

FDCC PROPERTY INSURANCE BOOT CAMP AND I-3

November 8-10, 2023

The Art of Preparing and Defending Corporate Witnesses

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SESSION OBJECTIVES

- Understanding the Rule: 30(b)(6)
- Explore the challenges & effective strategy for the 30(b)(6) deposition
- Discussion

Origin of the Rule

- Enacted in 1970
Advisory Note:
- To reduce difficulty in determining who is the “managing agent”
- Curb practice of bandying by which officers or managing agents are deposed, but disclaim knowledge
- Assist the organization being deposed so as to reduce number of employees being deposed

The Rule: F.R.C.P. 30(b)(6) Notice or Subpoena Directed to an Organization

A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested.

The 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 he will testify.

The Rule: F.R.C.P. 30(b)(6) Notice or Subpoena Directed to an Organization (cont'd)

The persons so designated shall testify as to matters known or reasonably available to the organization.

This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

How is a 30(b)(6) Used?

- Answer . . . Rule 32: “Using Depositions in Court Proceedings”
- Can be used against a party at a hearing or trial for any purpose to the extent admissible under Rules of Evidence
 - Deponent need not be unavailable

Impact of 30(b)(6) Testimony

- Testimony within the scope of the notice topics binds the corporation
- Corporation cannot defeat summary judgment by submitting an affidavit that conflicts with its 30(b)(6) testimony

Impact of 30(b)(6) Testimony (cont'd)

- How binding is the testimony?? -- Split in authority
 - Is a judicial admission under F.R.E. 801(d)(2), but can be contradicted by testimony of other witnesses at trial; opposing counsel can use corporate deposition testimony to impeach that witness; then for jury to weigh credibility
 - *A.I. Credit Corp. v. Legion Ins. Co.*, 256 F.3d 630, 637 (7th Cir. 2001)

versus

- Precludes more knowledgeable witnesses from testifying at trial
 - *Reilly v. NatWest Markets Group, Inc.* (2d Cir. 1999)

Obligation Upon Receipt of a 30(b)(6)

- Designate the witness(es) in writing
- Produce a witness(es) with knowledge of the topics

Scrutiny of 30(b)(6) Deposition Notice Topics

Topics must be stated with “reasonable particularity”

- What is “reasonable particularity”?
 - Depends on particular circumstances and issues of each case
 - Courts need persuasive guidance from defense counsel re why particular topic is not identified with reasonable particularity
 - Examples – “the computer systems known as Big Brother and or WHODB”
- versus
- “Manufacturer’s Vehicle Allocation System” or “Customer Satisfaction”

Scrutiny of 30(b)(6) Deposition Notice Topics (cont'd)

- Topics that “include, but are not limited to” a given subject
- Remedy for insufficient “reasonably particular” topics
 - Consistent with its powers under F.R.C.P. 26(c) to regulate discovery, Court may:
 - Quash the notice topic/protective order re topic
 - Modify the topic

Scrutiny of 30(b)(6) Deposition Notice Topics (cont'd)

Additional Considerations:

- Reasonably calculated . . .
- Overbroad?
- Privilege issues?
- Protective order necessary?

When to Seek a Protective Order

- Scope of individual topics or notice as a whole is unduly burdensome/ambiguous in its scope, after meet-and-confer attempts to narrow the scope
- Corporation truly is unable to designate a representative on a given topic, because it has no agents [current or former] who can testify without invoking privilege
- Onus is on corporation/entity to file for protective order before the deposition

Meet-and-Confer Opportunities To Narrow Notice Topics

- Typically, conferral with opposing counsel is required
- Practice Pointer – seek to eliminate, modify, and limit topics

How Many Depositions? Length of the Deposition?

- 30(b)(6) deposition counts as ONE deposition, no matter how many designees
 - Advisory Committee Notes, 1993, Rule 30(a)
- Some courts: each designee may be subjected to seven hours
 - Advisory Committee Notes, 2000, Rule 30(d) (“For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition”)

How Many Depositions? Length of the Deposition? (cont'd)

- Argument Point – To extent the questioner goes outside the scope of the noticed topics – should count as second, personal deposition of that witness

Duty to Prepare the Witness(es)

- The Rule recognizes an “affirmative obligation” for the deponent to be educated as to the matters identified
- The designee/deponent must be able to give answers that bind the organization
- Must be able to answer “fully, completely and unequivocally”

~~“I don't know”~~

...



Unacceptable

Sanctions for Improper Designation

- Expense reimbursement, including attorneys' fees, for failing to designate witness with knowledge, whether intentional or not
- Duty immediately to provide new witness, if during the deposition, designated witness is unable to answer questions on the noticed topics
- Preclusion of testimony at trial

Selecting the 30(b)(6) Witness(es)

- The person “with the most knowledge”?
 - Still requirement of some state rules, not in federal or Colorado rules
- However, entity owes duty to educate its designees, i.e. to prepare them to answer fully questions posed on the notice topics
- Can select more than one person

Selecting the 30(b)(6) Witness(es) (cont'd)

➤ Strategy –

- Select experienced, articulate, “quick study” testifier who has some knowledge of the relevant events and aware of potential pitfalls
- Opportunity to identify one or few company representatives to tell a coherent account of the facts/processes at issue as opposed to number of representatives with piecemeal relevant knowledge

Preparing for the Deposition

- Case background
- Document review
- Review of rules
- Opposition themes
- Mock exam

Attorney-Client Privilege?

- “Educating” designee who lacks personal knowledge with documents protected by attorney-client privilege or attorney work product may force production of those documents
- Similar risk of disclosure as prepping fact witnesses with documents that “refresh their recollection”
 - Rule of Evidence 612

Objections at the Deposition

Lead Cases:

- *Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727 (D. Mass. 1985)
 - Opposing counsel **cannot** go beyond the scope
- *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995)
 - Opposing counsel **can** go beyond the scope
- Trend says – “O.K.”

Objections at the Deposition (cont'd)

Going Beyond the Scope

- At the deposition, must object to questions beyond the noticed topics as beyond the scope
 - Rationale: Won't bind corporation if outside scope
- State on the record that any answers given by witness are not the answers of the entity, and therefore won't bind the entity
- Cannot instruct the witness not to answer the question
- Relationship with Rule 30(a)



THE REAL WORLD



Examples of Requests Received on Last Day of Discovery

- “The current financial condition of ABC Insurance Company”
- “Employee and executive compensation plans and programs in effect at any time”
- “Business plans, programs, projects, goals, agendas, directives, or the like to make ABC Insurance Company more profitable”
- “Business plans, programs, projects, goals, agendas, directives, or the like to make the claims division of ABC Insurance Company less costly”

Post-Deposition

- Can you change the transcript?
- “A deposition is not like a take-home exam”
 - *Burns v. Board of County Comm’rs of Jackson County*, 330 F.3d 1275 (10th Cir. 2003)
- Most courts: transcript can be changed per the procedure in Rule 30(e) - read and review
 - *Foutz v. Town of Vinton*, 211 F.R.D. 293, 295 (W.D. Va. 2002)

Post-Deposition (cont'd)

- Other courts – refuse to allow changes that would materially alter the representative's answers
 - Goes to obligation of corporate party to designate a witness capable of providing knowledgeable and binding answers
 - *Wyeth v. Lupin Ltd.*, 252 F.R.D. 295, 296 (D. Md. 2008)
- Practice Point – as with any deposition, deponent can be recalled for subsequent deposition to testify/explain material changes

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QUESTIONS?

