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Rule 30(b)(6) Corporate Depositions: Effective Defense Strategies

Best Practices for Responding to a Deposition Notice, Selecting and Preparing Witnesses

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1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Rule 30(b)(6) Corporate Depositions: Effective Defense Strategies

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Introduction

- Party seeking information from a corporation may serve a notice requiring the corporation to designate a person to testify in a deposition on specified topics
- Such notices:
 - Are referred to as corporate designee or 30(b)(6) notices
 - Impose various obligations on the corporation
 - Present numerous issues for the corporation
- This seminar will:
 - Identify those obligations and issues
 - Discuss practical responses to them

The Language of Rule 30(b)(6)

“A party may ... name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested.... [T]he organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The person so designated shall testify as to matters known or reasonably available to the organization....”

The Rationale For Rule 30(b)(6)

- Reduce the difficulty a deposing lawyer encounters in determining whether a particular employee of a corporation is a “managing agent”
- Curb the practice of “bandying”
- Protect entities from the burden of having an unnecessarily large number of their employees deposed

Common Uses of 30(b)(6) Depositions

- **Seek factual information regarding claims**
- **Discover the company's:**
 - Position with respect to disputed matters
 - Subjective beliefs and opinions
 - Interpretation of documents and events
- **Authenticate documents**
- **Probe discovery compliance**

Use of 30(b)(6) Deposition Testimony

FRCP 32(a)(3) provides:

Deposition of Party, Agent, or Designee. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

Predominant view:

30(b)(6) testimony is not a judicial admission

Key 30(b)(6) Issues

- **Responding to the Deposition Notice**
- **Selecting the 30(b)(6) Witness**
- **Preparation for the Deposition**
- **Problem Areas and What to Do About Them**

Responding to the Deposition Notice

Preliminary Issues to Consider

- Is the notice procedurally proper?
 - If the corporation is not a party:
 - Does a subpoena accompany the notice?
 - Does the issuing court have jurisdiction?
 - Does the notice satisfy rule requirements?
 - *E.g.*, does it identify the topics for designation?
 - Is it limited to relevant, discoverable topics
 - Was service proper?
 - Does the notice provide required time to respond?

Responding to the Deposition Notice

Preliminary Issues Continued

- If defective, challenge, ignore or accept the notice?
 - Ignoring the notice is dangerous
 - Court may disagree that the notice is defective
 - This tactic will increase hostility with serving party
 - May accomplish little; the party can re-serve notice

Responding to the Deposition Notice

Preliminary Issues Continued

- Accepting the notice may be best option if:
 - Defect is debatable or just technical in nature
 - Little is at stake for the corporation
 - You want to avoid fees of the challenge
 - You can get greater cooperation from serving party

Responding to the Deposition Notice

Addressing The Notice

- Does the corporation have responsive information?
 - If so, must present a witness to testify
 - If not, may be able to negotiate with serving party

- Is the requested information protected?
 - Information may be protected if it is:
 - Covered by attorney/client privilege, work product
 - A trade secret
 - If information is protected, you may:
 - Try to avoid deposition through negotiation; or
 - Seek protective order from court; or
 - Attend deposition and object to questions

Responding to the Deposition Notice

- Is the request vague or ambiguous?
 - If so, seek clarification from serving party
- Is the request overly burdensome?
 - A notice may be overly burdensome if:
 - The deposition topics are very broad
 - The number of requested documents is large
 - Collecting the information would entail great cost
 - If the notice is overly burdensome, you may
 - Try to narrow topics through negotiation
 - File for protective order
 - Suggest a more efficient means of discovery (such as contention interrogatories) for certain information

Responding to the Deposition Notice

- Should you serve objections?
 - Regardless of whether you will present a witness:
 - Review the notice carefully
 - Serve the noticing party with a response identifying:
 - All objections
 - Topics for which the corporation has no information
 - Any limitations on testimony that will be given

Responding to the Deposition Notice

- Should you serve your own 30(b)(6) notice?
 - This is only applicable to a party in a suit
 - You may wish to serve such a notice to:
 - Obtain leverage in negotiating scope of notice
 - Restrict demands, expectations of other side
 - Positively influence behavior during the deposition

Selecting the 30(b)(6) Witness

Rule 30(b)(6) requires the corporation to:

"... designate one or more officers, directors, or managing agents, or other person who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify." (emphasis added)

Whom to Select?

- Current Employee
- Former Employee
- Expert
- Multiple Witnesses

Selecting the 30(b)(6) Witness

Rule 30(b)(6) requires the witness to:

“... testify as to matters known or reasonably available to the organization.”

- Witness need not have first-hand knowledge
- Witness' testimony not limited to the “facts”
- Characteristics of a good 30(b)(6) witness
 - Consider the personality the company wishes to convey and which individuals would have adequate time to devote to preparation
- Privilege concerns re: attorneys as witnesses

Selecting the 30(b)(6) Witness

Strategic considerations in identifying a 30(b)(6) witness who has personal knowledge:

- More efficient for witnesses to be deposed only once
- Clarify which questions are under the 30(b)(6) hat and which are under the fact witness hat
- Pros & Cons of a combined deposition

Selecting the 30(b)(6) Witness

Less Knowledge = More Time, More Work, More Expense, More Risk

- Lack of personal knowledge is no defense
- Keep records and prepare witnesses regarding all steps taken
- Avoid the “I don’t know” response to questions within scope of notice
- The company could be prohibited from offering contrary evidence at trial. See *Ierardi v. Lorillard, Inc.*, 1991 WL 158911 (E. D. Pa)
- 1 witness = 7 hours, 2 witnesses = 14 hours

Preparation for the Deposition

- Must you educate the witness?
 - The witness is to provide the company's knowledge
 - You must educate him to key facts he does not know
 - There may be limits to what a witness can learn
 - There may be limits to questions you can anticipate
 - However, you must try to educate him to relevant facts
 - There are risks to a witness not knowing information
 - A party may not be able to put on evidence at trial
 - A party may not be able to assert certain positions
 - Risks are much smaller if the company is not a party

Preparation for the Deposition

- What should you do to educate the witness?
 - Depending on the situation, you may:
 - Have the witness review key documents
 - Have the witness speak to knowledgeable employees
 - Have the witness speak to former employees
 - You must show that the witness was prepared

Preparation for the Deposition

- What the witness reviews may be discoverable
 - Do not have him review privileged material
 - Be careful in selection of documents
 - You may not want to highlight certain documents
 - Be careful in selection of whom he interviews
 - You may not want to highlight certain witnesses

Preparation for the Deposition

- When should you prepare “cheat sheets”?
 - Sometimes it is helpful to prepare “cheat sheets”
 - Facts on which the witness can rely in the deposition
 - Makes sense to do so when:
 - Important that the witness provide certain testimony
 - Information too much or complex for witness to remember

Problem Areas and What to Do About Them

- How to handle questions beyond the scope:
 - Establish the scope ahead of time
 - Make the objection
 - If necessary, instruct the witness not to respond (privilege, bad faith, court limits)
 - This can be risky
 - Seek protective order if necessary

Problem Areas and What to Do About Them

How to handle lack of witness knowledge:

- Prepare, Prepare, Prepare
- Seek sources during the break
- Reconvene deposition if necessary
- Produce additional witnesses

How to handle inaccurate / incomplete testimony:

- Be prepared to cross/ rehabilitate your witness
- Review/edit the transcript

Thank You

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