collected during its investigation was duplicative because the EEOC had already produced its investigative file. A topic that sought information about the EEOC’s policies, procedures and/or practices” was deemed off-limits because it improperly delved into the sufficiency of the EEOC’s investigation, which was prohibited under Seventh Circuit law.

B. Many courts have ordered Rule 30(b)(6) depositions of enforcement authorities to proceed as noticed.

Many courts have been unsympathetic to enforcement plaintiffs’ arguments regarding the perils of proceeding with their Rule 30(b)(6) depositions. While some cases present arguably distinguishable facts, others do not. For example, courts often cite the plain language of Rule 30(b)(6) stating “a party may name as the deponent . . . a government agency” as the primary reason such depositions should proceed, offering little additional analysis. Discussed below are some of the leading cases that have required Rule 30(b)(6) depositions of enforcement authorities to proceed as noticed.

**Securities and Exchange Commission v. Kramer**

In *Securities and Exchange Commission v. Kramer*, the court reviewed prior trial and discovery rulings and overturned the magistrate judge’s ruling denying the defendant’s motion to compel the SEC to submit to a Rule 30(b)(6) deposition. The defendant’s 30(b)(6) notice sought testimony about,

The specific facts, information, documents, and/or other evidence specifically relied upon by the [SEC] which support a specific cause of action and claim(s) for relief asserted by the [SEC], specifically against Mr. Kramer … which asserts, inter alia, that Mr. Kramer violated the Broker Dealer Registration provisions of the Exchange Act.

The court reviewed the general rules regarding Rule 30(b)(6) depositions, observing that “Rule 30(b)(6) expressly applies to a government agency and provides neither an exemption from Rule 30(b)(6) nor ‘special consideration concerning the scope of discovery, especially when [the agency] voluntarily initiates an action.’” The court seemed persuaded by the defendant’s argument he was only seeking to “discover facts underlying the claim against him” and the SEC “could designate any person (i.e., someone other than counsel) to depose in response to Kramer’s request.” The *Kramer* court did not provide insight into why it was unwilling to consider the SEC’s arguments regarding its role as a government enforcement plaintiff.

**Securities and Exchange Commission v. Merkin**

In *Securities and Exchange Commission v. Merkin*, the trial court upheld a magistrate judge ruling that the SEC was not categorically exempt from a 15 topic Rule 30(b)(6) deposition noticed by the defendant. The *Merkin* court relied heavily on *Kramer* in its analysis, noting that none of the parties had submitted “any binding Supreme Court or Eleventh Circuit opinions involving civil litigants’ efforts to obtain 30(b)(6) depositions from the SEC or any other federal agencies.”

The court reviewed a number of authorities which concluded that the government enjoyed no special status or exemption as a litigant or deponent, including Judge Sheindlin’s opinion in *Securities and Exchange Commission v. Collins & Aikman Corp.*, where she noted that the government (in a document
production dispute) “is not entitled to special consideration concerning the scope of discovery, especially when it voluntarily initiates an action.” The Merkin court further observed that “[t]he mere fact that it might be an SEC attorney preparing a government investigator as the designee instead of a private attorney preparing the client’s current or former employees is not a meaningful distinction.” Ordering that the deposition proceed on a question-by-question basis with privilege objections to be interposed by the SEC as needed, the court streamlined the deposition by eliminating eight topics it deemed “irrelevant and/or overly broad.”

**Securities and Exchange Commission v. McCabe**

In Securities and Exchange Commission v. McCabe, in denying the motion for a protective order, the court simply focused on the fact that “Rule 30(b)(6) expressly applies to a government agency and provides neither an exemption from Rule 30(b)(6), nor ‘special considerations concerning the scope of discovery, especially when [the agency] voluntarily initiates an action.”

**Federal Trade Commission v. DIRECTV, Inc.**

The court observed that “DIRECTV has not shown why it cannot seek the same information directly from the FTC through a Rule 30(b)(6) deposition.”

Concluding the appropriate course of action was for the defendant to seek discovery about the communications directly from the FTC itself, the court remarked that “it appears DIRECTV has already done precisely that, as it noticed the FTC’s Rule 30(b)(6) deposition.”

C. Courts have also ordered limited Rule 30(b)(6) depositions of enforcement plaintiffs to proceed.

Some courts have ruled that enforcement authorities may only be deposed as to certain topics listed in a Rule 30(b)(6) deposition notice, while quashing or restricting other topics.

For example, in EEOC v. Honeybaked Ham, the court granted the majority of the EEOC’s protective order, but ordered the deposition to proceed to the extent there might be some information the defendant did not yet have. One of the EEOC’s main areas of objection concerned the relevance of several Rule 30(b)(6) topics that related to a later-filed administrative proceeding. Although the court recognized that the defendant was entitled to such information to the extent it related to double recovery or claim preclusion defenses, it held the defendant had to obtain such discovery through the administrative proceeding, not through the present case. The court also held that, if the other proceeding generated relevant admissions of a party opponent, those admissions would have to be produced to the extent proper discovery requests had already been made.

The court declined to order the EEOC to provide 30(b)(6) testimony about “all” facts and information underlying its allegations in the case, concluding such topics were not appropriate for inquiry under Rule 30(b)(6). The court observed that “[e]ven under the present-day liberal discovery rules, [a party] is not required to have counsel ‘marshal all of its factual proof and prepare a witness to be able to testify on a given defense or counterclaim.’” The court declined to grant the EEOC’s motion in its entirety, but “amend[ed] each of the topics only insofar as the documents in the case, and the testimony provided by the witnesses in this case, do not already address and provide sufficient information concerning the particular topic.” In this way, “[i]f the deponent is not aware of any additional information on a particular
B. When defendants argue they are merely seeking “facts,” show the court how the deposition notice invades work product or other privileges.

Enforcement defendants frequently try to avoid the argument that their Rule 30(b)(6) notice of the government seeks the actual or practical equivalent of the deposition of the government’s trial counsel by arguing that their notice seeks only “facts” and does not demand that an attorney appear for the deposition. But when a defendant’s 30(b)(6) notice asks the government to explain what facts it considers important to the case, or how it intends to prove its case at trial with respect to the allegations in the complaint, such topics can constitute an impermissible invasion of attorney work product. Courts have consistently held that merely cloaking a request for a Rule 30(b)(6) deposition under the guise of a request for “facts” does not change the true nature of the request.

For example, in Securities and Exchange Commission v. Morelli, the defendant’s Rule 30(b)(6) notice purported to designate factual topics such as the time and place of defendant’s alleged receipt of inside information. But, because the defendant had already received ample fact discovery, the court was “drawn inexorably to the conclusion that [defendant] intended to ascertain how the SEC intend[ed] to marshal the facts, documents and testimony in its possession, and to discover the inferences that [the SEC] believes properly can be drawn from the evidence.”

Sometimes defendants will carefully craft their 30(b)(6) topics by including terms like “factual basis” or “nature and details,” to avoid a facial intrusion into work product. Courts have recognized that defense attempts to recast their notice of deposition in this way does not change the true nature of the request.

For example, in Buntrock, the court rejected the defendant’s attempt to avoid a work product objection by claiming his notice was only seeking facts:

[T]he “facts”— if that is truly what [the defendant] is after— are available elsewhere and through other means. . . [Defendant] seeks knowledge a step beyond “factual knowledge alone;” he seeks, as his own submissions reveal, what the SEC’s attorneys brought to bear having discovered those facts.
Similarly, in *Securities and Exchange Commission v. Jasper,* the court noted it was “unpersuaded by [the defendant’s] assertions that he seeks only the factual content of [the third party’s] statements.” The court recognized that “it appears that what defendant really seeks is a probing examination as to the [third party’s] (reconstructed) statements through the recollections of the SEC counsel who are prosecuting this matter—recollections which this court finds are not easily segregated from those attorneys’ thoughts, mental impressions, opinions or conclusions about this case.” The court noted defendant acknowledged he was seeking to discover “[t]he SEC’s state of knowledge at the time it filed the Maxim and Jasper complaints,” concluding, “[s]uffice to say that for discovery purposes and on the record presented, this court is unpersuaded that the stated need for the SEC’s deposition outweighs the SEC’s interest in protecting its attorneys’ work product.”

In *Equal Employment Opportunity Commission v. HBE Corp.*, the court granted a protective order to the EEOC where the only person with knowledge of the facts was the EEOC’s trial counsel. The court rejected the defendant’s claim that it was merely seeking to “explore the factual bases of the claims made by Plaintiff,” and noted that “[a]s defendant well knows, it is the selection and compilation of the relevant facts that is at the heart of the work product doctrine.”

In *McCormick & Schmick’s,* the defendants sought a Rule 30(b)(6) deposition of the EEOC for “factual information and documents that support or rebut the EEOC’s allegations set forth in the Complaint,” as well as factual information and documents that supported or rebutted various specific allegations in the EEOC’s Complaint. In response to the EEOC’s objection that the deposition notice would require the testimony of counsel, the defendants made the argument that they were simply seeking to discover factual information that directly relates to the claims and defenses in this case from the EEOC and that if the EEOC “has created a case that depends solely on the ‘facts’ known by counsel, that is a product of its own making, and one that should not prejudice [Defendants’] ability to obtain discovery.”

Relying on *SBM Inv. Certificates, Inc.*, the court granted a protective order to the EEOC because “the subjects outlined in the 30(b)(6) deposition notice on their face seek attorney work product and would
require the deposition of EEOC counsel or a proxy prepared by counsel.”

In Securities and Exchange Commission v. Monterosso, the court recognized that “any question on the ‘factual basis’ for an allegation [by the SEC] implicates attorney work product.”

The problem with this line of inquiry is that the SEC has stated that it has already produced all the documents it has in support of its action, and the SEC has no independent knowledge of these documents. Thus, the only remaining knowledge as to the ‘factual basis’ of the SEC’s claims is the importance the SEC gives to each document. How the SEC intends to marshal facts, documents and testimony in its possession is protected from disclosure, pure and simple.

Using the guidance provided by these cases, trial counsel should be prepared to explain to the court exactly why the defendant’s argument that it is only seeking “facts” is improper and that a protective order is warranted.

C. Reject defense suggestions that the Rule 30(b)(6) deposition proceed on a question-by-question, objection-by-objection basis.

Some courts have ruled that the government should produce a Rule 30(b)(6) witness to testify on the objectionable topics, and the government’s counsel could then interpose objections on a question-by-question basis, instructing the witness not to answer where appropriate. Other courts have rejected this suggestion, recognizing such situations called for a complete protective order because a party was effectively seeking to depose another party’s attorney. “The practical effect of the question-by-question approach is the impermissible intrusion into work product and a host of other privileges and protections.” One court observed, “[t]his approach risks the disclosure of privileged information, it would increase the burden on the [government] to prepare a witness, and it would increase the burden on this Court which would likely have to make many otherwise unnecessary decisions about issues of work product privilege.” Another court rejected the idea outright:

It is appropriate to make this ruling now rather than allowing the deposition to proceed with EEOC reserving the right to object to questions on the basis of privilege. There is little doubt the EEOC would be lodging numerous such objections which would require eventual resolution either during the deposition or subsequent thereto. This would be an inefficient use of the parties’ time and the court’s time.

This manner of inquiry has repeatedly been recognized as burdensome for the court. For example, in Rosenfeld, the court recognized that a Rule 30(b)(6) deposition of the SEC “would undoubtedly place an undue burden on the SEC and the court, which would have to make a multitude of otherwise unnecessary decisions about issues of attorney work product and law enforcement privilege. . . .” Similarly, in McCormick & Schmick’s, the court held that “the attendant objections as to individual questions during the deposition on attorney-client privilege and work product grounds would likely involve recourse to this Court and a significant burden on this Court’s time that would be lessened by other means of discovery.”

In some cases, where defendants have attempted to depose the enforcing authority under Rule 30(b)(6), courts have held that the defendants can conduct the required discovery by reviewing documents and serving interrogatories, which provide information without intruding on the work product of the government’s attorneys. If the government has already produced all relevant evidence to the defense, courts have generally been more willing to conclude that the Rule 30(b)(6) deposition is unnecessary.

When defendants claim that they remain unable to understand some aspect of the government’s allegations, even after reviewing all the discovery available to them, the appropriate vehicle to seek information from the government would be a limited number of narrow, carefully drafted contention interrogatories. Like all litigants, defendants have the opportunity to flesh out contentions and prepare for trial, and courts have been clear that contention interrogatories allow for fair discovery without intruding upon the work product of an enforcement authority’s attorneys. Even if a defendant could show a sufficient reason for needing additional information, that does not mean that the floodgates should be opened for overuse of inappropriate contention interrogatories.
D. In complex cases, argue it is unduly burdensome to require the Rule 30(b)(6) designee to memorize thousands of facts.

Courts have been sympathetic to the fact that a Rule 30(b)(6) deposition of an enforcement authority can be extremely burdensome, especially in complex cases. For example, in SEC v. Nacchio,145 the court recognized that the SEC’s representative would have to spend weeks, if not months learning the case, which would be “inefficient in the extreme” and that even agency counsel might not have all the facts “immediately at her fingertips.”146 When appropriate, trial counsel should bring this fact to the court’s attention, as unduly burdensome discovery need not be provided as requested.

E. Argue the defendant has failed to show that no other means exist by which to obtain the requested information and, when appropriate, demonstrate that the government has provided or will provide defendants with responsive information through other means of discovery.

The government is not obligated to provide multiple cumulative examples of the same facts. Courts have held that there is no duty to provide additional information through a Rule 30(b)(6) deposition of the enforcement agency if the pertinent information was previously produced to the defendant through discovery responses or other disclosures.147 Notably, to the extent a defendant is already in possession of all the discoverable material and facts because they were previously produced by the government, “defendants are not entitled to explore opposing counsel’s thought processes as to which facts support these contentions (and which do not), or what inferences can be drawn from the evidence that has been assembled so far.”148

IV. STRATEGIES FOR HEADING OFF CERTAIN RULE 30(b)(6) TOPICS.

A. Seeking information about allegations in the complaint or the government’s position about affirmative defenses is usually not appropriate under Rule 30(b)(6).

Many courts have ruled that Rule 30(b)(6) depositions are not the proper vehicle for discovering facts about the allegations in a civil enforcement complaint, especially in cases where the government previously provided the defendant with all underlying facts.149 Unsurprisingly, other courts have ruled to the contrary.150 With respect to the former category of cases, many of those courts have commented that contention interrogatories, not Rule 30(b)(6) depositions, are the more appropriate vehicle for discovering facts concerning the allegations in an enforcement complaint.151

For example, in American International Group, Inc.,152 the defendant sought to discover information related to the EEOC’s investigation including “(1) who was interviewed; (2) what the [Rule 30(b)(6)] deponent did to refresh his recollection of the facts in the case; and (3) what facts [the] EEOC considered concerning the defendants’ defenses.”153 While the court held the first two categories of inquiry were permissible, the “questions seeking to discover what facts were considered with respect to the defendants’ defenses face the same problem as questions about the allegations in the complaint.” Because the defendants already had the EEOC’s investigative file, “[d]eposition inquiries concerning the EEOC’s view of the relevant facts can only be designed to explore the EEOC’s determinations of how it intends to order its proof.”154

B. Prevent defendants from seeking information the government does not have or defendants already possess.

Defendants sometimes attempt to depose the government about information only they possess or have failed to produce to the government in response to discovery. While such a practice is disingenuous, defendants may persist in seeking such information from an enforcement authority through a motion to compel. Courts have recognized it would be impossible for the government to prepare a designee to testify under such circumstances. As one court held, The Court is not inclined to order the State to produce a Rule 30(b)(6) representative at this point because the areas of inquiry identified in Defendants’ Rule 30(b)(6) notice cover areas for which Defendants have not produced relevant documents that form the bases of the State’s claim. The State could not prepare a witness to address those areas where discovery has not been forthcoming.155

Courts have also been persuaded to grant protective orders prohibiting Rule 30(b)(6) depositions of the enforcement authority in cases where the government has been able to demonstrate that the
defendant is already in possession of the relevant facts sought by the deposition.156

C. Avoid providing unnecessary duplicative discovery.

Like any discovery request, a deposition under Rule 30(b)(6) “is subject to limitations under Rule 26, which requires that discovery not be unduly burdensome or duplicative.”157 Thus, when the first six topics designated in a Rule 30(b)(6) deposition notice of the State overlapped with a defendant's previously served interrogatory, a court concluded “it would be premature to require the State at this time to designate a Rule 30(b)(6) representative when Defendants’ discovery issues may very well be resolved through other means of discovery to which they have resorted.”158 Similarly, in Equal Opportunity Commission v. Evans Fruit Co.,159 in addition to granting a protective order to the EEOC preventing a deposition from going forward on the basis of the deliberative process privilege, the court further held that defendant's Rule 30(b)(6) inquiries into the EEOC's investigation “seek information which would be cumulative or duplicative of information contained in the EEOC files already provided to Defendant.”160

D. Avoid revealing the government’s investigative thoughts and strategies.

Courts have also held that 30(b)(6) topics that inquire into the government's investigation “would require the investigating attorneys’ thought processes and opinions.”161 The Rosenfeld court recognized that inquiry into the government's investigation “would inevitably tend to disclose the investigating attorneys’ preliminary positions and legal theories concerning the suspected conduct of defendant . . . and those factual areas which were of particular interest to the SEC investigators.”162

Another court concluded that a defendant's attempt to inquire into an attorney general's “relationship” with government regulators and public and private consumer complaint organizations “purporting to investigate any Defendant, including but not limited to the nature and content of any communication, collaboration, or correspondence regarding Defendants,” was irrelevant, concluding that “these areas [do not] warrant a Rule 30(b)(6) designee at this time as these deal with the investigative working of the State and do not bear on the substance of the allegations in this case.”163

In Evans Fruit Co.,164 the court held that “[a]llowing the Defendant unfettered discretion to ask questions about the investigation and the conciliation process would open the door to inquiry into EEOC’s evaluation of the strengths and weaknesses of its case and into its decision-making process.”165

E. Discovery of opinion work product from a related, but closed, enforcement case has been prohibited.

In the context of a Rule 30(b)(6) deposition of the SEC, one court has held that “[o]pinion work product remains privileged even when the litigation it was prepared for has ended, especially as here where the same parties are again involved in litigation over related matters.”166

F. The government should not have to elaborate on its objections and responses to written discovery in a Rule 30(b)(6) deposition.

Rule 30(b)(6) inquiry into “the State’s objections and responses to all document requests and interrogatories and what the State did to comply with answering or responding to Defendants’ discovery requests” was viewed as an “attempt to delve into the inner workings of the State's counsel in responding to the requests. That, on its face, appears to be intruding into an area clearly protected by the work product doctrine and is not relevant to any issue in this case.”167

G. Rule 30(b)(6) depositions are not proper vehicles for the discovery of third party information.

 Defendants usually recognize the State has investigated and marshaled the facts from third parties as part of its enforcement investigation. Rather than invest effort into written discovery or third-party depositions, some defendants attempt to elicit the State's work product developed from the State's interviews of consumers and others through 30(b)(6) depositions. Topics that seek information regarding the knowledge of third parties, such as complaint information, persons and documents identified in initial disclosures, or information dealing with the substance of a third party’s knowledge, are improper for Rule 30(b)(6) purposes. If a defendant requires such information, it should interview or depose such third parties, or, at a minimum, review the factual summaries that may have been provided to the defendant through initial disclosures or discovery
C. The Law Enforcement Privilege

In jurisdictions that recognize the law enforcement privilege, counsel should be prepared to assert it and demonstrate why it applies in the case. In Rosenfeld, for example, the court held that Rule 30(b)(6) testimony about the SEC’s trial counsel’s communications with certain third-party witnesses could implicate the law enforcement privilege “since it might reveal the SEC’s techniques and procedures and how it develops relationships with informants, and strategies for eliciting information from individuals who provide it with information.”

D. State Secrets Privilege

“The State Secrets Privilege is a common-law evidentiary privilege that permits the Government to bar the disclosure of information where there is a reasonable possibility that disclosure will expose sensitive national security interests.” Once successfully invoked, courts must consider how the invocation of the privilege and the related unavailability of evidence affects the proceeding and whether dismissal of all or part of the case is warranted. As a practical matter, this privilege will rarely be invoked on the state level because it applies to information that is deemed classified or of concern to national or military security.

VI. WHAT TO DO WHEN THE ENFORCEMENT PLAINTIFF IS REQUIRED TO SUBMIT TO A RULE 30(b)(6) DEPOSITION

Despite plaintiff’s counsel’s best efforts, there will be times when a court will order an enforcement plaintiff to submit to a Rule 30(b)(6) deposition, even where trial counsel also investigated the underlying case. As a practical matter, it seems that defendants remain unsatisfied with the results of such depositions, given the inevitable (and sometimes numerous) work product and privilege objections that must be made. These types of disputes even arise when the enforcement authority voluntarily submits to a Rule 30(b)(6) deposition.

Federal Trade Commission v. CyberSpy Software, LLC

Federal Trade Commission v. CyberSpy Software, LLC, is an example of a case where the defendants’ apparent dissatisfaction with the FTC’s designee’s

responses. Defense attempts to obtain such third party information should also be subject to defeat because it would be more easily available to the defendant through written discovery or by subpoena to the complaint agency at issue.

V. TRIAL COUNSEL SHOULD ENSURE THAT THE RULE 30(b)(6) OPPOSITION COVERS ALL PRIVILEGES WHICH MAY BE AT RISK.

As already seen, the most common protection at risk discussed in cases examining Rule 30(b)(6) depositions of enforcement authorities is work product. A number of cases touch on other privileges as well. Trial counsel should ensure that all applicable privileges are considered and covered in argument, along with cases which support counsel’s position and refute defense arguments. Below are cases discussing some of the other privileges which have been raised by the government when intrusive Rule 30(b)(6) depositions have been attempted by defendants.

A. Common Interest Privilege

In Rosenfeld, the court agreed with the SEC that the defendants’ Rule 30(b)(6) topic, which sought information about investigative information shared between the SEC and the Ontario Securities Commission, could compromise the common prosecutorial interest the two agencies shared because certain topics sought information obtained from the latter agency.

B. Deliberative Process Privilege

A number of civil enforcement cases have granted protective relief to government enforcement authorities faced with the prospect of waiving the deliberative process privilege in Rule 30(b)(6) depositions. For example, in Evans Fruit Co., the court quashed a Rule 30(b)(6) deposition of the EEOC based, in part, on the EEOC’s assertion of the deliberative process privilege. The court engaged in a lengthy analysis of EEOC enforcement cases that involved the assertions of the deliberative process privilege under Rule 30(b)(6), and concluded that other than defense questions “related to seeking clarifying factual information” inquiries seeking the facts behind the government’s charging determination ran afoul of the deliberative process privilege.
testimony led to a contempt motion against the FTC. In CyberSpy, the magistrate judge ordered the Rule 30(b)(6) deposition of the FTC to proceed as noticed, despite the FTC's work product concerns. The magistrate judge seemed focused only on the fact that the FTC was a government agency and government agencies are subject to deposition under Rule 30(b)(6). The FTC produced the assistant director of its Division of Advertising Practices as its Rule 30(b)(6) designee, who declined to answer a number of questions on grounds of privilege or lack of information. The defendants were dissatisfied and filed a contempt motion against the FTC, complete with a string of sanctions requests.

After examining the defendants’ topics of inquiry in light of the FTC’s designee’s answers, the trial court denied the defendants’ contempt motion. Notably, the court provided some guidance regarding the lines of inquiry that ran afoul of work product protection. For example, one area of inquiry focused on whether the FTC was “satisfied” with the defendants’ post-preliminary injunction website changes. The FTC’s designee refused to answer these questions on the grounds of work product. The court held the defendants’ questions were impermissible because they “clearly sought opinion work product—mental impressions as to the changes made to the CyberSpy website and opinions as to the legal effect of those changes.”

The defendants further sought information about statutes other than the FTC Act that the FTC intended to argue were violated. The FTC’s “unfairness” claim was based, in part, on allegations that the defendants’ acts and practices violated other state and federal statutes. The FTC’s designee identified two federal statutes, but declined to “provide a factual basis regarding the same” on work product grounds. The court agreed, holding that “[a]s for the ‘factual basis justifying same,’ a request for such justification is explicitly a request for the ‘mental impressions, conclusions, opinions or legal theories of a party’s attorney’ and was properly objected to.”

The defendants also sought information from the FTC’s designee relating to third parties, such as defendants’ purchasers and victims. As to the former, the FTC’s designee referred the defendants to other discovery, but defendants claimed they were still “completely in the dark about the facts underlying the allegations made against them by the FTC.” Defendants failed to offer any analysis as to why the designee’s responses were improper, leading the court to observe that “the Defendants are almost certainly in possession of the [purchasers’] identities they sought to discover.” As to the latter category of third parties, the FTC’s designee identified persons harmed by defendants’ conduct as persons who downloaded defendants’ spyware without notice or authorization, but was unable to elaborate on individuals identified in the FTC’s interrogatory answers, or facts beyond those in a victim’s affidavit. The court accepted the FTC’s representation that all responsive information had been produced to the defendants in discovery, and held that “the [FTC] is not required to produce a witness who has memorized all of the facts that have been uncovered to date.”


In Equal Employment Opportunity Commission v. American International Group, Inc., the defendants moved to compel and for sanctions against the EEOC, despite the fact the EEOC produced its entire investigative file to the defendants and voluntarily submitted to a Rule 30(b)(6) deposition. The EEOC’s designee was the case investigator’s supervisor. During the deposition, the EEOC instructed its designee not to answer certain questions on grounds of work product and deliberative process privilege. At times, the designee was simply unable to answer questions regarding details in the investigative file. Defendants complained that the EEOC’s designee was unprepared, but the court disagreed:

Rule 30(b)(6) is not designed to be a memory contest. It is not reasonable to expect any individual to remember every fact in an EEOC investigative file. Subject to its asserted privileges, the EEOC has provided the defendants with the investigative file. Under these circumstances, the defendants do not have a legitimate need to inquire into facts contained in the file.

Most of the remaining contested matters were resolved in the EEOC’s favor. This case is an example where the government placed itself in a good position by making an early production of documents to the defendants, and voluntarily submitting to a Rule 30(b)(6) deposition—facts which seemed to work in its favor.
VII. CONCLUSION

A motivated defendant can wreak havoc on even the most solid of enforcement cases through an improper Rule 30(b)(6) deposition of the plaintiff. Preparation, good planning, and a solid understanding of the law are key to staving off defense attempts at invading privilege and work product through improper Rule 30(b)(6) depositions of the government.

Endnotes

1 This article represents the opinions of the author and not necessarily those of the Office of the Tennessee Attorney General and Reporter.

2 Because of the variations in state court rules of civil procedure, this article will refer to the Federal Rules of Civil Procedure and related federal cases.


4 U.S. Grant Res., 2004 WL 1444951, at *9. See also SBM Inv, 2007 WL 609888, at *23-24; Morelli, 143 F.R.D. at 47 (Rule 30(b)(6) deposition of the SEC "constitutes an impermissible attempt by defendant to inquire into the mental processes and strategies of the SEC.").


7 See, e.g., SBM Inv. Certificates, Inc., 2007 WL 609888, at *23-26; Buntrock II, 2004 WL 1470278, at *2 [hereinafter Buntrock II] (observing that the SEC produced 200 boxes of documents in hard copy and database along with a 12-page list of witnesses, testimony from 49 witnesses and accompanying documents); Am. Int'l Grp., Inc., 1994 WL 376052, at *2-3 (EEOC's prior production of complete investigative file to defendants confirmed that defendants' Rule 30(b)(6) notice was an improper attempt to 'discover how the EEOC 'intends to Marshall [sic] the facts, documents and [statements] in its possession, and to discover the inferences that [the EEOC] believes properly can be drawn from the evidence it has accumulated.') (citing Morelli, 143 F.R.D. at 47).

8 Order, State of Tennessee v. Escapes! Inc., No. 2:13-cv-00343 (E.D. Tenn. Nov. 19, 2015), ECF No. 180 (granting protective order prohibiting Rule 30(b)(6) deposition of the State on grounds that the 30(b)(6) notice sought protected work product and information that was irrelevant, premature, or tied to discovery defendants failed to produce.; FTC v. CyberSpy Software, LLC, No. 608-cv-1872-Orl-31GJK, 2009 WL 2386137, at *4 (M.D. Fla. July 31, 2009) ("According to the FTC, the Defendants are in possession of all the discoverable material—such as interrogatory responses, affidavits, and deposition transcripts—containing the facts supporting these contentions. Assuming this to be true, the Defendants have received all the facts they are entitled to discover."); EEOC v. Am. Int'l Grp., Inc., No. 93 Civ. 6390 (PKL) RLE, 1994 WL 376052, *3 (S.D.N.Y. July 18, 1994) ("To the extent defendants already have the objective calculations performed by the EEOC, they have no right to further inquiry.").


11 See, e.g., In re Bilzerian, 258 B.R. at 849 ("That is not to conclude that opposing counsel is absolutely immune from being deposed. There are recognized circumstances that may arise in which the court should order the taking of opposing counsel's deposition."). (citing Shelton v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986)).

12 Fed. R. Civ. P. 30(a)(1), for example, provides that "[a] party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2)" (emphasis added). Fed. R.
Civ. P. 30(a)(2) sets forth the requirements for depositions with leave of court.

13 See, e.g., Shelton, 805 F.2d at 1327.

14 See, e.g., Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir.1979); Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762, 766 (D.C. Cir. 1965).

15 Jennings, 201 F.R.D. at 277. See also Rosenfeld, 1997 WL 576021, at *3-4 (defendant’s failure to explain why he failed to utilize interrogatories to learn identity of persons having knowledge of facts and circumstances surrounding allegations in the complaint prevented him from deposing SEC under Rule 30(b)(6) for same information).


19 Id. (quoting N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 85 (M.D.N.C. 1987)).

20 805 F.2d 1323 (8th Cir. 1986).

21 Id. at 1327 (internal citations omitted).

22 See, e.g., Chester v. Allen, 122 F. App’x 184, 188 (6th Cir. 2005) (lower court erred in not applying Shelton test before compelling attorneys’ depositions); Avis Rent A Car Sys., LLC v. City of Dayton, No. 3:12-cv-399, 2013 WL 3778922, at *10 (S.D. Ohio July 18, 2013) (City’s motion to quash deposition of city attorney granted under Shelton analysis); HBE Corp., 157 F.R.D. at 466 (“The defendant has failed to establish that there are no other means to obtain the information, that the information is relevant, or that the information is crucial to the preparation of its case.”). Cf. Pine, 2011 U.S. Dist. LEXIS 158610, at *2–3.


24 HBE Corp., 157 F.R.D. at 466 (court accepted plaintiff’s undisputed contention "that the only person with knowledge of the information requested in the deposition notice is its trial attorney.")

25 See, e.g., McCormick & Schmick’s, 2010 WL 2572809, *3 (“[T]he SEC (like EEOC) is a law enforcement agency without independent knowledge of the transactions giving rise to the litigation and responsive information would only be known through work product efforts of its counsel[,]”) (citing Rosenfeld, 1997 WL 576021); Monterosso, 2009 WL 8708868, at *1 (same); HBE Corp., 157 F.R.D. at 466 (same).

26 No. 97 CIV. 1467 (RPP), 1997 WL 576021, at *2-4 (S.D. Fla. April 18, 2002).

27 The 11 designated topics are set forth at 1997 WL 576021, at *1.

28 Id.

29 Id. at *2.

30 Id. (citing Morelli, 143 F.R.D. 42).

31 Rosenfeld, 1997 WL 576021, at *1.

32 Id. at *2-3.

33 Id. at *3-4.

34 Id. at *4.

35 Id.

36 Id.

37 Id.

38 217 F.R.D. 441 (N.D. Ill. 2003).

39 Id. at 443.

40 Id. The 12 categories of information were summarized as follows:

The alleged false or misleading statements in WMI’s quarterly reports or public statements for the years 1992 through the first three quarters of 1997, all alleged fraudulent accounting practices for that time span, each alleged violation of GAAP and why and how and the GAAP was violated for that time span, the internal review of WMI's accounting practices taken up in the third quarter of 1997 and the 1998 restatement, communications between the SEC and accounting firms regarding the internal review of WMI's accounting practices undertaken in the third quarter of 1997 and its restatement, the roles of certain accounting firms in the SEC's investigation, the roles of certain SEC employees in the investigation, the extent of SEC reliance on work product of certain SEC employees while at the SEC and while in the private sector, and the role of the accounting firm of Arthur Andersen in WMI's restatement, and all alleged ill-gotten gains retained by the defendants during the pertinent time span. Id. 41 Id.

42 Id. at 443–44.

43 Id. at 444.

44 Id.

45 Id. at 445.

46 Id. at 444 (citing Rosenfeld, 1997 WL 576021; Morelli, 143 F.R.D. 42; HBE Corp., 157 F.R.D. 465).

47 1997 WL 576021.
48 Buntrock, 217 F.R.D. at 444. The court also rejected the defendants’ attempt to distinguish other cases prohibiting SEC depositions including Rosenfeld, noting that the one Rule 30(b)(6) case cited by the defendant “has little bearing on our concerns here.” Id.

49 Id. at 445-46 (citing Rosenfeld, 1997 WL 576021, *3-4; Morelli, 143 F.R.D. at 47).

50 Buntrock, 217 F.R.D. at 445.


52 Id. at *20. The 10 topics of testimony listed by the defendant are set out at 2007 WL 609888, at *21.

53 Id. at *20-21.

54 Id. at *22 (quoting Nicholas v. Wyndham Int’l, Inc., 373 F.3d 537, 543 (4th Cir. 2004).

55 SBM Inv. Certificates, Inc., 2007 WL 609888, at *22 (quoting Fed. R. Civ. P. 26(b)(3)).

56 2007 WL 609888, at *23 (quoting Rosenfeld, 1997 WL 576021, at *2-3).

57 2007 WL 609888, at *23.

58 Id.


60 2012 WL 442025, at *1.


62 2010 WL 2572809, at *1-2 (setting forth all 15 paragraphs in the defendants’ Rule 30(b)(6) notice).


64 McCormick & Schmick’s, 2010 WL 2572809, at *2.


66 McCormick & Schmick’s, 2010 WL 2572809, at *2-5 (“Judge Chasanow’s persuasive reasoning applies equally here where the subjects outlined in the Rule 30(b)(6) deposition notice on their face seek attorney work product and would require the deposition of EEOC counsel or a proxy prepared by counsel.”)


69 2010 WL 2572809, at *5.

70 Id.

71 Id.


73 Id. at *3, 5-6.

74 Id. at *3.

75 Id. at *4.

76 Id. at *5.

77 See, e.g., McCabe, 2015 WL 2452937.

78 778 F.Supp.2d 1320 (M.D. Fla. 2011).

79 Id. at 1328.

80 Id. at 1326.

81 Id. (citing SEC v. Collins & Aikman Corp., 256 F.R.D. 403, 414 (S.D.N.Y. 2009); United States ex rel. Fry v. Health Alliance of Greater Cincinnati, 2009 WL 5227661, *2 (S.D. Ohio 2009)). It should be noted that Collins & Aikman Corp., did not involve a Rule 30(b)(6) deposition dispute, but a dispute over the SEC’s refusal to produce documents. The court viewed the SEC’s refusal to produce documents and negotiate a workable search protocol as “penitently unreasonable,” Collins & Aikman Corp., 256 F.R.D. at 410-414.

82 Collins & Aikman Corp., 256 F.R.D. at 414.


84 The 15 topics are listed at 283 F.R.D. 692, but were not individually examined by the court. At first glance, many of the topics seem to intrude into work product on their face to the extent they relate to the SEC’s allegations or confidential investigations and other cases. See, e.g., Topics 1-9. Id.


86 283 F.R.D. at 695.


89 Merkin, 283 F.R.D. at 696.

90 Id. at 698. The prohibited topics included Topics 6 through 12, and 15. Id.


92 Id. at *3 (quoting Collins & Aikman Corp., 256 F.R.D. at 414.) While technically true, the court overlooked the fact that Rule 30(b)(6), like all the discovery rules, must be read in conjunction with Rule 26(b)(2), which authorizes the court to make adjustments to discovery limits and rules.

95 Id.
96 Id.
97 805 F.2d 1323, 1327 (8th Cir. 1986).
98 2016 WL 1741137, at *2.
99 Id.
100 Id.
101 Id.
103 2013 WL 435511, at *1.
104 Id.
105 Id. at *1-2.
106 Id. (quoting In re Indep. Servs. Orgs. Antitrust Litig., 168 F.R.D. 651, 654 (D. Kan. 1996) (citations omitted). The court noted that the defendant previously asserted the same objection when the EEOC attempted to take its deposition under Rule 30(b)(6), concluding “Plaintiff’s argument is well taken if for no other reason than the Goose and Gander rule.” Id. at *1 (citing United States v. Cos., 498 F.3d 1115, 1137 (10th Cir. 2007)).
107 2013 WL 435511, at *2.
108 Id.
109 See, e.g., SBM Inv. Certificates, LLC, 2007 WL 609888, at *5.
110 Rosenfeld, 1997 WL 576021, at *2 (“Defendant Rosenfeld’s responsive papers disingenuously avoid the fact that this action is an SEC enforcement proceeding seeking a determination as to whether defendant has violated the laws of this country.”)
111 Id. (“[SEC enforcement] investigations are conducted by the SEC’s legal staff.”)
112 See, e.g., SBM Inv., 2007 WL 609888, *23–24; Buntrock II, 2004 WL 1470278, at *3 (“through its attorneys, the SEC conducted an investigation of Buntrock and the other defendants. . . . No one at the SEC has any firsthand knowledge of the facts at issue in this case.”); Buntrock, 217 F.R.D. at 444 (same); Rosenfeld, 1997 WL 576021, *2 (same).
113 Morelli, 143 F.R.D. at 44.
114 Id. at 47.
115 Buntrock, 217 F.R.D. at 446; see also Rosenfeld, 1997 WL 576021, at *3 (notice sought attorney work product because it sought “to explore the extent of the SEC’s knowledge (how much it knows and how much it does not know) as a result of the investigative efforts of its attorneys”).
116 2009 WL 1457755, at *3.
117 Id.
118 Id. (internal quotations omitted).
119 Id.
120 157 F.R.D. at 465.
121 Id. at 466 (citing Shelton, 805 F.2d 1323) (internal quotations omitted).
122 2010 WL 2572809.
123 Id. at *1.
124 Id.
125 Id. at *2.
126 Id.
128 Id. at *5.
130 Id. See also Texas Roadhouse, 2014 WL 4471521, at *3 (“While the request is framed as one for ‘factual information’ and ‘documents,’ the witness . . . would necessarily be asked to interpret the facts and discuss how the EEOC decided to proceed in preparing the case.”); CyberSpy Software, 2009 WL 2386137, at *2 (“As set forth in the complaint (Doc. 1), the FTC is proceeding under the FTC Act. . . . As for the ‘factual basis justifying the same,’ a request for such justification is explicitly a request for the ‘mental impressions, conclusions, opinions or legal theories of a party’s attorney’ and was properly objected to.”) (citing Buntrock, 217 F.R.D. at 446); SBM Inv. Certificates, LLC, 2007 WL 609888, at *21.
131 Texas Roadhouse, 2014 WL 4471521, at *3 (granting EEOC’s motion for protective order because while Rule 30(b)(6) notice purportedly sought “factual information,” the witness would be required to interpret the facts and discuss EEOC strategy); CyberSpy Software, 2009 WL 2386137, at *4 (denying defendants’ motion for sanctions because “Defendants [already] received all the facts they are entitled to discover.”); Monterosso, 2009 WL 8708868, at *1-2 (granting SEC’s motion for protective order because defendants already in possession of facts and deposition intended to discover “[h]ow the SEC intends to marshal facts.”); SBM Inv. Certificates, LLC, 2007 WL 609888, *24 (granting protective order to SEC because defendant’s 10 areas of inquiry sought opinion work product); Rosenfeld, 1997 WL 576021, at *3 (granting SEC’s motion for protective order because written discovery should be used to discover facts); Buntrock, 217 F.R.D. at 445 (granting SEC’s motion for protective order because defendant not seeking “mere facts.”); HBE Corp., 157 F.R.D. at 465 (while defendant entitled to discover facts, Rule 30(b)(6) notice sought privileged information from EEOC).
132 See, e.g., Merkin, 283 F.R.D. at 698 (“The SEC, of course, may interpose objections and give privilege-based and Court order-based instructions not to answer specific questions at a 30(b)(6) deposition taken in this case.”); Kramer, 778 F.Supp.2d at 1328.
133 See SBM Inv. Certificates, LLC, 2007 WL 609888 *25–26 (explaining that the defendant can conduct other discovery, “and the
burden on the court and the SEC in considering the work product issue as to an inevitable array of issues raised at the deposition are not warranted”).

134 See, e.g., Rosenfeld, 1997 WL 576021, at *2–4 (court expressed concern that Rule 30(b)(6) deposition of SEC could compromise work product protection, common prosecution interest, and law enforcement privilege).


138 Id.


140 2010 WL 2572809, at *5.

141 See, e.g., SBM Inv. Certificates, LLC, 2007 WL 609888, at *23–26; Buntrock II, 2004 WL 1470278, at *2 (observing that the SEC produced 200 boxes of documents in hard copy and database along with a 12-page list of witnesses, testimony from 49 witnesses and accompanying documents); Rosenfeld, 1997 WL 576021, at *3 (holding that defendant could serve “contention interrogatories at the close or towards the close of factual discovery”); Morelli, 143 F.R.D. at 48 (same).

142 See note 156, supra.

143 See, e.g., Rosenfeld, 1997 WL 576021, at *3 (defendant could use contention interrogatories at or towards the close of other discovery); Am. Int’l Grp., Inc., 1994 WL 376052, at *3 (“The inquiries into the SEC’s prior production of complete investigative file to the defendants). See also Fed. R. Civ. P. 33(a)(2) (“the court may order that [contention interrogatories] need not be answered until after designated discovery has been completed or until a pre-trial conference has been completed or other later time”).


146 614 F.Supp.2d at 1177.

147 See notes 8 and 9, supra.


149 See, e.g., Texas Roadhouse, 2014 WL 4471521, at *3 (“While the request is framed as one for ‘factual information’ and ‘documents,’ the witness, in explaining why certain documents ‘support’ or ‘rebut’ the allegations, would necessarily be asked to interpret the facts and discuss how the EEOC decided to proceed in preparing the case.”); HBE Corp., 157 F.R.D. at 466 (“The defendant asserts that it is seeking to ‘explore the factual bases of the claims made by Plaintiff.’ As defendant well knows, it is the selection and compilation of the relevant facts that is at the heart of the work product doctrine.”) (citing Shelton, 805 F.2d 1323). In HBE Corp., the Rule 30(b)(6) deposition of the EEOC, which sought information about allegations in the complaint was quashed on grounds of work product and the fact EEOC previously produced investigative file and answered defendant’s discovery. See also Am. Int’l Grp., 1994 WL 376052, at *2–3 (EEOC was not required to provide 30(b)(6) testimony regarding the allegations in the complaint because it previously produced its complete investigative file to the defendants).


151 See infra notes 156, 158, supra.

152 No. 93 CIV. 6390 (PKL) RLE, 1994 WL 376052 (S.D.N.Y. July 18, 1994).


154 Id.


156 See, e.g., SBM Inv. Certificates, Inc., 2007 WL 609888, at *23–26; Buntrock II, 2004 WL 1470278, at *2 (observing that the SEC produced 200 boxes of documents in hard copy and database along with a 12-page list of witnesses, testimony from 49 witnesses and accompanying documents); Rosenfeld, 1997 WL 576021, at *3 (holding that defendant could serve “contention interrogatories at the close or towards the close of factual discovery”); Morelli, 143 F.R.D. at 48 (same).


158 Id.

159 2012 WL 442025, at *3.

160 Id. (citing Pinal Cnty, 714 E.Supp.2d at 1078).


162 Rosenfeld, 1997 WL 576021, at *4.


164 2012 WL 442025, at *3.
165 Id. (citing EEOC v. Keco Indus., Inc., 748 F.2d 1097 (6th Cir. 1984)).


169 See, e.g., Evans Fruit Co., 2012 WL 442025; Nacchio, 614 F.Supp.2d at 1168 (denying motion to compel based on deliberative process privilege).


171 Id. at *1-2 (citing Ca. Psychiatric Transitions, 258 F.R.D. at 397). The court declined to quash the Rule 30(b)(6) deposition of an investigator because "many of the questions Defendant is seeking relate to clarifying factual information contained in the EEOC's investigative file and would not be covered under the deliberative process privilege." Evans Fruit Co., 2012 WL 442025, at *1-3.

172 2012 WL 442025, at *1-3.

173 1997 WL 576021, at *3 (citing NLRB v. Robbins Tire & Rubber, 437 U.S. 214 (1978); J.P. Stevens & Co. v. Perry, 710 F.2d 136, 143 (4th Cir. 1983)).

174 See, e.g., Nacchio, 614 F.Supp.2d at 1168.

175 Id.

176 For example, in American International Group, Inc., the EEOC voluntarily submitted to a Rule 30(b)(6) deposition, producing the supervisor of the assigned investigator as its designee. 1994 WL 376052, at *1. Unsurprisingly, during the deposition the EEOC instructed the witness not to answer certain questions on the grounds of work product protection and deliberative process privilege. Id. at *2-3. The defendants then filed a motion to compel seeking, among other things, attorney fees and costs, an admonishment of the EEOC, precluding the EEOC from taking further depositions, and other sanctions. Id. at *1. Most of the contested matters were ultimately resolved by the court in the EEOC's favor. Id. at *2-3. See also U.S. v. Dist. Council of N.Y.C., No. 90–5722, 1992 WL 208284, at *5–6, 10 (S.D.N.Y. Aug. 18, 1992) (DOJ voluntarily submitted to Rule 30(b)(6) deposition in civil RICO enforcement action, and prevailed when defendants later sought to compel testimony related to government's work product).

177 See infra note 189, supra.


179 Id. at *1.

180 Id.

181 Id. at *2.

182 As an initial matter, the court noted that this line of inquiry fell outside the alleged category designated by the defendants which listed "transactions, occurrences, events, claims or complaints giving rise to this action." Id.

183 Id. The court further noted that “[c]ertainly, the Defendants are at least as knowledgeable as the FTC as to the facts relevant to this issue, such as what their website used to say, and what it says now.” Id. n.1.

184 Id. at *3.

185 Id.

186 Id.

187 Id. (citing Buntrock, 217 F.R.D. at 446 (request for 30(b)(6) deposition regarding facts supporting agency's allegations was improper effort to discover opposing counsel's legal theories and explanations of those theories; protective order granted)).


189 Id.

190 Id.

191 Id. (citing Nacchio, 614 F.Supp.2d at 1177) (noting that requiring agency rep to spend weeks if not months learning the case would be "inefficient in the extreme" and that even agency counsel might not have all the facts "immediately at her fingertips").

192 No. 93 CIV 6390 (PKL) RLE, 1994 WL 376052 (S.D.N.Y. July 18, 1994).

193 Id. at *1.

194 Id.

195 Id. at *2-3.

196 Id. at *3.

197 Id. Courts recognize that an “agency is not required to produce a witness who has memorized all of the facts that have been uncovered to date.” CyberSpy Software, LLC, 2009 WL 2386137, at *4 (citing Nacchio, 614 F.Supp. 2d at 1177) (noting that requiring a government representative to spend weeks, if not months, learning the case would be "inefficient in the extreme" and that even agency counsel might not have all the facts "immediately at her fingertips").

Many attorneys would agree that blogging is a wonderful way to express thoughts on particular legal issues and establish credibility as an expert in your field. But could blogging (and posting and tweeting using Twitter) violate ethics rules? Most of the bar opinions that have come down on this issue consider blogs and other web posts to be informative and educational in nature unless the blogger or poster promotes his or her skills so that the posting becomes a solicitation. Bar opinions on this issue, such as New York State Bar Association Ethics Opinion 967 (2013) and Philadelphia Bar Association Opinion 2010-6, focus on blogs and the ethics rules on advertising, but perhaps the biggest risk for a government attorney blogger is violating the rules on client confidentiality.

Most attorneys zealously protect client files, carefully control communication with the client, watch what they say to others, and otherwise take care to safeguard the confidentiality of their client relationships. So one would think the same care should apply online. However, the Internet and, particularly social media such as a blog, Twitter, Instagram and Facebook, often tempt even the most judicious to throw caution to the wind. Social media tools like blogs are much more personal and immediate and one often feels the need to post quickly before someone else does, making it much more likely that the poster may divulge more than the rule of confidentiality allows. And because that post is online, the effect of the breach of confidentiality is more widespread and stark.

A lawyer who discusses his or her case on Twitter, Facebook, or a blog risks violating the rules of client confidentiality. Unfortunately, it doesn’t take that much to do so – an attorney could easily breach client confidentiality by tweeting about what he or she is doing at the time. Let’s look at an example. What if your colleague tweets, “Case is over – waiting on the court to approve the settlement.” Does that potentially run afoul of the Rules? Yes, because Model Rule 1.6 states that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. Rule 1.6 requires that the lawyer preserve even public information about the client without consent. This is especially difficult to swallow when that same information can be blogged or tweeted by a reporter or another blogger.

Blogging or posting about a case can be a risky tactic even if the case or client is not identified in the post. Comment 4 of Model Rule 1.6 states that the prohibition against revealing client confidential information also applies to disclosures by a lawyer that do not in themselves reveal protected information but could lead to the discovery of such information by a third party.

So what alternatives do you have when writing your blog? You could, of course, seek consent from your client. Note that the Model Rules provide that “informed consent” means agreement by the client after you have communicated sufficient information about the risks of and feasible alternatives to the course of action you are proposing. In lieu of that, you could blog about other cases, for which you have no duty of confidentiality, and which is the path taken by most lawyer bloggers.

The bottom line: there is plenty to blog about without discussing your own case!

Endnotes

1 A blog, short for weblog, is a website run by an individual or small group where brief entries are usually presented in reverse chronological order, with the newest entry first. The content can be news, commentary, photos, video or any such combination and is typically offered in an informal or conversational style. An update to a blog is a blog post or blog entry. Examples include the U.S. attorney general blog, the Supreme Court of the United States blog and law blog from The Wall Street Journal.
Authority to Represent State

The attorney general’s authority to represent the state was reaffirmed in three cases earlier this year. In Colorado, the control of litigation on behalf of the state once again gave rise to litigation between the executive and the attorney general. The Colorado attorney general filed three federal lawsuits against the federal government, challenging rules promulgated by the U.S. Department of the Interior and the Environmental Protection Agency, that the governor did not support. The governor filed a petition in the Colorado Supreme Court, seeking a ruling on the authority of the attorney general to sue the federal government without the consent of the governor. Colorado statutes state that the attorney general “shall appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor.”

The governor argued that the governor is the supreme executive of the state and that his decision is therefore binding on the attorney general; that the language of the statute limited the attorney general’s authority to sue to situations in which the governor requested her to do so; and that by, undertaking these lawsuits against his wishes, the attorney general created a conflict of interest that prevents her from advising the governor on issues involved in the cases.

In response, the attorney general noted that an earlier decision by the Colorado Supreme Court, which involved a similar situation, had already established that the executive power of Colorado is intentionally diffused, rather than hierarchical, as the governor argued; that the Colorado attorney general, in addition to powers conferred by statute, has common law powers which have not been specifically repealed.
by any statute; and that, “the Attorney General must consider the broader institutional concerns of the state even though these concerns are not shared by an individual agency or officer.” The attorney general noted that, in prior cases where the governor had disagreed with the attorney general, he had filed an amicus brief expressing his views as governor.

Although the court did not address any of these arguments specifically, citing its prior decision, it held that the governor had an “adequate alternative remedy” and denied the governor’s petition. In re: Hickenlooper v. Coffman, No. 2015SA296 (Colo. Dec. 3, 2015).

Florida’s Court of Appeal took the opportunity to describe the attorney general’s status within state government and the bases of the attorney general’s authority in a recent qui tam suit. The court held that Florida’s attorney general may dismiss a pending qui tam action even though she previously declined to intervene in the action. The plaintiff (relator in the qui tam action) filed a state False Claims Act action against Motorola. Pursuant to the provisions of the Act, the state received a copy of the qui tam complaint, investigated, and declined to join the qui tam action. The relator prosecuted the case on his own for three years. The attorney general then filed a notice of voluntary dismissal without formally intervening in the case. The trial court held that the attorney general could file a voluntary dismissal without regard to any objections by the relator. The relator appealed, arguing that allowing the attorney general to dismiss the case would undermine the purpose of the False Claims Act, which is to combat fraud against the government.

The court of appeal affirmed the lower court’s ruling, citing four bases for its decision. First, the plain language of the statute supports the attorney general’s authority. Section 68.084(2)(a) of the state False Claims Act states: “The department may voluntarily dismiss the action notwithstanding the objections of the person initiating the action.” The court characterized the overarching principle of the federal False Claims Act is that the rights of all parties, other than the attorney general, are limited by the statute, and there is no common law right to file a qui tam case. Second, the case law interpreting the Act supports the attorney general’s authority to dismiss the action. Third, the court analyzed the Florida False Claims Act and determined that the attorney general is the real party in interest, and the relator is an assignee of the state’s substantive right to prosecute a qui tam action. That right is substantive, rather than procedural, because “it defines and creates the property right to maintain a qui tam action.” The state’s authority to terminate the action is thus substantive.

Finally, the court held that the Florida Constitution’s strict separation of powers requirement also requires that the attorney general be authorized to terminate a qui tam proceeding. The Florida attorney general is designated by the state’s constitution as the state’s chief legal officer and the attorney general serves as one of three members of the governor’s cabinet. The attorney general thus possesses the state’s executive authority. Florida statutes authorize the attorney general to “appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested.” The common law also provides the attorney general the authority to intervene in matters of “compelling public interest.”

The court noted its earlier decision in Bondi v. Tucker, in which the attorney general was not permitted to appeal a decision because she had not intervened in the lower court. In this case, however, the attorney general is exercising her authority under the plain language of the state False Claims Act and terminating an action brought in the name of the state. “Conducting and terminating legal actions brought in the name of and for the benefit of the State is the sine qua non of the State’s chief legal officer. . . . A State’s chief legal officer without the authority to conduct the State’s litigation would be no legal officer at all.” The court then quoted past decisions to support the proposition that “the Attorney General of Florida is invested with several powers of the Executive Branch; thus, she is far more than only the State’s chief legal officer.” The court held that the attorney general’s dismissal of the qui tam action, without having previously intervened, was proper. Barati v. Florida, 2016 Fla. App. LEXIS 2658 (Fla. Ct. App. Feb. 23, 2016).

The Pennsylvania attorney general’s authority to hire outside counsel on a contingent fee basis was upheld by the Pennsylvania courts. The attorney general hired an outside firm, Cohen Milstein, to investigate whether a group of long-term care facilities had fraudulently misrepresented their services in their billing and marketing practices. The targets of that investigation (petitioners) filed a declaratory judgment action arguing, among other things, that the attorney general exceeded her authority because the applicable statute (the Health Care Facilities Act) vests
exclusive jurisdiction in the Department of Health; thus, the attorney general was not able to delegate her authority to Cohen Milstein or use state funds to pay them. Further, they argued that the attorney general’s subpoenas were issued for the purposes of litigation, in violation of state law.

The court noted that the Department of Health did have authority to establish and enforce regulations about minimum standards for safe, adequate, and efficient facilities and protection of patients. However, the Department does not have the authority to “investigate the consumer marketing and billing practices of skilled nursing and long-term care facilities or to initiate litigation to correct illegal acts in this regard.” The attorney general has authority to restrain and obtain restitution for illegal acts, which include deceptive representations with regard to the characteristics, uses, benefits, or quantities of services. In this case, the investigation is directly related to unfair or deceptive acts or practices with regard to minimum staffing levels at petitioners’ facilities, rather than the minimum staffing levels themselves. Petitioners’ claims were, therefore, dismissed.

Turning to the question of outside counsel retained by the attorney general, the court analyzed section 103 of the Commonwealth Attorneys Act, which provides that no party to an action, other than the state agency being represented, may challenge the authority of the agency’s legal representation. Citing earlier decisions, the court stated, “in addressing the authority of Commonwealth attorneys, [the legislature] intended that no party but the affected agency should be heard to complain about so fundamental an executive matter as the identity of the lawyers representing Commonwealth entities.” The court therefore dismissed the petitioners’ claims for lack of standing. *GGNSC v. Kane*, 2016 Pa. Commw. LEXIS 44 (Pa. Commw. Ct. Nov. 18, 2015).

### Civil Investigative Demands

Attorneys general were challenged on their use of civil investigative demands (CIDs), with mixed results. A federal court in Maryland declined to block a civil investigative demand issued by the attorney general of Alaska to Lupin Pharmaceuticals, a company operating in Maryland. The attorney general issued a CID, requesting documents relating to potentially anticompetitive patent settlements (“pay-for-delay”) involving the drugs Loestrin and Effexor, to determine whether settlements violated Alaska antitrust law. Although Alaska law provides that the party receiving a CID may challenge the CID in Alaska Superior Court, Lupin did not do so. Instead, it filed a case in federal court in Maryland seeking an injunction restraining the attorney general from
issuing the CID, arguing that the issuance of CIDs to Lupin was unconstitutional. The attorney general filed a petition in Alaska state court for an order to show cause why Lupin should not be held in contempt and filed a motion to dismiss in the Maryland case.

The Maryland federal court first addressed Younger abstention. Under that doctrine, federal courts should abstain from exercising jurisdiction to enjoin ongoing state criminal prosecutions, “state civil proceedings akin to criminal prosecutions,” or state proceedings “that implicate a State’s interest in enforcing the orders and judgments of its courts.” The attorney general argued that its case in Alaska fulfills both of the latter categories. The district court agreed that the Alaska proceeding implicates a state’s interest in enforcing the orders and judgments of its courts.

Lupin argued that the CIDs here are administrative in nature, and cited Google v. Hood for the proposition that Younger abstention does not apply. The court distinguished that case, noting that there was no pending attempt to enforce the subpoena in Hood. Thus, the Alaska action satisfies the third Younger prong. Lupin next argued that the Alaska proceeding is not a parallel proceeding that allows a decision on the jurisdictional and constitutional issues raised in this case. However, the Supreme Court’s Younger jurisprudence requires that the federal court “assume that state procedures will afford an adequate remedy.” Lupin presented no evidence that its defenses would not be heard in Alaska superior court, so the court dismissed the petition. Lupin Pharmaceuticals, Inc. v. Richards, No. 1:15-cv-01281 (D.Md. July 2, 2015).

On appeal, the court first determined that the district court had federal question jurisdiction over Google’s complaint. The court noted that Google had alleged various violations of federal law and rejected the attorney general’s argument that the claims were really artfully pleaded defenses. The Fifth Circuit cited one of its recent decisions holding, “when a plaintiff seeks both declaratory and injunctive relief from allegedly unconstitutional state action, the well-pleaded complaint rule as adapted to declaratory actions “does not prevent that plaintiff from establishing federal jurisdiction.”

The court also found that Younger abstention did not apply. With respect to civil actions, the doctrine only applies, for purposes of this case, to certain “civil enforcement proceedings.” The Fifth Circuit held that “an executive official’s service of a non-self-executing subpoena creates an ongoing state judicial proceeding.” The mere existence of an investigation does not require Younger abstention.

However, the court of appeals held that the administrative subpoena issued by the attorney general was not ripe for adjudication by the district court because it was non-self-executing, and the attorney general could not himself sanction non-compliance. Instead, he would need to bring an enforcement action, at which time Google could raise its objections to the administrative subpoena. The court also noted that considerations of comity make it less willing to intervene “when there is no current consequence for resisting the subpoena and the same challenges raised in the federal suit could be litigated in state court.”

The court of appeals also held that the district court should not have enjoined the attorney general from “bringing a civil or criminal charge against Google under Mississippi law for making accessible third-party content to internet users.” The court characterized this injunction as prohibiting a “fuzzily defined range of enforcement actions that do not appear imminent.” The court concluded “invocation of the First Amendment cannot substitute for the presence of an imminent, non-speculative irreparable injury. And we cannot say at this early stage of a state investigation that any suit that could follow would necessarily violate the Constitution.” Google, Inc. v. Hood, No. 15-60205 (5th Cir. Apr. 8, 2016).
Separation of Powers

In an unusual case invoking the separation of powers doctrine, an Arizona voter challenged the election of the attorney general, not because the attorney general failed to satisfy the qualifications for office, but because the Arizona Supreme Court’s oversight of the state bar and the election of a member of the bar as attorney general violates the separation of powers doctrine. The district court dismissed the case because the voter’s challenge was brought under a statutory provision that permits challenges on the ground that the person elected “was not at the time of the election eligible to the office,” and there was no allegation that the attorney general was ineligible. In affirming the lower court, the Arizona Court of Appeals held, “those allegations in general seem to be based on the proposition that the legal requirements for election to the office of attorney general themselves are illegal or unconstitutional. An election contest is not the proper means by which to challenge the existence or legality of those requirements.” The court considered the case so frivolous that it imposed costs and attorneys’ fees on the plaintiff because the appeal was “totally and completely without merit.” Camboni v. Brnovich, 2016 Ariz. App. Unpub. LEXIS 127 (Ariz. App. Feb. 2, 2016).

Mandamus

Several mandamus actions against the Illinois attorney general were dismissed earlier this year. In the first case, the plaintiff had demanded that the attorney general investigate his claims that his civil rights were being violated by employees of the correction system; when she did not do so, he filed a mandamus action, citing the Illinois Civil and Equal Rights Enforcement Act. That Act provides that the attorney general’s office “shall investigate all violations of the laws relating to civil rights and the prevention of discriminations based on the proposition that the legal requirements for election to the office of attorney general themselves are illegal or unconstitutional. An election contest is not the proper means by which to challenge the existence or legality of those requirements.” The court considered the case so frivolous that it imposed costs and attorneys’ fees on the plaintiff because the appeal was “totally and completely without merit.” Camboni v. Brnovich, 2016 Ariz. App. Unpub. LEXIS 127 (Ariz. App. Feb. 2, 2016).

A statute is mandatory if “the intent of the legislature dictates a particular consequence for failure to comply with the provision.” In this case, the Enforcement Act does not include any “consequence for non-compliance.” The court noted that a prior Act, since repealed, “empowered the trial court to appoint a special assistant AG to prosecute the cause when the AG fails to act within a reasonable time.” Because there is no consequence for failure of the attorney general to investigate discrimination claims under the Enforcement Act, there can be no mandamus claim. The court also noted that the Illinois attorney general does not represent private individuals, but “represents the interests of all the people of the State of Illinois as a whole.” The attorney general therefore had no duty to act in this case. Cebertowicz v. Madigan, 2016 IL App (45h) 140917 (Ill. App. Ct. 2016).

In another mandamus action against the Illinois attorney general, the plaintiff was convicted of first degree murder and served 22 years in jail. He was then granted habeas corpus relief and released. The state declined to retry him. He filed a civil rights action in state court against McFatridge, the state’s attorney who was involved in his prosecution. McFatridge requested attorney general representation in connection with this suit, and the attorney general declined, “stating that the claims pending against McFatridge contain allegations of acts and omissions of intentional, willful and wanton misconduct.” The case was eventually resolved through a consent judgment, which contained findings that McFatridge had acted within the scope of his employment and his actions were intended to serve the people of Illinois. The plaintiff received $375,000 from the county’s insurer in partial satisfaction of a judgment against McFatridge of $2 million. McFatridge assigned his claim for indemnification from the state to the plaintiff. The plaintiff made a demand on the state, and the attorney general rejected the demand on the grounds that the acts upon which the judgment was based were intentional, willful, or wanton and the attorney general had not approved the settlement; therefore, McFatridge had no right to indemnification. The plaintiff filed a mandamus action. The trial court dismissed, agreeing that McFatridge had no right to indemnification.

The appellate court first discussed the structure of the State Employee Indemnification Act. Under the Act, if the attorney general declines to defend the state employee, the state employee may employ his own counsel, which was the case here. The statute provides, “[w]here the employee is represented by private

The Illinois appellate court first stated that the question of whether the attorney general has a duty in this case turns not on the wording of the statute, but on whether the statute is mandatory or directory.
counsel, any settlement must be so approved by the Attorney General and the court having jurisdiction, which shall obligate the State to indemnify the employee. In this case, the attorney general did not approve the terms of the consent judgment, although it was approved by the court. The court therefore dismissed the mandamus action because the attorney general had no non-discretionary duty to certify payment to the plaintiff. *Steidl v. Madigan, 2016 IL App (1st) 150040 (Jan. 8, 2016).*

**Authority Under Fraud Statute**

Finally, the authority of the New York attorney general to bring a case under the state’s fraud statute was clarified. The New York attorney general filed suit against Donald Trump and several business entities in connection with the operation of Trump University, LLC, which allegedly instructed small business owners and individual entrepreneurs in real estate investing by way of seminars and mentoring programs. In August 2013, the attorney general began a proceeding under Executive Law § 63(12) for injunctive relief, restitution, disgorgement, damages, and civil penalties, alleging that between 2005 and 2011, the defendants operated an unlicensed, illegal educational institution, that, through various fraudulent practices, respondents intentionally misled more than 5,000 students nationwide, including over 600 New York residents, into paying as much as $35,000 each to participate in live seminars and mentor programs with real estate experts that the students thought were picked by Donald Trump himself, which proved untrue. Specifically, the attorney general filed causes of action under New York statutes for fraud, fraudulent and deceptive practices, and false advertising; among other claims.

The defendants moved to dismiss the statutory fraud claims as outside the applicable three-year statute of limitations and argued that the attorney general had not sufficiently pleaded common-law fraud (which has a six year statute of limitations). The trial court applied the three-year statute of limitations to the statutory claims and held that the attorney general had adequately pleaded common law fraud. The trial court dismissed the attorney general’s first claim, which alleged fraud under section 63(12) of the Executive Law, because prior New York case law held that the statute does not provide a standalone cause of action for fraud. The appellate court reversed, overruling the prior case. The statute states:

> “Fraud” is defined as “any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pre-tense, false promise or unconscionable contractual provisions.” In *People v. Charles Schwab & Co.*, 109 AD3d 445, 971 N.Y.S.2d 267 (N.Y. App. 2011), the appellate court held that this section “does not create independent claims, but merely authorizes the Attorney General to seek injunctive and other relief on notice prescribed by the statute in cases involving persistent fraud or illegality.”

The current appellate court overruled *Charles Schwab*, stating that the case “did not comport with prevailing authority, and in fact, acts to limit the power that the Attorney General has long been exercising under §63(12).” The court thus held, “As one jurist has observed, [T]here is no requirement that a patent judicial mistake be allowed to age before it may be corrected [citations omitted]. Hence, we hold that the Attorney General is, in fact, authorized to bring a cause of action for fraud under Executive Law § 63(12).” People of New York by *Schneiderman v. The Trump Entrepreneur Initiative LLC*, 26 N.Y.S.3d 66 (NY App. Div. 2016).

**Endnotes**

3. This case was reported in 6 NAAGazette (Sept. 2012).
4. This case was reported in 1 NAGTRI Journal (Feb. 2016).
5. 5 Ill. Comp. Stat. 350/2(d).
U.S. Supreme Court Brief Writing Style Guide: Part 2 - General Considerations and the Prefatory Sections

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In the February issue of the NAGTRI Journal, I discussed what a cover page and the Questions Presented section in a U.S. Supreme Court brief should look like. In this second part of my series on U.S. Supreme Court brief writing style, I will take a step back and a step forward. Stepping back, I will discuss some big picture issues concerning Supreme Court style. Then I will turn to the parts of the brief that follow the Questions Presented.

Topic 1: General Rule — Ditch Local Idiosyncrasies

In some courts, an advocate begins oral argument by stating her name and who she represents and reserving rebuttal time. In other courts, the advocate dives right into the argument. Some courts expect argument to begin with a review of the facts. Other courts want their advocates to go straight to the legal issue. So the answer to the question “How should I begin my oral argument” is: “It depends on the customs and practices of the particular court before which you are practicing.” An obvious corollary is that you should not adhere to a custom your local courts observe if you are appearing in a court outside your jurisdiction that operates differently.

The same, of course, holds true when it comes to writing briefs in the U.S. Supreme Court. You should eliminate local idiosyncrasies and adopt the Supreme Court’s own idiosyncrasies. Here are some examples of local idiosyncrasies to eliminate:

- Many courts require that briefs begin with a Statement of the Case that sets out the procedural history, followed by a Statement of the Facts that describes the factual background. See, e.g., N.C. R. App. P. 28(b)(3), (4). Not the U.S. Supreme Court, which expects one Statement, typically called the Statement of the Case. And that Statement typically describes the facts before the procedural history.

- Some courts have adopted legal-writing guru Bryan Garner’s suggestion that all citations be placed in footnotes. The U.S. Supreme Court has not.

- Limit the use of block quotes. The occasional, relatively short, block quote is fine. Inserting block quote after block quote is not. Nor should any block quote take up more than half a page. As Justice Scalia and Bryan Garner have written, “Be especially loath to use a lengthy, indented quotation. It invites skipping. In fact, many block quotes have probably never been read by anyone.” The solution is to set out the underlying facts or reasoning in your own words, with an occasional one- or two-sentence quote as needed.

- I have read dozens of briefs from non-AGO Louisiana attorneys that refer to the Court as “this Honorable Court” — as in, “This Honorable Court held in Katz v. United States, 389 U.S. 347 (1967), that electronic wiretaps are searches under the Fourth Amendment.” Maybe Louisiana courts like to hear themselves referred to as “honorable.” But this stilted language is out of place in the U.S. Supreme Court. Meanwhile, New Jersey courts apparently demand that lawyers, when citing statutory codes and case reporters, italicize the codes and reporters — e.g., 42 U.S.C. §1983 or 389 U.S. 347. That idiosyncratic citation style has no place in the U.S. Supreme Court.
• Some courts still expect case names to be underlined, rather than italicized. With one exception, case names in U.S. Supreme Court briefs are italicized.³

How can you tell what flies and what does not fly in U.S. Supreme Court briefs (apart from this manual)? Simple: Read briefs filed by the U.S. Solicitor General’s Office and by top Supreme Court practitioners. Myriad such briefs are available on-line, at the Solicitor General’s webpage and on SCOTUSBlog. You can also take a look at The Solicitor General’s Style Guide (2d ed. 2015), which provides that office’s citation and style rules.

**Topic 2: Some U.S. Supreme Court-Specific Styles**

The Court’s rules mandate what font to use (the Century family), how many words a brief may contain, and so on. My goal is to go beyond what is in the rules and to discuss unwritten customs. Before turning to specific sections of a U.S. Supreme Court brief, it’s worth recounting a few Court-specific styles that cut across many sections.

• Do not refer to the Court as “the Supreme Court,” as in “the Supreme Court has held that . . . .” Write “the Court held”; “this Court held”; or “Grutter held . . . .”

• Citations to U.S. Supreme Court opinions should be to the official U.S. Reporter, without any parallel citations to the unofficial (S. Ct. and L. Ed.) reporters. The proper cite, therefore, is Roe v. Wade, 410 U.S. 113 (1973) — not Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). If the decision is not yet included in the official reporter, use the S. Ct. (and only the S. Ct.) cite.

• Do not refer to the lower court decisions in your very case by the case name. Let’s say, for example, that you’re seeking certiorari from the Ninth Circuit’s decision in Smith v. Jones. The cert petition should not say, “The Ninth Circuit held in Smith v. Jones that . . . .” That’s like my saying, “Dan thinks that’s a good idea.” It sounds wrong to the ear (at least the ear of a regular Supreme Court practitioner). The better style is to say, “The Ninth Circuit held below that . . . .” or simply “The Ninth Circuit held . . . .”

• Similarly, the case name should not appear when citing the lower court decisions in your very case. Nor should you cite the reporters, federal or regional. Rather, cite only the cert petition appendix — which, of course, contains the lower court decisions. Thus, the proper cite (in, say, a merits brief) is “Pet. App. 17a,” not “Smith v. Jones, 473 F.3d 1234 (9th Cir. 2008); Pet. App. 17a.” (In the cert petition itself, the cite would be “App. 17a” or “App., infra, 17a.”)

• When referring to a specific federal court of appeals, do not include the words “Court of Appeals.” It’s therefore, “the Ninth Circuit held,” not “the Ninth Circuit Court of Appeals held . . . .”

Now, let’s walk through some of the sections of a Supreme Court brief, starting with the Prefatory Sections.

**Topic 3: The Prefatory Sections**

The Prefatory Sections include Parties to the Proceeding; Table of Contents; Table of Authorities; Opinions Below; Jurisdiction; and Constitutional and Statutory Provisions Involved. With one important exception, these sections are not important in the scheme of things. They won’t convince a Justice to vote your way. Still, the goal of this style guide is to help your petitions read and look the right way. With that in mind, let’s turn to these sections.

**A. Parties to the Proceeding**

This section is needed only if the cover page does not include all the parties. If, for example, the only parties are the state and a criminal defendant, both of whose names must appear on the cover page, you do not need to have a Parties to the Proceeding section. And when you don’t need this section, I see no reason to include it.

When you do include this section, try to make it as simple as possible. For example:

**PARTIES TO THE PROCEEDING**

Petitioners Terry L. Cline, Lyle Kelsey, and Catherine C. Taylor were the appellants in the court below. Respondents are Oklahoma Coalition for Reproductive Justice and Nova Health Systems, doing business as Reproductive Services, and were appellees in the court below.
Or, in a case with more parties (*United States v. Texas*, 15-674):

### PARTIES TO THE PROCEEDING

Petitioners were appellants in the court of appeals. They are: the United States of America; Jeh Charles Johnson, in his official capacity as Secretary of Homeland Security; R. Gil Kerlikowske, in his official capacity as Commissioner of U.S. Customs and Border Protection; Ronald D. Vitiello, in his official capacity as Deputy Chief of U.S. Border Patrol, U.S. Customs and Border Protection; Sarah R. Saldaña, in her official capacity as Director of U.S. Immigration and Customs Enforcement; and León Rodríguez, in his official capacity as Director of U.S. Citizenship and Immigration Services.

Respondents were appellees in the court of appeals. They are: The State of Texas; State of Alabama; State of Georgia; State of Idaho; State of Indiana; State of Kansas; State of Louisiana; State of Montana; State of Nebraska; State of South Carolina; State of South Dakota; State of Utah; State of West Virginia; State of Wisconsin; Paul R. LePage, Governor, State of Maine; Patrick L. McCrory, Governor, State of North Carolina; C.L. “Butch” Otter, Governor, State of Idaho; Phil Bryant, Governor, State of Mississippi; State of North Dakota; State of Ohio; State of Oklahoma; State of Florida; State of Arizona; State of Arkansas; Bill Schuette, Attorney General, State of Michigan; State of Nevada; and the State of Tennessee. [Footnote omitted.]

### B. Table of Contents

The Table of Contents is the one exception to my earlier comment that these prefatory sections are not important. In Supreme Court briefs, as in all appellate briefs, a Table of Contents can be quite important. It serves as a de facto summary of argument, telling the reader up front not only what you will be arguing but also why your position is correct.

Any discussion of what a Table of Contents should look like is really a discussion of how to craft the headings of sections and subsections in the Statement of the Case and Argument. At the risk of going out of order (since we’re not yet up to the Statement and Argument), here are some general rules for headings in Supreme Court briefs.
In the Argument section, a heading should be a complete sentence that makes a positive point for your position. It should not be a word or phrase, such as “Introduction” or “Application of Balancing Test.” (By contrast, an introduction placed at the beginning of the brief may be called “Introduction.”)

A heading should never be more than one sentence. If you think you need two sentences to convey the argument being made in the section, think again.

At the same time, that one sentence should not be unduly long. The Table of Contents as a whole should summarize your argument, but no individual heading needs to do so. For example, the heading to Section I in the opening brief in Michigan v. Bryant, 131 S. Ct. 1143 (2011), is too long:

I. Preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because “made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency,” that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual.

Do not put headings in all caps. As the Seventh Circuit’s Requirements and Suggestions for Typography in Briefs and Other Papers says, headings written in all-caps “are very hard to follow.”

C. Table of Authorities
As far as I can tell, there are no Supreme Court-specific rules when it comes to this table. Most practitioners begin with cases, and include both federal and state cases together; then move on to constitution, statutes, and regulations (though these are occasionally separated out); and then provide “other authorities.”

D. Opinions Below
Cert petitions and petitioner’s opening merits brief must contain this section. Here are a few examples of cert petitions that simply and directly present the lower court opinions, each slightly different than the others:


The First Circuit’s decision has not yet been published in the Federal Reporter, but is reported at 2015 WL 4079422 and reprinted in the Appendix (“App.”) at 1-68a. Similarly, the district court’s opinion has not yet been published, but is reported at 2015 WL 522183 and reprinted at App. 69-137a.


The opinion of the court of appeals (App., infra, 1a-16a) is reported at 769 F.3d 671. The oral ruling of the district court denying respondent’s motion to dismiss (App., infra, 32a) is unreported.


The opinion of the court of appeals (App. 1a-20a) is reported at 788 F.3d 1124. A previous opinion of that court (App. 72a-74a) is unpublished, as are the most recent opinion of the district court denying habeas relief (App. 21a-25a), the related report and recommendation of the magistrate judge (App. 26a-71a), an earlier opinion of the district court (App. 75a-76a), and the magistrate’s report related to that opinion (App. 77a-130a). The orders of the California Supreme Court (App. 131a), the California Court of Appeal (App. 132a-133a), and the Superior Court for Los Angeles County (App. 134a-135a) denying Lee’s state habeas petitions are also unpublished, as are the opinion of the California Court of Appeal affirming Lee’s conviction (App. 137a-162a) and the order of the California Supreme Court denying review on direct appeal (App. 136a).


The opinion of the Court of Appeals of Maryland is reported at 431 Md. 147. App. 1-52. The opinion and order of the Circuit Court for Howard County are unreported. App. 53-129. The order and oral ruling of the Maryland Tax Court also are unreported. App. 130-41.
A few things to note about listing of opinions below:

- The opinions are listed in reverse chronological order (i.e., beginning with the federal court of appeals or state appellate court decision for which review is sought).

- You do not need to provide the case names. The Supreme Court knows that (with one exception discussed below) the opinions all involve this case.

- The exception is that, in federal habeas corpus cases, you should provide the citations to the relevant state-court decisions. (Technically, it was a different case in state court. A direct appeal of a state conviction is part of the criminal case; federal habeas corpus cases are, of course, civil cases that collaterally challenge the criminal conviction.) This is particularly important where the issue is whether the federal courts of appeals violated AEDPA when it held that a state court unreasonably applied clearly established law. The Supreme Court can assess that issue only by reviewing the state-court decision. You therefore want to provide it in the appendix to the cert petition; and therefore must list it in the Opinions Below section.

- Descriptions of the opinions are generally not needed. So in a First Amendment case, you do not need to write: “The Eighth Circuit’s decision holding that [State] Code §1234 violates the First Amendment is reported at . . . .”

Denials of rehearing applications are not listed in Opinions Below. Rather, they are set out in the Jurisdiction section, to which we now turn.

**E. Jurisdiction**

Once again, the goal is to be simple and direct. The section generally begins with the key dates relevant to jurisdiction, followed by the statutory basis for jurisdiction. That means the section should set out the date on which the decision under review was entered; followed by the date on which any petition for rehearing was denied; followed by any extension(s) the Circuit Justice may have granted; followed by the statutory basis for Supreme Court review. That's it.

For example, from the United States' cert petition in *Department of Transportation v. Association of American Railroads*, 575 U.S. ___ (2015):

**JURISDICTION**

The judgment of the court of appeals was entered on July 2, 2013.

A petition for rehearing was denied on October 11, 2013 (App., infra, 51a-52a). On December 31, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 7, 2014. On January 28, 2014, the Chief Justice further extended the time to March 10, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).
When the petition seeks review of a federal court of appeals decision, the Supreme Court’s jurisdiction is being invoked under 28 U.S.C. §1254(1); when the petition seeks review of a state-court decision, the Court’s jurisdiction is being invoked under 28 U.S.C. §1257(a).

When a petition seeks review of a state-court judgment, the question often arises whether that judgment is final — a prerequisite to Supreme Court jurisdiction. Some practitioners prefer to tackle the issue head-on in the Jurisdiction section. If that’s your approach, make it short and sweet. For example, this is what Ohio wrote in its petition in *Ohio v. Clark*, 135 S. Ct. 2173 (2015), which sought review of an Ohio Supreme Court decision reversing a conviction based on a purported Confrontation Clause violation:

**JURISDICTIONAL STATEMENT**


**F. Constitutional and Statutory Provisions Involved**

This section, too, must be included in cert petitions and the opening briefs for petitioners. You have two options: to present some or all of these provisions in the body of the brief or to put them in an appendix. Both approaches are acceptable to the Court. Which one you take depends on the provisions’ length and whether the case turns on a particular provision, the precise phrasing of which you may wish to set out in an easy-to-find place at the beginning of the brief.

My rule of thumb is that you don’t want this section to be longer than three pages. I’ve read briefs where the Statement of the Case doesn’t begin until page 8 because of a very long Constitutional and Statutory Provisions Involved section. That’s not how your brief should begin.

Feel free to use ellipses liberally to keep this section concise. In a recent cert petition raising a Confrontation Clause issue (*Kansas v. Carr*, 577 U.S. ___ (2016)), Kansas set out the relevant constitutional provision as:

**The Sixth Amendment to the United States Constitution** provides in relevant part that “[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him …” U.S. Const. amend. VI.

Similarly, if an AEDPA case involves 28 U.S.C. §§2254(d)(1) and (e)(1), include only those subsections, not the entirety of §2254.

Also: The only provisions that must be included are those that are directly relevant to the question presented. If, for example, the case involves the meaning of the AEDPA statute of limitations, you do not need to provide the state criminal statute the defendant was convicted of violating. That statute has nothing to do with the issue you are presenting to the Court.

That’s all for now. Stay tuned for the next and final part of this series, which will cover the remaining sections of a Supreme Court brief.

**Endnotes**


2 *Id.* at 128. Every rule has its exceptions, of course. For example, in the rare case it is helpful to include a long passage from a trial or hearing transcript.

3 The exception is in briefs filed on 8½ x 11 inch paper, rather than the usual (for the Court) 6½ x 9¼ booklet. For state attorneys, that means briefs in opposition to in forma pauperis cert petitions. In such briefs, either underlining or italics are acceptable.
On Sept. 19, the President’s Council of Advisors on Science and Technology (PCAST) issued a 174-page report titled “Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods” (the PCAST Report or the Report).

It should be noted that PCAST Report does not bind any prosecutors or any courts, but may contain arguments that will be made by defense attorneys in cases that involve forensic evidence, particularly in the areas that PCAST argues should not be introduced into federal criminal trials.

As described at greater length below, the forensics disciplines that PCAST recommends that judges not admit into evidence are the following: (1) bite mark evidence, (2) firearms tool mark identification, (3) footwear analysis, and (4) hair analysis. PCAST also suggests that judges very carefully consider whether to admit DNA from complex-mixture samples and recommends that juries be advised that fingerprint examination has a high error rate.

A. Overview of PCAST

PCAST describes itself as “an advisory group of the nation’s leading scientists and engineers who directly advise the President and the Executive Office of the President. PCAST makes policy recommendations in the many areas where understanding of science, technology, and innovation is key to strengthening our economy and forming policy that works for the American people.” Since its formation in 2009, PCAST has issued a number of reports ranging from “Technology and the Future of Cities” to “Accelerating U.S. Advanced Manufacturing.”

PCAST’s co-chair, Eric Lander, is the only member of PCAST to have been directly involved in forensic science. Lander testified for the defense in State v. Castro, 544 N.Y.S.2d 985 (Bronx S. Ct. 1989) in the late-1980s about the then-nascent field of DNA and is on the board of the Innocence Project. Months before PCAST was invited to consider the use of forensic science in federal criminal cases, Lander wrote an Op-Ed for The New York Times titled “Fix the Flaws in Forensic Science.”

For the PCAST Report on forensic science, the members were advised by lawyers and judges PCAST refers to as “Senior Advisors.” Those senior advisors included federal judges who have argued that forensic science is used improperly in criminal proceedings, including Jed Rakoff from the Southern District of New York and Alex Kozinski of the Ninth Circuit Court of Appeals.

B. The PCAST Report

The Report considers whether these forensic feature comparison methods are “scientifically valid and reliable”: (1) DNA analysis of single-source and simple-mixture samples, (2) DNA analysis of complex-mixture samples, (3) bitemarks, (4) latent fingerprints, (5) firearms identification, (6) footwear analysis, and (7) hair analysis. It concludes that only items (1) and (4) are foundationally valid.

1. DNA Analysis of Single-Source and Simple-Mixture Samples

The Report concludes that single-source DNA (a DNA sample from only one person) and simple-mixture DNA (DNA from two people, such as DNA from rapist and a victim obtained from a rape kit) are foundationally valid.

2. DNA Analysis of Complex-Mixture Samples

The Report is relatively agnostic about whether the analysis of DNA from “complex mixtures”—that is,
from more than two contributors—is foundationally valid. It concludes that one “subjective” method, Combined-Probability-of-Inclusion, “is not foundationally valid,” but allows that courts might nonetheless consider admitting evidence obtained from that method if the analysts followed “rules specified” in a recent paper. A second “objective” method, Probabilistic Genotyping, is described as “a relatively new and promising approach” for which foundational validity has not yet been established.

3. Bitemarks
The Report concludes that bitemark analysis does “not meet the standards for foundational validity,” and that it is unlikely bitemark analysis could ever be validated.

4. Latent Fingerprints
The Report concludes that latent fingerprints are foundationally valid. It then recommends that jurors be advised, inter alia, that “false positive” error rates for fingerprint “matches” are as high as 1/18.

5. Firearms Identification
The Report concludes that firearms analysis—that is, determining whether a bullet was fired from a particular firearm—“currently falls short of the criteria for foundational validity” because only one “appropriately designed study” exists. The Report adds:

Whether firearms analysis should be deemed admissible based on current evidence is a decision that belongs to the courts. If firearms analysis is allowed in court, the scientific criteria for validity as applied should be understood to require clearly reporting the error rates seen in appropriately designed black-box studies (estimated at one in 66, with a 95 percent confidence limit of one in 46...).

6. Footwear Analysis
The Report does not address whether examiners can reliably determine “class characteristics” of shoes—e.g., if a shoeprint was made by a size 12 Nike Air Jordan released in 2014—but concludes that testimony that a particular piece of footwear—e.g., the size 12 Nike in the defendant’s closet—made a particular shoeprint is “unsupported by any meaningful evidence ... and ... not scientifically valid.” The Report did not include any specific directions to courts—unlike for firearms analysis.

6. Hair Analysis
PCAST relied entirely on the materials regarding hair analysis that the U.S. Department of Justice (DOJ) gathered for the DOJ’s Proposed Uniform Language for Testimony and Reports for the Forensic Hair Examination Discipline for its section on hair analysis. While the Report does not explicitly conclude that hair analysis lacks foundational validity, it suggests that the studies the DOJ cited “do not provide a scientific basis for concluding...[that hair analysis employs] a valid and reliable process.”

C. The Report’s Recommendations to the Federal Government
After concluding that several forensic science disciplines lack foundational validity, the Report makes recommendations to various federal science-based agencies, the FBI laboratory, the U.S. attorney general, and the federal bench. In summary, those recommendations are that more research needs to be done and that the science agencies and the FBI should secure millions of dollars to do that research; and that the attorney general not seek to admit, nor federal judges admit, evidence from the forensic disciplines that PCAST has determined lack “foundational validity.”

In other words, PCAST is recommending that the DOJ not seek to introduce evidence from the following disciplines: DNA analysis of complex-mixture samples, bitemarks, firearms identification, footwear analysis, and hair analysis. It is also recommending that federal judges—overruling precedent if necessary—refuse to admit evidence from those disciplines.

D. Responses to the Report by Criminal Justice Stakeholders
The response to the PCAST Report has included the following:

- A statement by U.S. Attorney General Loretta Lynch, reported by the Wall Street Journal, stating that the U.S. Department of Justice “will not be adopting the recommendations” in the Report.
- A release by the Federal Bureau of Investigation (FBI) criticizing the conclusions made by the Report regarding the admissibility of evidence.
- A position statement criticizing the PCAST Report by the American Congress of Forensic Science Laboratories.
- A press release criticizing the Report by the National District Attorneys Association (NDAA). In addition, the NDAA executive director appeared at the Sept. 30 meeting of PCAST, reiterating NDAA’s deep concerns with the Report.
NAGTRI is planning to host a nationwide symposium on forensic science issues in the spring or summer of 2017. Prosecutors may contact Amie Ely, Director, NAGTRI Center for Ethics and Public Integrity, at aely@naag.org for information about the symposium and/or a longer explanation of the PCAST Report, additional information about PCAST, and an analysis of some of the issues raised by the Report.

Endnotes


2 About PCAST, https://www.whitehouse.gov/administration/eop/ostp/pcast/about.

3 PCAST Documents & Reports, https://www.whitehouse.gov/administration/eop/ostp/pcast/docsreports.

4 A second member, S. James Gates, Jr., is a staff member of the National Commission on Forensic Science, which was established by the U.S. Department of Justice in 2013. Gates is a theoretical physicist who studies string theory. His 101-page C.V. (http://www.umdphysics.umd.edu/images/CV/gates_cv.pdf) reveals no familiarity with—or even interest in—any areas of forensic science.

5 While there was no appeal in Castro, the New York Court of Appeals later “disagree[d] with the conclusion of the court in People v. Castro . . . .” People v. Wesley, 83 N.Y.2d 417, 436 n.2 (NY 1994) (Kaye, C.J., concurring).


7 Report at 67-122.

8 Id. at 69.

9 Id. at 82.

10 Id. See also id. at 148.

11 Id. at 87, 148.

12 Id. at 149.

13 Id. at 96, 101. This data is from an unpublished study, the authors of which concluded that the majority of the incorrect matches were as a result of clerical errors and were “caught” by a second examiner—a verification system in use by the FBI.

14 Id. at 112.

15 Id. at 112, 150.

16 Id. at 150.

17 DOJ’s Forensic Science Discipline Review is studying the areas of forensic science in the PCAST Report, but with a more transparent procedure to solicit feedback and criticism from the stakeholders who will be impacted by its recommendations.

18 Id. at 120.

19 While the Report does not explicitly conclude that hair analysis lacks foundational validity, it strongly suggests that conclusion—and it is difficult to see how, under the PCAST “standards,” hair analysis would be considered foundationally valid.

20 Id. at 143-44

21 Gary Fields, “White House Advisory Council Report is Critical of Forensics Used in Criminal Trials,” Wall St. J. (Sept. 20, 2016) at ___. Ms. Lynch is quoted as saying, “We remain confident that, when used properly, forensic science evidence helps juries identify the guilty and clear the innocent, and the department believes that the current legal standards regarding the admissibility of forensic evidence are based on sound science and sound legal reasoning.”


Free Podcasts for Paralegals in AG Offices

The National Attorneys General Training and Research Institute (NAGTRI), a branch of the National Association of Attorneys General, has recorded three podcasts offering training to paralegals in attorneys general offices. Available here, they can be heard either through the NAGTRI website or downloaded on personal devices for listening at more convenient times.

The first podcast, recorded by Judy Zeprun Kalman, general counsel and head of the Attorney General Institute in the Massachusetts Attorney General’s Office, deals with the unauthorized practice of law and some ethical issues paralegals should be aware of in their job. In the second podcast recorded by Mark Neil, NAGTRI program counsel, he recommends methodologies for drafting discovery requests. In the third podcast, Hedda Litwin, NAAG cyberspace law chief counsel and NAGTRI program counsel, explains what paralegals should know about the 30(b)(6) deposition.

Four more podcasts for paralegals are being planned on topics such as using the Bluebook, research methodologies, prison litigation, and a deeper look into ethical issues. If a paralegal is interested in being contacted when one of these podcasts has been posted, please contact Laurel Pugliese at lpugliese@naag.org.

If there is interest in a podcast being recorded on a particular topic, please contact Judy McKee at jmckee@naag.org.

NAGTRI has been notified that some offices are having difficulties accessing the podcasts. If that is the case in your office, please contact your office IT personnel for assistance.

2016 NAGTRI Trainings At a Glance

Students during a breakout session at a Negotiations Training in Connecticut, February 2016.

Advancing Fair Housing Practices and Principles: Compliance of the Fair Housing Act in Missouri, April 2016.
About the Authors

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Olha N.M. Rybakoff serves as senior counsel in the Tennessee Attorney General’s Office, where she handles consumer protection, telemarketing and false claims litigation. Before joining the office in 2005, she served as deputy attorney general and director of the Delaware Attorney General’s Consumer Protection Division from 1997 - 2005. Before then, she was in private practice with the Wilmington, Delaware law firm of Connolly, Bove, Lodge & Hutz beginning in 1984, handling general, commercial and patent litigation matters.

Dan Schweitzer is director and chief counsel for the NAAG Center for Supreme Court Advocacy and has worked at NAAG for 20 years. The Center staff conducts moot courts for state attorneys who argue in the Court, edits 45-50 state briefs each Term, facilitates communication among the states on amicus briefs, and holds annual training programs.

2016 NAGTRI Trainings At a Glance

Students at a Trial Advocacy Training in Maryland, May 2016.

NAGTRI Management Training in Minnesota, May 2016.