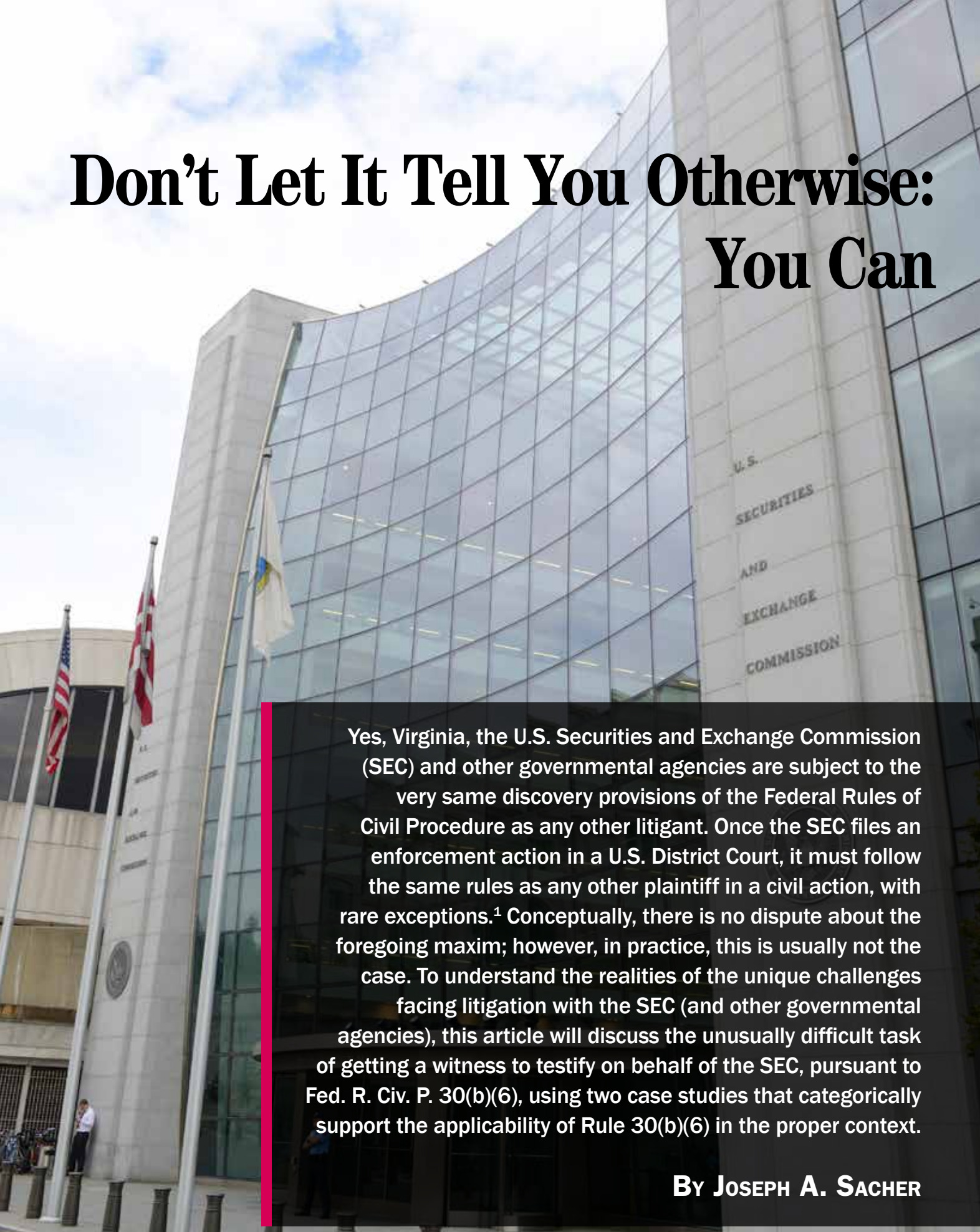
Don't Let It Tell You Otherwise: You Can



Yes, Virginia, the U.S. Securities and Exchange Commission (SEC) and other governmental agencies are subject to the very same discovery provisions of the Federal Rules of Civil Procedure as any other litigant. Once the SEC files an enforcement action in a U.S. District Court, it must follow the same rules as any other plaintiff in a civil action, with rare exceptions.[1] Conceptually, there is no dispute about the foregoing maxim; however, in practice, this is usually not the case. To understand the realities of the unique challenges facing litigation with the SEC (and other governmental agencies), this article will discuss the unusually difficult task of getting a witness to testify on behalf of the SEC, pursuant to Fed. R. Civ. P. 30(b)(6), using two case studies that categorically support the applicability of Rule 30(b)(6) in the proper context.

By Joseph A. Sacher

Depose the SEC ... Sometimes

A Lesson for Private and Public Securities Litigators, as Well as the Judiciary

Once the pleadings are filed, the claims and defenses are at issue, and discovery begins, every federal court litigant must decide on an approach to discovery. They also must determine how to support the asserted claims or defenses or what information may lead to the discovery of other admissible evidence—to be used during discovery, in preparation for summary judgment, or for use at trial.[2] The Federal Rules of Civil Procedure provide a number of different forms of viable discovery methodologies, including requests for admissions, requests for production, interrogatories to parties, and depositions (both oral and written). Any and all of these are fair game in any civil action pending in U.S. District Court, including those in which the government or its agencies, such as the SEC, is a party.

The SEC's Avoidance of Rule 30(b)(6) Depositions

While litigation with the government may bring about unique issues, with respect to special governmental claims of privilege, work product, and related considerations not available to a nongovernmental litigant (deliberative process privilege, the law enforcement privilege, and the informant privilege), they do not drastically differ in actual substance from those encountered in nongovernmental litigation between private parties, yet the SEC often asserts that "it is different." This article will not attempt to focus on those oft-discussed areas but instead on the rather unique positions that the SEC and other governmental agencies and departments have taken in an attempt to thwart a defendant's absolute right to properly notice and take a Rule 30(b)(6) deposition of a plaintiff to confront its accuser and obtain relevant testimonial evidence.

For reasons known only to the inner sanctum of the commission, the SEC has repeatedly and consistently taken the position that it is somehow exempt from, and need not comply with, the rather straightforward, mandatory requirements of Rule 30(b)(6), which states, in relevant part:

> In its notice or subpoena, **a party may name as its deponent** a public or private corporation, a partnership, an association, **a governmental 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. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition

> by any other procedure allowed by these rules. (Emphasis added)

By its own, express terms, Rule 30(b)(6) absolutely applies to governmental agencies, such as the SEC. However, as many defendants have learned, the hard way, the SEC often manages to avoid submitting to such depositions.

Every case is unique, to a certain degree, and should be approached as such. Sometimes the evidence is overwhelming, while other times, more circumstantial. In the former situation, a defendant may very well be satisfied with the SEC's initial disclosures, followed by normal and usual document requests, seeking the production of relevant, nonprivileged documentation, followed by depositions of fact witnesses, and perhaps even interrogatories, or requests for production. Other times, particularly in matters involving voluminous document production or matters involving individuals acting alone, or in the periphery of more complicated matters, the evidence is not always as clear or obvious. It is not unusual for defense counsel to be confronted with a room full of bankers boxes or massive amounts of electronically stored data, containing the entirety of the evidence that the SEC staff considers to be relevant to a particular case. While some enforcement actions involve one defendant with interrelated claims, many typically involve multiple defendants charged with various (sometimes different) violations. In either situation, defendants may find it difficult to decipher what evidence the SEC plans to use to support its case.

SEC v. Kramer

Our first case study illustrates the latter situation, described above, with Kenneth Kramer as one of six defendants in the matter currently known as *SEC v. Kramer*.[3] There, the commission brought suit against a defunct public company, three of its former officers and directors, and two separate individuals, including Kramer. The SEC's case primarily focused on an alleged pump-and-dump scheme in violation of the antifraud provisions of the Securities Exchange Act and Securities Act; sales of unregistered securities, in violation of the Securities Act; and reporting violations, in violation of the Exchange Act. Additionally, the SEC sued Kramer (and another individual defendant who failed to appear or defend) for purported violations of the broker-dealer registration provisions of the Exchange Act, for allegedly acting as a broker or dealer engaged in the business of effecting transactions in securities for the accounts of others. Significantly, Kramer was not a broker. He never sold any of the pertinent stock in the defendant company to anyone directly. Instead, he had personally engaged in his own, periodic purchase and sale transactions, executed through a brokerage account at an SEC-registered broker-dealer, which did not violate the federal securities laws.

Thus, Kramer found himself in the middle of a complex matter involving claims of pervasive and systematic securities fraud by a company and its insiders while attempting to defend himself against claims that did not require a finding of scienter. At the onset of discovery, Kramer's counsel went to the SEC's Miami Regional Office to inspect the initial disclosures and was confronted with 29 boxes of documentary evidence. Of those, 20 were represented to contain the "relevant Rule 26 disclosures," as well as an additional nine boxes of documents that were represented to contain exhibits that "may or may not be relevant." Even after an extensive document review, Kramer's counsel was still unable to determine what specific evidence the SEC was using to support its sole claim against Kramer, much less the "immediate threat of harm" he purportedly posed, as alleged by the SEC, which asserted the need for injunctive relief and disgorgement concerning matters that had occurred years earlier.

As a result, Kramer noticed a Rule 30(b)(6) deposition of the plaintiff, the SEC. The notice requested the SEC to designate one or more individuals, who consent to testify on its behalf, concerning the specific facts, information, documents, or other evidence specifically relied upon by the SEC, which support the specific cause of action and claims for relief asserted in the Complaint for Injunctive and Other Relief (which asserted, *inter alia*, that Kramer violated the broker-dealer registration provisions of the Exchange Act). Four days later, the SEC responded, by asking whether Kramer would agree to cancel the Rule 30(b)(6) deposition and indicating that it intended to file a motion for protective order.

Thus, although properly noticed, in accordance with the applicable rules of court, the SEC was not inclined to comply with its discovery obligation. When no motion for protective order was forthcoming, Kramer filed a motion to compel, advising the district court that the SEC's lack of cooperation contradicted established, black-letter law, including the specific language of Rule 30(b)(6), which applies to all litigants and expressly includes governmental agencies, such as the SEC. Kramer cited additional support in other contexts, such as actions involving municipalities, an FTC action, and a then-recent decision in *SEC v. Collins & Aikman Corp.*, in which the district court found:

> Like any ordinary litigant, the Government must abide by the Federal Rules of Civil Procedure. It is not entitled to special consideration concerning the scope of discovery, especially when it voluntarily initiates an action."[4]

Furthermore, in an attempt to avoid expected rebuttal arguments by the SEC, Kramer stated, up front, that he had no intention of invading any "mental processes and strategies" that might be protected by the work product doctrine, nor did he intend to depose the plaintiff's trial counsel.

As expected, the SEC actively opposed the motion and asserted five separate bases for denial to compel the commission's Rule 30(b)(6) deposition by arguing that: (1) the deposition would amount to the deposition of commission counsel; (2) the information was protected by the "nearly impermeable" opinion work product doctrine; (3) the information was protected by the fact work product doctrine; (4) Kramer had failed to demonstrate an exception to the general rule prohibiting the deposition of opposing counsel; and (5) the information was protected by the deliberative process privilege. In support of the foregoing, the SEC cited to a plethora of short, fact-based decisions, many unreported slip opinions, in various SEC cases, decided by magistrate judges or district court judges throughout the United States over the past decade. In doing so, the SEC took a rather bold position, asserting that, "Rule 30(b)(6) depositions of the commission 'amount to an attempt to depose opposing counsel' and would necessarily 'involve the testimony of attorneys assigned to the case, or require those attorneys to prepare other witnesses to testify.'"[5]

Following a telephonic discovery hearing before the assigned magistrate judge, the court denied Kramer's motion. Although not required by any rule, the court found that, apart from a document review, Kramer had failed to take any alternative discovery, such as interrogatories or requests for admissions, and suggested that the SEC's case appeared to be discoverable by such means. The magistrate judge also found that the proposed Rule 30(b)(6) deposition would necessarily inquire on matters protected by the work product or deliberative process privileges since the investigation was conducted by the SEC's counsel, who had not been identified as witnesses in the case. The court further noted that, although it was possible to prepare a Rule 30(b)(6) witness to testify, the process would infringe on counsel's mental impressions, raising numerous issues, and found that Kramer could obtain discover through other, less-intrusive means. The magistrate judge specifically explained:

> This ruling is consistent with those made by numerous other courts in similar circumstances, i.e., cases involving discovery efforts by defendants in actions brought by the SEC. Those cases are set forth in the parties' pleadings and are not recited herein. To permit a Rule 30(b)(6) deposition in circumstances where the sole investigators in the enforcement action are counsel for the agency would necessarily involve inquiry into otherwise privileged matters. Absent a demonstration by Defendant that such discovery may not be obtained by other methods, his motion is appropriately denied.[6]

Not to be deterred, Kramer filed objections to the magistrate judge's order pursuant to Rule 72 and 28 U.S.C. § 636(b)(1) and attempted to demonstrate that although the disposition of a motion to compel is left to the sound discretion of the trial court, the foregoing decision was "clearly erroneous" and "contrary to law." In his objections, Kramer explained that the opinion relied on the SEC's self-serving arguments and distinguishable decisions rather than the express provisions of the federal rules or those correctly reported decisions that interpret and enforce them. The SEC, of course, opposed the objections, and argued that (1) it had already produced all of the documents in its possession, had no independent knowledge of the documents, and its only remaining knowledge on the basis of the claims was the importance the SEC staff gives each document and other evidence; and (2) neither the commission counsel, who investigated the matter, nor its trial counsel, would appear as witnesses at trial. Both parties largely relied on their prior arguments but supported them with additional authorities.[7]

"Like any ordinary litigant, the Government must abide by the Federal Rules of Civil Procedure. It is not entitled to special consideration concerning the scope of discovery, especially when it voluntarily initiates an action."

—SEC v. Collins & Aikman Corp.

Following a two-week bench trial, the district court issued a 38-page, well-reasoned decision, directing the clerk to enter a judgment in favor of Kramer and against the commission. More than five pages of the order addressed Kramer's prior objection to the magistrate judge's order denying a Rule 30(b)(6) deposition of the commission.[8]

In its order, the district court sustained Kramer's objections and overruled the magistrate judge's prior order. It acknowledged the various decisions cited and relied upon by the SEC, where the commission successfully avoided being deposed based on asserted privileges, and those courts' findings that the information could be obtained by other, less-intrusive means. However, the district court cited to numerous decisions in support of its ruling 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.'"[9] Notably, the district court found it very difficult to establish a basis for prohibiting a deposition before it begins, explaining that a motion for protection can be made during the deposition if the need should arise.[10] The order also stated that, based on the record alone, it was clear that the SEC's staff accountant had worked on the case alongside its attorneys and noted that Kramer simply sought to discover only the *facts* underlying the claim against him, not the mental impressions of commission counsel. Notably, the district court emphasized that Rule 30(b)(6) does not require the seeking party to first obtain discovery of the facts by other means and further explained that the commission could designate any person, including someone other than counsel, to prepare for and appear for the deposition. The district court also dealt with the SEC's privilege concerns by noting that if the deposition attempts to elicit privileged matters, the deponent has the right to refuse to answer on the basis of privilege and seek protection; however, a prospective, blanket claim of privilege before the first question has been asked is not appropriate and deprives a litigant of a primary means of discovery without a meaningful review of the claim of privilege.[11]

Ultimately Kramer, though vindicated following a full trial, was deprived of his right to depose the SEC in a timely manner pursuant to the plain words of Rule 30(b)(6). Nevertheless, the decision provided a new precedent for others attempting to depose the SEC (or any governmental agency), which is what actually occurred in our second case study.

SEC v. Merkin

Our second case study involves a sole defendant in the matter known as *SEC v. Merkin*.[12] There, the commission brought suit against a single individual, an attorney who provided limited legal services to a public company, then-listed with the Pink Sheets. The SEC alleged that Merkin made false statements that violated the antifraud provisions of the Exchange Act. Specifically, the SEC alleged that Merkin had authored four attorney letters, which he knew would be posted on the internet, and stated that, to Merkin's knowledge, his client was not under investigation regarding possible

violations of securities laws, when in fact he knew that the SEC was conducting such an investigation. As part of his defense, Merkin asserted that it is the SEC's policy, which the SEC had instructed him to follow, not to disclose the existence of the commission's non-public, confidential investigation. The conflict ultimately resulted in the enforcement action.

During the course of discovery, Merkin's counsel attempted, unsuccessfully, to convince the SEC to permit him to take a Rule 30(b)(6) deposition and issued a Rule 30(b)(6) notice of deposition of the SEC. In response, just like in the *Kramer* case, the SEC objected to the notice, asked Merkin to withdraw it, and took the position that the deposition was improper because it would invade work product–protected information, the attorney–client privilege, the deliberative process privilege, and the investigative privilege. True to form, the SEC further argued that a Rule 30(b)(6) deposition would require it to produce enforcement attorneys as deposition designees or would require such counsel to prepare a nonlawyer using counsel's opinions, strategies, and thoughts. Last but not least, the SEC asserted that each of the 15 noticed deposition topics were irrelevant or overbroad and that documents previously produced to Merkin (totaling 125 gigabytes) were more than sufficient to determine the *factual information* upon which the SEC based its sole claim.

In accordance with the presiding district court judge's unique, fast-track discovery procedures, the parties conferred about their discovery dispute, contacted chambers to schedule a discovery hearing, and submitted relevant materials, such as the correspondence leading up to the dispute, which served as mini-briefs, and notices of supplemental authorities.[13] Merkin relied on Rule 30(b)(6), itself, *SEC v. Kramer*, *SEC v. Collins & Aikman Corp.*, and other decisions. The SEC attempted to categorize the *Kramer* decision as an outlier contrary to the weight of judicial authorities.

During a hearing conducted by the magistrate judge, the SEC argued that none of the 15 topics noticed by Merkin warranted a Rule 30(b)(6) deposition and that the notice should be quashed. When asked, the SEC advised that it was not taking the position that it was somehow exempt from the rule but that the issue should be decided on a case-by-case, topic-by-topic basis. In fact, during the hearing, the SEC's counsel, an assistant chief litigation counsel of the enforcement division, advised the court that he had never personally produced a Rule 30(b)(6) designee in his eight years with the agency, was unaware of any instance when it had occurred, and that he could not imagine even one issue in the case that would justify such a deposition. In support of that position, SEC counsel cited to additional decisions from the Southern District of Florida, and other districts, where district courts ruled the depositions inappropriate and would not permit them to take place. In response, Merkin's counsel argued that the SEC was seeking special treatment, contrary to the express terms of the operative rule, which applies equally to all parties.

In addressing the applicable law, as a starting point, the magistrate judge noted that, by its very terms, Rule 30(b)(6) applies to the government and its agencies, such as the SEC, and that there is not an express or even an implied exception even though they may be entitled to certain unique privileges, such as the deliberative process privilege, the law enforcement privilege, and the informant privilege. Furthermore, the court noted that the Advisory Committee Notes to Rule 30(b)(6) were revised in 1970 specifically to allow for depositions of governmental agencies.

With that background, the magistrate judge addressed the SEC's arguments and observed:

> Despite the SEC's insistence that it is not advancing a *per se* rule excluding it from complying with Rule 30(b)(6), its counsel's statements suggest otherwise. It is therefore appropriate, as a threshold matter, to reject the notion that the Government (in general) and the SEC (in particular) enjoy some type of automatic, special exemption from Rule 30(b)(6).

In support of this holding, the court (as with *Kramer*) relied on *SEC v. Collins & Aikman Corp.* and its finding that, "[l]ike any ordinary litigant, the Government must abide by the Federal Rules of Civil Procedure. It is not entitled to special consideration concerning the scope of discovery, **especially when it voluntarily initiates an action**. (emphasis added)." Also relying on the holding in *Kramer* and noting that the SEC had asserted the very same arguments, the court concluded that Merkin, like any other party litigating in federal court, had the right to take a Rule 30(b)(6) deposition from the SEC, subject to applicable privileges and work product claims afforded all litigants and the additional, unique privileges possessed by the government.[14] The magistrate judge also noted that, "Because the SEC is seeking sanctions that would, if granted, yield 'a very severe penalty,' this civil case 'can be considered 'quasi-criminal' in nature.' (citations omitted) This practical reality is equally present in this case and necessitates careful consideration of the SEC's attempts to avoid a Rule 30(b)(6) deposition in a case that it, not the Defendant, chose to file."[15]

In rejecting the SEC's notion of *Kramer* as an outlier case, contrary to the weight of judicial authority, the magistrate judge explained that, "one of the leading treatises on civil procedure cites *Kramer* with approval and cites other cases in which courts deemed the FBI and Navy Department government agencies within 30(b)(6) that could be compelled to provide designees for a 30(b)(6) deposition."[16] In doing so, the magistrate judge also noted the lack of any binding Supreme Court or Eleventh Circuit opinions involving civil litigants' efforts to obtain such depositions from governmental agencies and that federal magistrates or district court judges addressed virtually all of the pertinent authorities. The magistrate judge also explained that the SEC supported its position with nonbinding authorities, as well as cases from the Southern District, but acknowledged and addressed other decisions in Florida, which reached opposite results.

The court addressed and rejected each of the SEC's stated objections. First, the magistrate judge explained, "A government' agency's concerns over privilege in a 30(b)(6) deposition would not be analytically different if the agency involved was connected to a *state* or *city* instead of the federal government," and "[A]s a general proposition, government agencies embroiled in litigation are subject to the same discovery rules as private litigants, regardless of the level of government to which the agency belongs." Second, the court explained, "The concern that a 30(b)(6) deposition would risk disclosure of privileged information is not unique to cases involving the Government," and "[T]o the contrary, private litigants routinely confront identical hazards and raise similar objections (in motions

for protective orders, motions to quash or objections to motions to compel)." Most significantly, the court rejected the SEC's concerns that an attorney would be required to prepare the designees, noting that courts routinely overrule such arguments from private litigants, explaining that "the argument that a lawyer would be involved in the preparation process is simply a truism which, if sufficient to preclude 30(b)(6) depositions, would eliminate that discovery tool." To the contrary, the presence of counsel at the deposition, who may give appropriate instructions not to answer improper questions and preserve all applicable privileges, counters such risk.[17]

The SEC argued that none of the 15 topics noticed by Merkin warranted a Rule 30(b)(6) deposition and that the notice should be quashed. When asked, the SEC advised that it was not taking the position that it was somehow exempt from the rule but that the issue should be decided on a case-by-case, topic-by-topic basis.

While most of the fact-specific decisions cited and relied upon by the SEC favor the use of interrogatories in lieu of a Rule 30(b)(6) deposition as a less-intrusive and more-efficient means of obtaining the desired discovery, the *Merkin* court rejected this approach, citing numerous decisions that refused to deny parties their choice of discovery methods and one decision for the proposition that "a party should not be prevented from taking a 30(b)(6) deposition 'just because the topics posed are similar to those contained in documents provided or interrogatory questions answered.'"[18]

The magistrate judge summarized his findings, as follows:

a. Litigants usually cannot prohibit a 30(b)(6) deposition by arguing in advance that each and every question would trigger the disclosure of attorney–client and work product information;
b. Litigants (and their counsel) served with a 30(b)(6) notice decide which witnesses to designate and those witnesses need not be (and generally are not) attorneys;
c. The mere fact that attorneys were involved in the preparation of the 30(b)(6) witness does not foreclose all questions of the 30(b)(6) witness;
d. Litigants can ordinarily select which available discovery tools they want to use, along with the order in which they want to use them, and courts usually will not force litigants to select another form of discovery (e.g., interrogatories) before permitting a 30(b)(6) deposition;
e. Litigants are permitted to learn the facts underlying their opponent's claims and defenses;
f. Counsel may protect against the disclosure of work product or privileged information in 30(b)(6) depositions by interposing appropriate objections and giving instructions on a question-by-question basis;
g. The Government and its agencies are subject to the same discovery rules as private litigants; and
h. Although the Government sometimes enjoys privileges not available to private parties, these unique privileges do not usually generate an automatic, across-the-board immunity from 30(b)(6) depositions.

The magistrate judge also expressly rejected any attempt by the SEC to suggest that it enjoyed a *de facto* immunity from Rule 30(b)(6) depositions and likewise overruled the SEC's objection to each of the 15 topics designated, finding such an assertion to be unpersuasive. Instead, the court analyzed the topics and found eight of which to be either irrelevant or unduly broad (and struck those topics, without prejudice, so that Merkin could revisit or modify them or raise entirely new topics later, if appropriate). It also modified the language in two of those topics in an effort to avoid an additional discovery dispute in the future. Thus, Merkin was permitted to proceed with the Rule 30(b)(6) deposition as to seven topics.[19]

Following the foregoing ruling, the SEC moved to stay the Rule 30(b)(6) deposition. However, the magistrate judge denied its motion to stay, finding *inter alia* that the SEC had taken inconsistent and changing positions about its concern that the deposition would implicate privilege since the commission claimed to have no firsthand knowledge of the facts underlying the civil enforcement action. Rejecting that assertion, the court explained that this was a further rehash of the SEC's earlier arguments and noted the typical situations faced by private parties in civil litigation, using a subrogation claim as an example. The court specifically addressed the SEC's assertion that it would "likely be required to object and instruct the witness not to answer virtually every question." In doing so, the court memorialized the SEC's positions during an earlier hearing, in which the commission acknowledged that asking the same questions in interrogatory format would be permissible and that the SEC considered such an approach to be better since it prefers to respond to interrogatories rather than to risk misstatements during a live Rule 30(b)(6) testimony. In its conclusion, the court explained (emphasis in original):

> A question either seeks privileged information or it does not. To be sure, the SEC *prefers* to provide discovery in an interrogatory answer, rather than through a 30(b)(6) witness. The Court supposes that virtually *every* litigating party would adopt that preference. But why would a question be permissible (and not risk the disclosure of privileged information) if asked in an interrogatory but suddenly be transformed into an impermissible question if asked of a 30(b)(6) witness? The SEC has no answer.[20]

The SEC objected to these rulings and sought the district court's review of the magistrate judge's order, raising the same arguments once again and referencing the court to contrary, but fact-specific,

decisions from the district and approximately a dozen other related decisions. Namely, the SEC asserted that the magistrate's order would allow inquiry into counsel's mental impressions and into purportedly irrelevant subject matter. The SEC also argued that Merkin failed to address the overwhelming case law precluding Rule 30(b)(6) depositions of the commission regarding *factual* allegations. Finally, the SEC also requested expedited review of its objections to the magistrate's denial of its motion to stay.

The district court addressed each of the SEC's concerns, overruled its objections, and affirmed the magistrate judge's orders. First, the district court dealt with the SEC's assertion that the magistrate judge's rulings were clearly erroneous and contrary to law because they purportedly permitted Merkin to inquire into the mental impressions and work product of the SEC's counsel. The district court rejected this argument, finding the SEC's cited cases to be factually distinguishable from the instant case, noting that those authorities involved protection from inquiries seeking work product and noting that the magistrate judge did not find that the defendant intended to invade privileged matters. Further, the operative order allowed for SEC counsel to "interpose objections and give privilege-based and Court order-based instructions not to answer specific questions at 30(b)(6) depositions taken in this case," allowing the SEC to protect itself against the disclosure of nonprivileged matters. Next, the district court addressed the SEC's objections that the deposition would inquire into irrelevant subject matter and found that the SEC had failed to demonstrate that the magistrate judge, in the exercise of his broad discretion, was clearly erroneous in finding the confidential nature of SEC investigations relevant, particularly based on the defendant's operative affirmative defense, claiming that the SEC instructed him to keep its investigation confidential.[21]

Accordingly, as a result of all of the foregoing, Merkin was permitted to, and actually deposed the SEC, pursuant to Rule 30(b)(6), through its chosen designee, an assistant director, who also happened to be an attorney. The approximately 300-page transcript memorialized Merkin's good faith questions, the SEC's good faith answers, and various objections and instructions by the SEC's trial counsel. The magistrate judge subsequently addressed those disputes, sustaining some objections and overruling others, by directing simple yes/no answers. When all was said and done, the SEC ultimately obtained summary judgment against Merkin. However, at the end of the day, Merkin successfully obtained discovery to his satisfaction, in a manner that permitted him to use a completed factual record to defend himself against the SEC's enforcement action to the best of his ability.

Conclusion

The SEC, like many other governmental agencies, continues to attempt to ignore the express obligations under Rule 30(b)(6) and to direct district courts to self-serving decisions favoring the government's preference for avoiding deposition. However, the next time you find yourself defending a civil enforcement action in federal court— involving the SEC or any other governmental agency, department, or municipality—or presiding over such a matter, and the agency attempts to take the position that it is not required to appear for deposition, pursuant to Rule 30(b)(6), concerning discovery of *facts* that it relied on, make sure you have copies of the *Collins*, *Kramer*, and *Merkin* decisions, as well as the applicable portions of Wright & Miller's Federal Practice and Procedure, to ensure that you make the best possible record in an attempt to obtain all of the discovery rights and privileges afforded to every litigant under the Federal Rules of Civil Procedure. ⊙

Joseph A. Sacher, Esq. is a name partner at Sacher, Zelman, Hartman, Paul, Beiley & Sacher, P.A., located in Miami, Fla.; a member of the South Florida Chapter of the FBA; and belongs to both the Georgia and Florida Bars. He is a proud alumnus of Emory University (1994) and the University of Alabama School of Law (1997) and served as a summer extern at the SEC's Atlanta District Office during law school. Since entering private practice, he has defended numerous SEC investigations and served as counsel in litigation matters throughout the Southeast, including both SEC v. Kramer and SEC v. Merkin, the case studies discussed above. He also co-authored "The Public Company Accounting Reform and Protection Act: The Changing Landscape of Public Corporations and the Accounting and Law Firms Who Provide Them Services," The Florida Bar News, Sept. 1, 2002. In addition to his SEC practice, he has extensive experience in general and complex commercial litigation matters in state and federal courts and regularly organizes and moderates broker-dealer roundtables for the Florida International Bankers Association.

Endnotes

[1]*See, e.g.,* Fed. R. App. P. 4 (unlike nongovernmental litigants, the United States, its agencies, and its officers or employees sued in an official capacity, are afforded 60 days, instead of 30, to file an appeal).

[2]*See* Fed. R. Civ. P. 26(b)(1).

[3]*SEC v. Sky Way Global LLC, et al.*, Case No. 8:09-cv-00455-SDM-TBM (M.D. Fla. 2008).

[4]256 F.R.D. 403, 414 (S.D.N.Y. 2009).

[5]Docket Entry 62 at 5 (citing *SEC v. Buntrock*, No. 02-cv-2180, 2004 WL 1470278, at *2 (N.D. Ill. June 29, 2004)); *SEC v. Monterosso*, No. 07-cv-61693, 2009 WL 8708868 (S.D. Fla. June 2, 2009).

[6]Docket Entry 66 at 3 n.1.

[7]Due to inadvertence, and the fact that the objection was never docketed as a pending motion, the court never ruled on Kramer's objections. Subsequently, during the course of the litigation, the SEC attempted to rely on two declarations in support of its motion for summary judgment, which were authored by the SEC's staff accountant and the primary staff attorney responsible for the investigation of the underlying enforcement matter (who also appeared as trial counsel). Kramer properly noted his objections to the foregoing, and, pursuant to Rule 16(e), the district court modified its pretrial order to note Kramer's objections to any attempt by the commission to call these individuals as witnesses and to identify Kramer's unresolved objections to the magistrate judge's order. Thereafter, the magistrate judge entered a pretrial order, which noted Kramer's objections to the SEC calling the staff accountant at trial, on the grounds that the SEC previously stated that none of its agents or employees would be witnesses and also because the

Depose the SEC continued on page 45

DEPOSE THE SEC continued from page 36

SEC failed to identify him as an expert witness. The pretrial order directed that if Kramer wished to depose the witness (even though discovery was closed), the SEC should cooperate fully in scheduling the deposition prior to trial. Thereafter, the SEC's staff accountant was deposed, and he testified on the SEC's behalf at trial, in an individual capacity.

[8]*SEC v. Kramer*, 778 F. Supp. 2d 1320, 1326-28 (M.D. Fla. 2011).

[9]*Id.* at 1327 (quoting *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*, No. 1:03-cv-167, 2009 WL 5227661, at *2 (S.D. Ohio Nov. 20, 2009) (citing *Yousuf v. Samantar*, 451 F.3d 248, 255 (D.C. Cir. 2006)).

[10]*Kramer*, F. Supp. 2d at 1327, citing Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus, 8A Fed. Prac. & Proc. § 2037 (3d ed.); *SEC v. Dowdell*, No. 3:01-CIV-00116, 2002 WL 1969664, at *2 (W.D. Va. Aug. 21, 2002).

[11]*SEC v. Kramer*, appeal dismissed Dec. 2, 2011, 11th Cir. No. 11-12510 (DE 22).

[12]*SEC v. Merkin*, Case No. 1:11-cv-23585-Graham/Goodman (S.D. Fla.).

[13]The SEC submitted the following authorities in support of its request that the Rule 30(b)(6) deposition notice be quashed: *SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (quashing 30(b)(6) deposition of SEC on ground that it "constitutes an impermissible attempt by defendant to inquire into the mental processes and strategies of the SEC."); *SEC v. Nacchio*, No. 05-cv-00480-MSK-CBS, 2009 WL 211511 (D. Colo. Jan. 29, 2009) (magistrate judge upholds SEC's refusal on deliberative process grounds to answer questions during 30(b)(6) deposition of division of corporation finance and office of chief accountant); *SEC v. Nacchio*, 614 F. Supp. 2d 1164, 1175-79 (D. Colo. 2009) (affirming magistrate judge's decision to quash 30(b)(6) deposition regarding he allegations in the complaint as "unduly burdensome" and because "most of the areas of inquiry . . . would repeatedly tread upon arguably privileged grounds.").

[14]*Merkin*, 283 F.R.D. at 693 and n.2 (S.D. Fla. 2012) (footnote 2 states, "*Contra* George Orwell, Animal Farm ch. X (1945) ('All animals are equal, but some animals are more equal than others.')").

[15]*Id.* at 694 n.4 (citing *United States v. Sanchez,* 520 F. Supp. 1038, 1040 (S.D. Fla. 1981)); *see also SEC v. Snyder*, No. H-03-04658, 2006 WL 6508273, at *1 (S.D.Tex. Aug. 22, 2006).

[16]*Merkin*, 283 F.R.D. at 694-95 and n.5 (citing 8A Charles Alan Wright, Arthur R. Miller and Richard L. Marcus, Fed. Prac. & Proc. § 2103 n. 37). The magistrate court also noted, in footnote 5 of its order, "In their April 2012 supplement, the authors also added the comment that 'permitting a party to invoke work product as a blanket obstacle to a 30(b)(6) deposition seems to undermine the important utility of that device.'"

[17]*Id.* at 696.

[18]*Id.* at 697 (quoting *Dongguk Univ. v. Yale Univ.*, 270 F.R.D. 70, 74 (D. Conn. 2010)).

[19]*Id.* at 696.

[20]*SEC v. Merkin*, No. 11-23585-CIV, 2012 WL 2504003, at *3 (S.D. Fla. June 27, 2012).

[21]*SEC v. Merkin*, 283 F.R.D. 699 (S.D. Fla. 2012).

FINDER OR BROKER continued from page 37

receive a success-based compensation in the form of a percentage of the funds raised by those investors. Brumberg agreed not to engage in negotiations on either party's behalf, make recommendations about financing agreements, or assist with any financing transactions. Nevertheless, the SEC stated that Brumberg should register as a broker-dealer because of the success-based compensation and because its involvement in prescreening investors to determine eligibility and interest exceeded the scope of a finder's role.

An analysis of the SEC's recent no-action letters suggests that the SEC was focusing heavily on the method of compensation received by the potential finder. The *Kramer* court's critique of that approach suggests that the SEC's analysis is too narrow.

So which analysis should one follow? The SEC has not issued any no-action letters since the *Kramer* decision and, to the great surprise of industry watchers, has decided not to appeal the decision. However, it would be imprudent to rely upon a single decision from a Florida district court. It would be best to act in accordance with the SEC's pre-Kramer no-action letters until the SEC clarifies its approach or the problem is resolved by additional litigation. ⊙