How to Prepare for and Successfully Defend a Rule 30(b)(6) Deposition

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This Practice Note discusses the key issues to consider when selecting and preparing a corporate representative to testify under Federal Rule of Civil Procedure 30(b)(6). This Note further discusses how to successfully defend a Rule 30(b)(6) deposition.

A deposition noticed under Federal Rule of Civil Procedure 30(b)(6) (FRCP 30(b)(6) or Rule 30(b)(6)) requires an organization to produce one or more witnesses to testify on the organization's behalf with respect to the topics set out in the discovering party's notice of deposition. The importance of producing a knowledgeable and well-prepared Rule 30(b)(6) witness cannot be overstated. If the Rule 30(b)(6) witness performs poorly at her deposition, the organization may be bound by the witness' unfavorable testimony and be precluded from taking contrary positions at trial. In contrast, if the Rule 30(b)(6) witness is well-prepared, she can put a human face on the organization and tell the organization's side of the story. Therefore, it is critical to select the right person to testify for the organization and to ensure that she is thoroughly prepared and well-defended.

This Note discusses the key issues to consider when selecting and preparing a corporate representative to testify under FRCP 30(b)(6). This Note further discusses how to successfully defend a Rule 30(b)(6) deposition.

OVERVIEW OF FEDERAL RULE OF CIVIL PROCEDURE 30(B)(6)

Rule 30(b)(6) allows a party to depose organizations, including corporations. Under this rule, the discovering party serves a notice of deposition on the organization setting out the particular topics on which the organization is required to testify. The organization must then designate one or more individuals to testify on its behalf. The designated individual or individuals must testify about information known or reasonably available to the organization.

According to the Advisory Committee Notes to Rule 30, Rule 30(b)(6) was enacted primarily to prevent "bandying," or putting up a series of individual witnesses who each claim to lack knowledge of facts known by the organization (*1970 Advisory Committee Notes to FRCP 30(b)(6)*). To prevent bandying, Rule 30(b)(6) requires an organization to prepare one or more Rule 30(b)(6) witnesses to give binding answers on the organization's behalf with respect to the noticed topics. A Rule 30(b)(6) witness need not have personal knowledge about the noticed topics but rather testifies as to the organization's knowledge.

REVIEWING THE RULE 30(B)(6) DEPOSITION NOTICE

After receiving a Rule 30(b)(6) deposition notice, the organization's counsel should carefully review the notice to ensure that it is proper and identifies the topics for deposition with reasonable particularity. The party that seeks to depose a company witness under Rule 30(b)(6) must provide enough detail in the deposition notice for the organization to effectively prepare

a witness. Counsel should serve written objections specifically setting out appropriate objections if any of the noticed topics are:

- Vague.
- Overly broad.
- Excessive.
- Otherwise objectionable.

Counsel should then make a good faith attempt to resolve any outstanding issues with the discovering party's counsel. If these efforts fail, the organization should move for a protective order under FRCP 26(c). The organization may inadvertently waive its objections to the Rule 30(b)(6) deposition notice if it fails to make a timely motion for a protective order or fails to meet and confer with its adversary before making the motion.

Keep in mind that merely making a motion for a protective order does not always stay discovery, though some courts have local rules providing for an automatic stay of discovery after a motion for a protective order has been made (compare *Versage v. Marriott Intl., Inc., No. 05-cv-0974, 2006 WL 3614921, at *7 (M.D. Fla. Dec. 11, 2006)* (discovery not stayed), with *Petersen v. DaimlerChrysler Corp., No. 06-cv-0108, 2007 WL 2391151, at *5 (D. Utah Aug. 17, 2007)* (discovery automatically stayed under D. Utah Local Civil Rule 26-2)). Therefore, counsel should consider making a motion to temporarily stay the deposition in addition to (or as part of) its motion for a protective order.

CONDUCTING THE FACTUAL INVESTIGATION

If the organization decides not to object to the deposition notice, or if the court orders the deposition to go forward after considering the organization's objections, the next step is to conduct an initial investigation to determine who (if anyone) in the organization possesses knowledge about the noticed topics. Importantly, even if there is no one in the organization who presently has knowledge of the noticed topics, the organization must nevertheless take reasonable steps to educate a witness on those topics.

Specifically, after reviewing the Rule 30(b)(6) deposition notice, counsel should:

- Assemble binders containing relevant documents for each noticed topic (see *Assemble Binders for Each Noticed Topic*).
- Identify individuals with knowledge about the noticed topics (see *Identify Individuals with Knowledge about the Noticed Topics*).
- Interview the individuals with knowledge about the noticed topics (see *Interview Individuals with Knowledge about the Noticed Topics*).

ASSEMBLE BINDERS FOR EACH NOTICED TOPIC

After reviewing the Rule 30(b)(6) deposition notice, the organization's counsel should assemble binders for each of the noticed topics. The binders should include:

- Documents that have been produced in discovery and which relate to the noticed topics.
- Any other documents related to the noticed topics that have not been requested during the litigation. If counsel decides to prepare the Rule 30(b)(6) witness with company documents that have not yet been produced in discovery, she may need to disclose those documents to the other parties in a supplemental Rule 26(a) disclosure. In addition, counsel should consider Bates stamping the documents and producing them to the other parties to remove any doubt that the documents may be relied on at the deposition or trial.

IDENTIFY INDIVIDUALS WITH KNOWLEDGE ABOUT THE NOTICED TOPICS

Counsel should next identify individuals likely to have knowledge about the topics in the Rule 30(b)(6) deposition notice. The individuals can be identified based on a review of the documents in the binders and conversations with current employees at the organization. In-house counsel in particular may know who has testified in the past on related topics and whether a proposed witness is competent, reliable and articulate.

INTERVIEW INDIVIDUALS WITH KNOWLEDGE ABOUT THE NOTICED TOPICS

Counsel should conduct preliminary interviews of potential Rule 30(b)(6) witnesses to:

- Learn both the good and bad facts so that counsel can develop a persuasive and factually supported company position.
- Explore potentially damaging facts, documents, or both, to determine how they can be contextualized.
- Identify which of the potential candidates should serve as representatives to testify on behalf of the organization.

SELECTING THE RULE 30(B)(6) WITNESS: PRELIMINARY ISSUES

It is critical to select the right witness for the Rule 30(b)(6) deposition. Counsel can select anyone who consents to testify on behalf of the organization, including:

- Officers.
- Directors.
- Managing agents.
- Former employees.
- Outsiders to the organization hired to serve as Rule 30(b)(6) witnesses.

The Rule 30(b)(6) witness must be able to testify on behalf of the organization regarding matters known or reasonably available to the organization, even if no employee in the organization with personal knowledge of those matters is available to testify. In these situations, the organization must prepare someone on the noticed topics using available information, including documents and

interviews, even if this requires the organization to hire someone to testify on its behalf with respect to the noticed topics (see, for example, *Ierardi v. Lorillard, Inc., No. 90-cv-7049, 1991 WL 158911 (E.D. Pa. Aug. 13, 1991)*).

Keep in mind that it is particularly challenging to educate the Rule 30(b)(6) witness when:

- The deposition notice includes topics related to the distant past.
- Key employees have retired, been terminated or now work for a competitor.
- Relevant business lines have been sold or abandoned.

SELECTING THE RULE 30(B)(6) WITNESS: SPECIFIC ISSUES

When considering the various candidates to be Rule 30(b)(6) witnesses, counsel should:

- Try to designate only one Rule 30(b)(6) witness.
- Look for an experienced witness.
- Consider the strategic reasons for using a current employee, a former employee or an outsider.
- Look for important personal traits (such as good memory and ability to speak clearly).

In addition, counsel should be careful not to select an employee who might invoke the Fifth Amendment privilege against self-incrimination at the Rule 30(b)(6) deposition.

TRY TO DESIGNATE ONLY ONE RULE 30(B)(6) WITNESS

Selecting only one witness, such as a mid- to senior-level official who, with preparation, can testify about all of the noticed topics will likely minimize the extent of "off-topic" questioning during the deposition because the deposing party generally has only seven hours to depose the Rule 30(b)(6) witness (discussed below). Selecting only one witness also makes the preparation process easier for counsel and the organization. If the organization designates only one witness, counsel must ensure that the witness has plenty of time for an intense period of preparation.

Some noticing parties strategically set out a large number of topics to force counsel to designate more than one Rule 30(b)(6) witness. In these situations, the noticing party's goal is to get more than one seven-hour day for the Rule 30(b)(6) deposition. Under Rule 30(d)(1) of the FRCP, a party may only depose a witness for one day (for a total of seven hours) unless the court allows for more time. If the company designates only one witness to testify about all of the noticed topics, the discovering party will be forced to complete its questioning in one seven-hour deposition unless the court orders otherwise.

LOOK FOR AN EXPERIENCED WITNESS

Counsel should consider whether a potential Rule 30(b)(6) witness has the attributes of a good corporate representative. For purposes of a Rule 30(b)(6) deposition, titles and résumés do not matter. Ideally, the selected witness should have experience testifying at depositions or at trial. A witness who is easily intimidated or flustered by questioning is likely to veer off course, which is dangerous because the witness' statements are attributed to the organization. In contrast, a witness who is comfortable with aggressive questioning is more likely to represent the organization well.

DECIDE WHETHER TO USE A CURRENT EMPLOYEE

If the organization decides to designate a current employee, it should not pick an employee who is involved in setting the organization's legal strategy or has a lot of personal knowledge on issues relevant to the litigation that are not included in the Rule 30(b)(6) deposition notice.

By choosing an employee who is privy to the organization's legal strategy, the organization may unnecessarily risk waiving the attorney-client privilege or work product protection if, for example, the witness inadvertently discloses privileged or protected information during her deposition.

In addition, the more personal knowledge the witness has on topics outside the scope of the Rule 30(b)(6) deposition notice, the more easily the deposing party can mix questions based on the organization's and the witness' personal knowledge. This may confuse the witness, create a murky deposition transcript and potentially lead to certain knowledge and statements being improperly attributed to the company.

DECIDE WHETHER TO USE A FORMER EMPLOYEE OR OUTSIDER

Sometimes, an organization decides that it is in its best interest to designate a former employee or an outside agent to testify on its behalf. One important factor in deciding whether to designate a non-employee witness for a Rule 30(b)(6) deposition is whether the organization may successfully assert the attorney-client privilege and work product protection for communications between company counsel and non-employee witnesses.

Typically, the attorney-client privilege only attaches to communications between a lawyer and her client. But in most cases, the company's lawyer represents the company exclusively, and not the non-employee witness (even though the witness is testifying for the company). Because the non-employee witness is technically not the lawyer's client, the argument may be made that the attorney-client privilege cannot attach to pre-deposition communications between the non-employee witness and the organization's lawyer.

However, courts have generally rejected these challenges, especially where the non-employee used to work for the company and is testifying about matters that relate to the scope of her former employment (see *Practice Note, Attorney-Client Privilege: Privileged Parties: Communications with Former Corporate Employees (http://us.practicallaw.com/9-502-8339)*). In addition, courts recognize that the privilege may extend to communications between corporate counsel and third-party agents who are the "functional equivalent" of company employees (see *Practice Note,*

Attorney-Client Privilege: Privileged Parties: Communications with Non-employees (http://us.practicallaw.com/9-502-8339)). In any event, the work product doctrine usually protects these communications because it covers communications between a lawyer and a friendly third party that are made in anticipation of litigation (see *Practice Note, Work Product Doctrine: Waiver: Express Waiver: Intentional Disclosure (http://us.practicallaw.com/3-504-0061)*).

Nevertheless, to minimize the risk that a court will require the disclosure of pre-deposition communications between the organization's lawyer and a non-employee Rule 30(b)(6) witness, counsel may have to be more circumspect in her communications with former employees or outsiders.

In addition, former employees and outsiders are commonly compensated for time spent preparing for and testifying at the deposition. The witness should therefore be prepared for questioning on the compensation arrangements. Counsel must also evaluate how a jury will react to the fact that the company is paying a Rule 30(b)(6) witness to testify on its behalf.

IMPORTANT PERSONAL TRAITS

Preparing for a Rule 30(b)(6) deposition is grueling. The witness has to retain a lot of information at the preparation stage and endure an intense day of questioning at the deposition. Therefore, the ideal witness should:

- Be patient.
- Be able to commit time to preparing for the deposition.
- Have a great deal of mental endurance.
- Have an excellent memory.

In addition, an ideal witness will be articulate and savvy. An articulate witness will represent the organization well and make clear what she intends to say on behalf of the organization. A savvy witness will understand that she is testifying about the organization's knowledge and pick up on cues from counsel, such as objections based on the scope of the Rule 30(b)(6) notice. A savvy witness will also answer carefully and know that she should clearly state whether her answers are based on her own personal knowledge.

PREPARING THE RULE 30(B)(6) WITNESS

The organization must educate a Rule 30(b)(6) witness on the noticed topics by collecting information through a review of corporate documents and interviewing current and former employees. If the Rule 30(b)(6) witness does not know the answer to a particular question, the organization may be precluded from introducing evidence on that topic in opposition to a summary judgment motion or at trial (see, for example, *Wilson v. Lakner, 228 F.R.D. 524 (D. Md. 2005)*). Therefore, ample time should be reserved for counsel to meet with the Rule 30(b)(6) witness in advance of the deposition to:

- Educate the witness on the deposition process, including the role of the Rule 30(b)(6) witness.
- Walk through the noticed topics and relevant documents, which should be gathered and reviewed by counsel before the preparation session.
- Conduct a mock deposition.

PREPARATION SHOULD NOT BE LIMITED TO THE "FACTS"

A Rule 30(b)(6) witness' testimony is not limited just to "facts." The witness may also be required to testify about the organization's:

- Positions.
- Subjective opinions or beliefs.
- Interpretation of facts and events.

(See *Krasney v. Nationwide Mut. Ins. Co., No. 06-cv-1164, 2007 WL 4365677 (D. Conn. Dec. 11, 2007)*.)

Counsel should keep this in mind when preparing the organization's Rule 30(b)(6) witness for her deposition.

PREPARATION SHOULD COVER ISSUES OUTSIDE THE SCOPE OF THE DEPOSITION NOTICE

The organization's lawyers must anticipate that the discovering party will ask questions that exceed the scope of the deposition notice. While there is no obligation to prepare a Rule 30(b)(6) witness to answer questions that go beyond the scope of the noticed topics, most courts have held that the Rule 30(b)(6) deposition notice amounts to the minimum topics that may be inquired into at the deposition, not the maximum (see, for example, *Eng-Hatcher v. Sprint Nextel Corp., No. 07-cv-7350, 2008 WL 4104015 (S.D.N.Y. Aug. 28, 2008)*). Therefore, counsel should prepare the Rule 30(b)(6) witness for questions that go beyond the scope of the noticed topics. In addition, counsel should caution the witness to distinguish any answers given that are based on her independent personal knowledge as opposed to the organization's knowledge.

CONDUCT A MOCK DEPOSITION

After thoroughly preparing the Rule 30(b)(6) witness on the deposition process, the claims and issues in the case, the organization's themes, the relevant documents and anticipated areas of examination, counsel should conduct a mock deposition. A mock deposition should test the witness' memory with questions about the noticed topics. It should also test her ability to deal with questions that go beyond the noticed topics. By tackling off-topic questions, the witness learns how to deal with unexpected questions, which she may not initially know how to answer, and questions that require the witness to answer based on her personal knowledge. If the witness does well, the mock deposition also builds up the witness' confidence.

DEFENDING THE RULE 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. For example, counsel may object on grounds that the question exceeds the scope of the organization's duty to prepare a Rule 30(b)(6) witness or relates to a topic on which a separate Rule 30(b)(6) witness has been designated (if the organization has designated more than one Rule 30(b)(6) witness).
- State that any answer made is not on behalf of the organization.
- Ultimately allow the witness to answer.

Keep in mind that the lawyer defending the deposition may instruct the witness not to answer only if the question invades a privilege or the terms of a court order. As a last resort, counsel may terminate the deposition and seek a protective order if the deposition is conducted in bad faith or in a manner that unreasonably annoys, embarrasses or oppresses the deponent or party (*FRCP 30(d)(3)(A)*).

AFTER THE DEPOSITION: EVIDENTIARY ISSUES

Courts generally take the position that the purpose of a Rule 30(b)(6) deposition is to obtain binding testimony. Therefore, if the Rule 30(b)(6) witness does not fare well at the deposition, the company may be stuck with the witness' "bad" testimony (see, for example, *W.R. Grace & Co. v. Viskase Corp., No. 90 C 5383, 1991 WL 211647 (N.D. Ill. Oct. 15, 1991); Ierardi v. Lorillard, No. 90-cv-7049, 1991 WL 158911 (E.D. Pa. Aug. 13, 1991)*). In these situations, counsel must determine how the organization will explain to the judge or the jury any damaging admissions made during the Rule 30(b)(6) deposition. This is yet another reason why the organization must select the best Rule 30(b)(6) witness possible and thoroughly prepare that witness.

**Based on "A Practical Guide to the Successful Defense of a 30(b)(6) Deposition," by David R. Singh and Isabella C. Lacayo, 2009, Verdict: The Journal of the Trial Practice Committee, 23:2. (c)2009 by the American Bar Association. Revised with permission. All rights in original material reserved.*

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