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Selecting And Preparing Corporate 30(b)(6) Witnesses

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The seemingly mundane task of selecting and preparing appropriate corporate representatives for "Rule 30(b)(6)" depositions of the corporation can often present complex challenges and potential pitfalls for both the company and its counsel. Understanding what courts expect from a corporation in this regard can help ease much of the difficulty associated with selecting and preparing a representative to appear on your company's behalf at a deposition.

What is a Rule 30(b)(6) Deposition?

Rule 30(b)(6) of the Federal Rules of Civil Procedure allows a party to name a corporate entity (or other organization), rather than a specific individual, in a notice of deposition and to identify the subject matters to be explored. According to the Rule, these subject matters must be identified with "reasonable particularity." In response, the corporation must designate one or more persons to testify on its behalf to "matters known or reasonably available to the organization" regarding those topics. The resulting testimony binds the company and may be used by the discovering party for any purpose.[1]

Difficulties Associated With The Device

There is no limit in the Rule on how many topics (related or unrelated) can be specified in a single 30(b)(6) deposition notice. Moreover, while the Rule states that the subject matters to be explored must be identified with "reasonable particularity," courts that have interpreted that language have held that the subjects identified in the deposition notice serve as a starting point, not an ending point, for the deposition.[2]

Sometimes litigants try to use 30(b)(6) depositions to mitigate the impact of time and numerical limitations on depositions imposed by the Federal Rules of Civil Procedure and/or case-specific orders. For example, faced with the standard limitation of a one-day seven-hour deposition, a litigant may notice a 30(b)(6) deposition with dozens of subject matters (possibly unrelated) to force the designation of multiple corporate representatives – each of whom, according to the express text of the Rule, can then be deposed for a separate seven-hour period on their respective topics.

Some litigants also attempt to use 30(b)(6) depositions to shortcut more time-intensive and expensive conventional discovery devices (like document productions and written interrogatories) by noticing a deposition to explore all the available evidence on contested factual matters in a case, and sometimes even a legal interpretation of those facts.

Designating The Appropriate Witness(es)

The corporation has a range of options in responding to a 30(b)(6) deposition notice. Rule 30(b)(6) expressly authorizes the deponent corporation to split the specified deposition topics among multiple representatives. A corporation also has the right to designate persons outside the organization (such as former employees or outside advisors) as its testifying representative.[3] Most critical in selecting the company's representative(s) is that the testimony on the 30(b)(6) topics will be deemed admissible against the company for any purpose at trial.[4] The corporation will be bound by the testimony even if the representative lacked personal knowledge on any of the subjects explored.[5]

Designating the corporation's 30(b)(6) representative(s) is a decision that rests within the sole discretion of the corporation.[6] Under the Rule, a corporation cannot be required to designate a representative other than persons who are current "officers, directors or managing agents," although it has the option of designating others (e.g., ordinary employees).[7] The designated witness(es) need not have personal knowledge on the matters identified in the notice, or be the person(s) in the organization with the most personal knowledge.[8] To the extent a designated witness lacks personal knowledge, however, he or she must then be thoroughly prepared in advance of the deposition on the institutional knowledge, documents, and all other relevant information reasonably available to the corporation that may be at issue in the deposition notice. The preparation undertaken by counsel and the witness should be exhaustive, both because courts require it and also because opposing counsel can and will explore the steps taken by the witness to prepare for the deposition.[9] Because steps taken by the witness to prepare for a Rule 30(b)(6) deposition are themselves discoverable, counsel should ensure that "the witness does not review privileged documents" and that "the sole source of [the witness's] information is not facts related by counsel."[10] Using privileged material to prepare a Rule 30(b)(6) witness runs the significant risk of waiving the privilege otherwise attaching to documents and advice relating to the subject matters explored during the deposition.[11]

One possible response to a wide-ranging 30(b)(6) notice is to produce a single corporate representative who has been prepared on all topic areas where he or she lacks personal knowledge, thus forcing the noticing party to compress the entire examination into a single seven-hour day. However, such a tactic may not always work, because the examining party can apply to the court to expand the permitted length of the examination in such circumstances.[12] Moreover, such a tactic requires careful consideration of the potential witness's ability to address the

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core areas to be explored and the confidence of the corporation and its counsel in the witness's ability to tell the company's story, given the binding effect that the testimony will have on the company.

Sometimes a corporate designee is deposed not only as the company representative but also in his or her individual capacity as a fact witness. For purposes of convenience, these multiple depositions are often taken in one combined proceeding. It is not surprising that such "mixed" depositions can confuse witnesses about which "hat" they may wearing at any given time during the deposition and thus whether they should confine their testimony to personal knowledge or also address overall corporate knowledge. In such instances, counsel must vigilantly insist that the examiner be clear on whether he or she is asking for the deponent's individual personal knowledge or the corporation's knowledge. This reality of 30(b)(6) deposition practice also militates in favor of choosing an intellectually agile corporate representative who can navigate such waters – even if he or she is not the person with the maximum amount of personal knowledge on the designated subjects.

How Much Preparation Is Adequate?

If the designated witness lacks personal knowledge of some or all of the subject matters contained in the notice, the corporation – using information reasonably available to it – must prepare the designee on those issues either through documents, conversations with past or current employees, or other sources of information.[13] However, a Rule 30(b)(6) deposition is not meant to be a "corporate memory test."[14]

Nevertheless, a corporation may be put in the position of having to address matters such as isolated historical documents and events that pre-date the knowledge of any current corporate employees.[15] While a corporation, like an individual deponent, may plead lack of institutional memory,[16] it must be mindful that many courts and commentators state that a party claiming lack of corporate knowledge on a subject is generally precluded from offering any evidence at trial on that same subject matter.[17]

Witness preparation is further complicated because in practice a Rule 30(b)(6) notice may not reliably limit the scope of the deposition to the designated topics despite the Rule's explicit requirement that the deposition notice "describe with reasonable particularity the matters on which examination is requested."[18] Despite the sprawling areas on which a corporate litigant may be required to provide testimony – virtually any topic related to the subject-matters addressed in the deposition notice or the claims at bar – courts are not always strict in employing the "reasonable particularity" standard contained in the Rule when evaluating whether a witness with adequate information was presented.[19]

Some courts have gone further. Some have interpreted the Rule's reference to the knowledge of the "organization" to embrace entities beyond the specific corporate deponent, if deemed within that corporation's control (e.g., subsidiaries), even if those other entities are not parties to the action.[20] Such an interpretation magnifies the challenges of witness selection and preparation.

There are some boundaries, however. For example, in a commercial dispute regarding the drafting and interpretation of a contract, a "fact" deposition can easily degenerate into a quasi-legal argument between lawyer and lay witness about contractual interpretation. While some degree of inquiry about a company's legal position is permitted,[21] courts have held that a 30(b)(6) examiner cannot demand testimony concerning contentions and legal theories "[u]nder the guise of requesting facts."[22]

The heavy preparation burdens placed on the deponent corporation further underscores the need to designate a witness who is knowledgeable on the core subject matters of the deposition notice, who can clearly articulate the company's factual and legal positions and, with the help of counsel, quickly get up to speed on the potential areas of inquiry about which they are not adequately informed. Failure to do so may result in the imposition of discovery sanctions against the discovered party.[23]

Conclusion

A Rule 30(b)(6) deposition often presents a corporate litigant with a sizable task, compounded with the risk that any unhelpful testimony might conclusively bind the company. At bottom, the two most important issues in successfully managing these challenges is witness selection and preparation. Paying heed to these two issues will enable counsel and the corporate client to avoid the pitfalls and meet the challenges posed by a Rule 30(b)(6) deposition.

1 *For a detailed discussion from a judicial perspective of a variety of issues raised by a Rule 30(b)(6) deposition, see Sidney Schenkier, U.S.M.J. (N.D. Ill.),* Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6)*, 29 Litigation No. 2, 20-26 (Winter 2003).*

2 King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995).*

3 Ierardi v. Lorillard, Inc.*, Civ. A. No. 90-7049, 1991 WL 158911, at *2 (E.D. Pa. Aug. 13, 1991).*

4 *Fed. R. Civ. P. 32(a)(2).*

5 United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996).*

6 Sanders v. Circle K Corp.*, 137 F.R.D. 292, 294 (D. Ariz. 1991).*

7 Village of Kiryas Joel Local Development Corp. v. Insurance Co. of North America*, 1991 WL 41667, at *2 (S.D.N.Y. March 21, 1991).*

8 Reed v. Bennett*, 193 F.R.D. 689, 691 (D. Kan. 2000).*

9 Calzaturficio S.C.A.R.P.A. SPA v. Fabiano Shoe Co.*, 201 F.R.D. 33, 36 (D. Mass. 2001).*

10 *Schenkier,* supra*, at 24-25.*

11 Suss v. MSX International Services, Inc.*, 212 F.R.D. 156, 165 (S.D.N.Y. 2002) (noting that privilege is waived if witness reviews privileged material in preparation for deposition and "relies on" that material in providing testimony).*

12 *Year 2000 Amendment to Fed. R. Civ. P. 30 (imposing one-day seven hour deposition limitation to each 30(b)(6) designee no matter how many subject matters they are prepared to address);* see also Canal Barge Co. v. Commonwealth Edison Co.*, No. 98 C. 0509, 2001 WL 817853, at *4 (N.D. Ill. July 19, 2001).*

13 Bank of New York v. Meridien Biao Bank Tanzania, Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997).*

14 EEOC v. American Int'l Group, Inc.*, No. 93 Civ. 6390, 1994 WL 376052, at *3 (S.D.N.Y. July 18, 1994).*

15 Ierardi*, 1991 WL 158911, at *1 (E.D. Pa. Aug. 13, 1991).*

16 Taylor*, 166 F.R.D. at 362.*

17 Id. *at 363.*

18 *For a detailed assessment of this and other doctrinal concerns arising from a Rule 30(b)(6) deposition,* see *Sinclair and Fendrich,* Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms*, 50 Ala. L. Rev. 651, 658-59 (Spring 1999).*

19 King*, 161 F.R.D. at 476.*

20 Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc.*, No. 01 Civ. 3016, 2002 WL 1835439, at * 2 (S.D.N.Y. Aug. 8, 2002).*

21 Taylor*, 166 F.R.D. at 362.*

22 JPMorgan Chase Bank v. Liberty Mut. Ins. Co.*, 2002 WL 31082958, at *2 (S.D.N.Y. Sept. 16, 2002).*

23 Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 78 (S.D.N.Y. 1991).*

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