A Practical Guide to the Successful Defense of a 30(b)(6) Deposition

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A deposition noticed pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure is a powerful tool that requires a corporation to produce one or more witnesses to testify on the corporation's behalf with respect to the noticed topics. If a 30(b)(6) deponent performs poorly, it can have disastrous consequences for the corporation: The corporation may not be able to take positions that were not taken by the 30(b)(6) representative, or, even worse, the corporation may be bound to unfavorable positions. In contrast, when the 30(b)(6) deponent is articulate, well-prepared, and savvy, it can put a human face on the corporation and allow it to tell the corporation's side of the story persuasively. Thus, it is absolutely critical that the right person be selected to testify on the corporation's behalf and that the person selected be thoroughly prepared and well defended. This article provides practical steps to follow when selecting, preparing, and defending a 30(b)(6) deposition.

Rule 30(b)(6) allows a party to take the deposition of organizations, including corporations.[1] Under Rule 30(b)(6), when an opposing party provides notice to a corporation that it is seeking a 30(b)(6) deposition on particular topics, the corporation is required to designate one or more individuals to testify on its behalf. One of the primary reasons for implementing Rule 30(b)(6) was to prevent organizations from "bandying," or putting up a series of individual witnesses who each claim to lack knowledge of facts known by the corporation.[2] To prevent bandying, Rule 30(b)(6) obligates a corporation to prepare one or more 30(b)(6) witnesses to give binding answers on the corporation's behalf with respect to the noticed subjects. A 30(b)(6) witness need not have personal knowledge about the noticed subjects, but rather testifies as to the knowledge of the corporation. Given the stakes of a 30(b)(6) deposition, it is important to proceed carefully from the time the corporation is served with a notice to the time of the deposition.

Reviewing the 30(b)(6) Deposition Notice

When served with a 30(b)(6) deposition notice, counsel should carefully review the notice to ensure that it is proper and identifies the topics for deposition with reasonable particularity. Serving parties are obligated to provide enough detail for the corporation to enable effective preparation of a witness. If any of the noticed topics are vague, overly broad, excessive, or otherwise objectionable, counsel for the corporation should assert objections and make a good faith attempt to resolve the issues with the serving party. If efforts to resolve the issues with counsel for the serving party fail, the corporation should move for a protective order. Failure to do so may waive the corporation's objections. Once the issues regarding the 30(b)(6) notice have been resolved, the next step is choosing the right witness.

Selecting the 30(b)(6) Witness

Selecting the right witness for the 30(b)(6) deposition is critical. Counsel can select anyone who consents to testify on behalf of the corporation. This may be an officer, a director, a managing agent, a former employee, or even a stranger to the corporation hired to serve as a 30(b)(6) witness.

It is important to bear in mind that the 30(b)(6) witness must be able to testify on behalf of the corporation regarding matters known or reasonably available to the corporation, even if no employee in the corporation with personal knowledge is available to testify. This can pose significant challenges when the 30(b)(6) deposition notice includes topics related to the distant past; when key employees have retired, been terminated, or now work for a competitor; when relevant business lines have been sold or abandoned; or if an employee with personal knowledge invokes the Fifth Amendment privilege against self-incrimination at the deposition. Under these circumstances, the case law is clear that the corporation is obligated to prepare someone on the noticed topics using available information, including documents and interviews, even if this requires the corporation to hire someone to testify on its behalf with respect to the noticed topics.[3]

How should the corporation select one or more witnesses to testify on its behalf? Counsel should interview individuals within the corporation with knowledge about the issues in the deposition notice and/or management within the corporation with responsibility for the litigation. While doing so, counsel should bear in mind the following strategic considerations.

Designate Only One 30(b)(6) Witness

The first thing to consider is whether to designate one or more witnesses for the 30(b)(6) deposition. Some noticing parties will strategically set out a great number of topics to force counsel to designate more than one 30(b)(6) witness. Counsel should be wary of this strategy because the noticing party's goal is to get more than one seven-hour day for the 30(b)(6) deposition. For each witness you designate, the noticing party will have one seven-hour day for questioning. Selecting only one witness, such as a mid- to senior-level official who, with preparation, can testify about all of the noticed topics, will more likely minimize the extent of off-topic questioning and make the preparation process easier for counsel and the corporation. Of course, if the

corporation designates only one witness, counsel must ensure that the witness has plenty of time for an intense period of preparation.

Look for an Experienced Witness

Counsel should also consider whether a potential deponent will make a good witness. For purposes of a 30(b)(6) deposition, titles and résumés do not matter. However, it is important to select a witness with experience testifying in depositions or at trial because a witness who is easily intimidated or flustered by questioning is likely to veer off course. An easily shaken 30(b)(6) witness is dangerous because the witness' statements are attributed to the corporation. A witness who is comfortable with aggressive questioning is more likely to be able to represent the corporation well.

Use a Current or Former Employee or an Outsider

Counsel will have to determine whether to select a current employee, a former employee, or a stranger to the corporation as the 30(b)(6) witness. Counsel must be aware of certain issues that arise depending on what kind of witness is chosen. For example, the deposing party may argue that by designating former employees or outsiders, the corporation waives the attorney-client privilege and loses the protection of the work product doctrine. Courts have generally rejected such arguments, but given the risk that communications with a former employee may not be privileged, counsel may have to be more circumspect in such communications.

Using former employees and outsiders also raises the issue of compensation for time spent preparing and testifying. The witness will have to be prepared for questioning on the compensation arrangement and the amount of compensation. Counsel must also evaluate how the finder of fact will react to a 30(b)(6) witness being compensated.

An important consideration when designating a current employee is avoiding anyone who is involved in legal strategy or who has a lot of personal knowledge on issues relevant to the litigation but not noticed as deposition topics. The more personal knowledge the witness has, the more the deposing party can mix questions based on corporate and personal knowledge. This may confuse the witness and create a murky deposition transcript.

Take Notice of Important Personal Traits

Because preparation will be grueling, the ideal witness is patient, able to commit time to preparing for the deposition, has a great deal of mental endurance, and has an excellent memory. The witness will have to retain a lot of information at the preparation stage and will endure an intense day of questioning. At the 30(b)(6) deposition, an ideal witness is articulate and savvy. Of course, an articulate witness represents the corporation well and will make clear what he or she intends to say on behalf of the corporation. A savvy witness will understand that he or she is testifying as to the corporation's knowledge and will pick up on cues from counsel, such as objections based on the scope of the 30(b)(6) notice. After such objections, the witness should answer carefully and know that he or she should clarify if any answer is based on personal knowledge.

Preparing the 30(b)(6) Witness

There is no such thing as over-preparing the 30(b)(6) witness. Indeed, Rule 30(b)(6) obligates the corporation to educate a 30(b)(6) witness on noticed topics by collecting information through review of corporate documents and interviewing current and former employees.[4] If the 30(b)(6) witness does not know the answer to a particular question, the corporation may be precluded from introducing evidence on that topic in opposition to summary judgment or at trial. Therefore, ample time should be reserved for counsel to meet with the 30(b)(6) witness well in advance of the deposition to provide information on the deposition process, including the role of a 30(b)(6) witness; to walk through the 30(b)(6) topics; and to go over relevant documents (which should be gathered and reviewed by counsel before the preparation session).

Counsel for the corporation should be mindful that a 30(b)(6) witness's testimony is not limited to the facts known to the corporation. A 30(b)(6) witness may be obligated to testify about the corporation's positions, subjective opinions or beliefs, or interpretation of facts and events.[5] Counsel should therefore discuss the issues in the case and the parties' respective positions with the witness.

Counsel for the corporation must also anticipate questions that exceed the scope of the deposition notice. Indeed, while there is no obligation to prepare a 30(b)(6) witness to answer questions that go beyond the scope of noticed topics, a majority of courts have held that the 30(b)(6) deposition notice amounts to the minimum topics on which the witness must be prepared, not the maximum.[6] Counsel must therefore also prepare the 30(b)(6) witness for questions that go beyond the scope of the designated topics. With respect to such questions, it is perfectly appropriate for the witness to answer that he or she does not know the answer if that is in fact the case. Counsel should caution the witness to distinguish any given answers that are based on personal knowledge (as opposed to corporate knowledge).

After thoroughly preparing the 30(b)(6) witness on the deposition process and the claims and issues in the case and going over the relevant documents, including anticipated areas of examination, counsel should conduct a mock deposition. A mock deposition can test the witness's memory with questions about the noticed topics. The mock deposition should also test the witness's ability to deal with questions that go beyond the noticed topics. By throwing off-topic curveballs at the witness, the witness will learn how to deal with questions that he or she does not know the answer to and questions where the answers come only from personal knowledge. If the witness does well, the mock deposition will have the added benefit of building the witness's confidence.

Defending the 30(b)(6) Deposition

When the deposing party asks a question that goes beyond the scope of the noticed topics, counsel should object to the question, stating that any answer is not made on behalf of the corporation, and then should allow the witness to answer. Objections may be based on the question exceeding the scope of the corporation's duty to prepare a 30(b)(6) witness. If more than one witness is designated for the 30(b)(6) deposition, counsel may object on the ground that the question exceeds the corporate knowledge possessed by the particular witness. Counsel should be careful to instruct the witness not to answer only if the question invades a privilege or the terms of a court order. As a last resort, if the deposition is "being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party,"[7] counsel may terminate the deposition and seek a protective order.

Counsel will have to deal with any unfavorable statements made if a 30(b)(6) witness does not fare well. The good news is that courts generally agree that 30(b)(6) statements do not constitute judicial admissions (which are binding and may not be controverted by the party at trial or on appeal of the same case). But courts do agree that 30(b)(6) statements are binding to some degree. Some courts state that 30(b)(6) statements are evidentiary admissions (which may be controverted or explained by the party).[8] Other courts state that 30(b)(6) testimony is only as binding as the testimony of any other individual under Rule 30(b)(1).[9] Such testimony is binding in that the individual is committed to a position at the time of the deposition, but the testimony may be explained or contradicted. So, while counsel will not be precluded from explaining or controverting the 30(b)(6) witness's testimony, it is clearly in the corporation's best interest to keep such evidentiary battles to a minimum by putting forth the best 30(b)(6) witness possible. After all, a savvy, well-prepared 30(b)(6) witness with little or no personal knowledge of relevant issues may provide the perfect opportunity to tell the corporation's story. ▯

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Endnotes

1. Fed. R. Civ. P. 30(b)(6) provides:

> In its notice or subpoena, a party may name as the 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.

2. The Advisory Committee Notes explain that Rule 30(b)(6) has three purposes. In addition to the prevention of "bandying," Rule 30(b)(6) was enacted to reduce the difficulty a deposing attorney encounters in determining whether a particular employee is a "managing agent" and to assist organizations by reducing the number of depositions of officers and agents by a party uncertain of who has the relevant knowledge. Fed. R. Civ. P. 30(b)(6) Advisory Comm. n. to 1970 Amendments.

3. *See, e.g.*, City of Chicago v. Wolf, No. 91 C 8161, 1993 WL 177020, at *2 (N.D. Ill. May 21, 1993) (where the employees of two nonparty corporations would invoke the Fifth Amendment, the corporations were obligated to retain and prepare witnesses to testify on their behalf with respect to the noticed topics); Ierardi v. Lorillard, Inc., Civ. A. No. 90-7049, 1991 WL 158911, at *1 (E.D. Pa. Aug. 13, 1991) ("If none of the defendant's current employees has sufficient knowledge to provide plaintiffs with the requested information, defendant is obligated to 'prepare [one or more witnesses] so that they may give complete, knowledgeable and binding answers on behalf of the corporation.'").

4. *See, e.g.*, Wilson v. Lakner, 228 F.R.D. 524, 528 (D. Md. 2005); Folwell v. Hernandez, 210 F.R.D. 169, 172–73 (M.D.N.C. 2002); *see also* Banks v. Office of the Senate Sergeant-at-Arms, 241 F.R.D. 370, 373 (D.D.C. 2007) (there is an obligation to prepare a witness to testify, but obligation to prepare is limited to information available to the corporation).

5. *See, e.g.*, Todd v. Precision Boilers, Inc., No. Civ. A. 07-0112, 2008 WL 4722338, at *3 (W.D. La. Oct. 24, 2008); Krasney v. Nationwide Mut. Ins. Co., No. 3:06CV1164, 2007 WL 4365677, at *2 (D. Conn. Dec. 11, 2007); Otero v. Vito, No. 5:04CV211, 2006 WL 3535149, at *2 (M.D. Ga. Dec. 7, 2006).

6. *See, e.g.*, Eng-Hatcher v. Sprint Nextel Corp., No. 07 Civ. 7350, 2008 WL 4104015, at *4 (S.D.N.Y. Aug. 28, 2008); UniRAM Tech., Inc. v. Monolithic Sys. Tech., Inc., No. C-04-1268, 2007 WL 915225, at *2 (N.D. Cal. March 23, 2007); McMahon v. Presidential Airlines, Inc., 6:05CV1002, 2006 WL 5359797, at *4 (M.D. Fla. Jan. 18, 2006).

7. Fed. R. Civ. P. 30(d)(3)(A).

8. *See, e.g.*, Sanders v. Circle K Corp., 137 F.R.D. 292, 294 (D. Ariz. 1991); Ierardi v. Lorillard, *supra*, 1991 WL 158911, at *3.

9. W.R. Grace & Co. v. Viskase Corp., No. 09-C-5383, 1991 WL 211647, at *2 (N.D. Ill. Oct. 15, 1991).

