Deposing the Corporate Witness: Increasing Clarity and Efficiency by Employing a Thoughtful Approach to Rule 30(b)(6)

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Deposing the Corporate Witness: History

- Rule 30(b)(6) was added in 1970. According to the Notes of the Advisory Committee:
  - The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the depositions process.
  - It will curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it.
  - The provisions should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge.

Federal Rule of Civil Procedure 30(b)(6)

Notice or Subpoena Directed to an Organization. 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.

Rule 30(b)(6) Mandatory Requirements

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Rule 30(b)(6) Mandatory Requirements (cont'd)

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3. A subpoena must advise a nonparty organization of its duty to make this designation.
4. The persons designated must testify about information known or reasonably available to the organization.

Deposing the Corporate Witness: Why a ***Thoughtful*** Approach Is Important

Consider the following facts:

- A Rule 30(b)(6) deposition notice is issued and received by sophisticated and experienced counsel.
- Prior to the Rule 30(b)(6) deposition, counsel had discussions about the notice, which included objections to the topics and scope of the objections.
- No agreement among counsel was recorded in a writing.
- Despite notice of the parties' disagreement, the noticing party did not substantively amend the deposition notice and the party receiving the notice did not move for a protective order.
- Instead, the parties simply proceeded to a deposition on the notice, mutually ignoring the procedural implications of their pre-deposition discussions.
- Not surprisingly, the deponent appeared to have little information regarding some of the designated topics.
- Neither counsel made any meaningful objections on the record.
- The noticing party filed a motion to redo the deposition and for monetary sanctions. Alternatively, the noticing party sought an order from the court requiring the organization to "affirmatively state that it has no witnesses that would be more knowledgeable" than the designee.
- The corporation objected in large part on the basis that notice failed to describe with reasonable particularity the matters for examination.

Deposing the Corporate Witness: Why a ***Thoughtful*** Approach Is Important (cont'd)

The foregoing factual background played out in *International Brotherhood of Teamsters, Airline Division v. Frontier Airlines, Inc.* When the court was finally presented with the dispute, the court struggled with the remedy. As the court explained:

> In my view, the "good cause" issue requires examination of several factors, including whether the parties made sufficient efforts to confer in good faith about disputes prior to the deposition, whether the deposition notice was sufficiently specific, whether the unanswered questions sought relevant information, whether the deponent sufficiently answered the questions in dispute, and whether the deponent made sufficient efforts to obtain information from its agents, to name a few. **In light of the procedural posture of this case, where the parties hotly dispute the extent, content and results of their pre-deposition communications, where neither party sought pre-deposition relief from the Court, and where the entire deposition was conducted without a single objection on the record to which either party refers, the Court is at a loss to determine whether "good cause" exists**. If the Airlines are correct about the scope of pre-deposition communications and agreements between the parties, good cause for a second deposition may well exist. If IBT is right about reaching an agreement with the Airlines that the proposed topics were too indefinite, too broad, or simply irrelevant, it is more difficult to find "good cause" for a second bite at the apple. The bottom line is that the parties' versions of the facts are diametrically opposed, and the Court does not know who to believe.

Id., WL 627149, at *8 (D. Colo. Feb. 19, 2013), *order amended on reconsideration*, No. 11-CV-02007-MSK-KLM, 2013 WL 12246941 (D. Colo. Sept. 12, 2013) (emphasis added).

Deposing the Corporate Witness: Why a ***Thoughtful*** Approach Is Important (cont'd)

Ultimately, the court refused to get in the middle of a credibility dispute between counsel, ordered a do-over of the deposition and the noticing party to amend its deposition notice to meet the reasonable particularity requirement. As to the dispute between counsel, the court expressed its frustration, providing:

> "The Court's inability to determine 'who to believe' regarding the disputed discussions and agreements was a significant part of the reason why a do-over deposition was ordered. Counsel's suggestion that the Court had a 'duty' to resolve the issue is remarkable, particularly in light of counsel's utter failure to take reasonable steps to document the discussions in dispute. Judges do not resolve serious credibility issues between licensed attorneys and officers of the Court by flipping a coin. When lawyers' credibility is questioned and impossible to accurately assess, the best approach is to point out the errors made and to allow counsel a fair opportunity to correct them on behalf of their clients."

Int'l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc., No. 11-CV-02007-MSK-KLM, 2013 WL 12246941, at *5 (D. Colo. Sept. 12, 2013).

Deposing the Corporate Witness: Why a ***Thoughtful*** Approach Is Important (cont'd)

Takeaway: There existed multiple opportunities for the parties to avoid the dispute:

- First, the noticing party could have taken more care to draft the topics.
- Second, to the extent possible the parties could have documented any agreement as to the topics and scope in writing.
- Third, to the extent the parties could not reach an agreement, the receiving party could have filed a motion with the court seeking a protective order.

Requirement #1: Reasonable Particularity

- The rule requires that the noticing party describe topics with "reasonable particularity."
- Courts interpreting the requirement of the rule have held that in order to "allow the Rule to effectively function, the requesting party must take care to designate, **with painstaking specificity**, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute."

E.E.O.C. v. Thorman & Wright Corp., 243 F.R.D. 421, 426 (D. Kan. 2007).

Requirement #1: Reasonable Particularity, continued

- The Rule does not limit what opposing counsel can ask the witness, even if those questions are outside the scope of the Rule 30(b)(6) deposition notice. FCC v, Mizuho Medy Co., 257 F.R.D. 679, 682 (S.D. Cal. 2009).
- Instead, answers outside the "scope" will not bind the organization.

Requirement #1: Reasonable Particularity (cont'd)

The Rule has inherent limits:

- A Rule 30(b)(6) notice that required a corporate designee to testify about facts supporting numerous denials and affirmative defenses in its answer and counterclaims, was declared "overbroad, burdensome, and a highly inefficient method through which to obtain otherwise discoverable information."
- A Rule 30(b)(6) notice requesting designation of a witness to testify regarding plaintiff's responses to defendants' interrogatories and requests for production, was declared "overbroad, unduly burdensome, and an inefficient means through which to obtain otherwise discoverable information." *Krasney v. Nationwide Mut. Ins. Co.*, No. 3:06 CV 1164 JBA, 2007 WL 4365677, at *3 (D. Conn. Dec. 11, 2007).
- A Rule 30(b)(6) notice containing 229 topics is "facially excessive." *Apple, Inc. v. Samsung Elec. Co., Ltd.*, 2012 WL 1511901 (N.D. Cal. Jan. 27, 2012).

Requirement #1: Reasonable Particularity (cont'd)

E.g., Castillon v. Corr. Corp. of Am., No. 1:12-CV-00559-EJL, 2014 WL 4365317, at *2 (D. Idaho Sept. 2, 2014).

In *Castillon,* the plaintiff's Rule 30(b)(6) deposition notice sought to require the corporation to designate a witness to testify as to the facts or data the corporation contended mitigated the need for a substantial punitive damages verdict in the case. The corporation objected on the basis that the topic was not described with reasonable particularity. The court agreed. Citing to *In re Independent Service Organizations Antitrust Litigation,* 168 F.R.D. 651, 654 (D. Kan. 1996), the court held as follows:

> Requiring Defendant to prepare a deponent to testify as to all such matters is overbroad and unduly burdensome. "Even under the present-day liberal discovery rules, [a party] is not required to have counsel marshal all of its factual proof and prepare a witness to be able to testify on a given defense or counterclaim."

Id.

Requirement #2: Designation of One or More Corporate Representatives

Text of the Rule:

> 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.

- The rule does not require the organization to produce the person "most knowledgeable" about a given subject.
- The rule does not require the organization to produce a person with "first hand knowledge" about a topic. *See QBE Ins. Corp. v. Jorda Enters.*, 227 F.R.D. 676, 688 (S.D. Fla. 2012).
- The rule does not require the organization to produce a current employee, and the organization may appoint (or be required in some case to appoint) a former employee.

Requirement #4: What Is Known or Reasonably Available

Text of the Rule:

The persons designated must testify about information known or reasonably available to the organization.

By far, the majority of disputes concern this requirement.

Requirement #4: What Is Known or Reasonably Available (cont'd)

Ellis v. Corizon, Inc., No. 1:15-CV-00304-BLW, 2018 WL 1865158, at *3 (D. Idaho Apr. 18, 2018), Winmill.

- "The testimony of a Rule 30(b)(6) designee 'represents the knowledge of the corporation, not of the individual deponents.'" *Id.*, citing *Great Am. Ins. Co. of New York v. Vegas Const. Co., Inc.*, 251 F.R.D. 534, 538 (D. Nev. 2008) (quoting *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996).
- "[A] corporation has 'a duty to make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them to fully and unevasively answer questions about the designated subject matter.'" *Ellis,* citing *Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kan. 1999).
- "The memory of a corporation extends beyond that of its present employees." *Ellis*, citing *Taylor*, 166 F.R.D. at 361. Therefore, "[a]lthough a corporation, through its designee, may plead lack of institutional memory or knowledge as to a specific topic or topics, it may do so only after it reviews 'all matters known or reasonably available to it' prior to the deposition."
- "Preparing for a Rule 30(b)(6) deposition may be burdensome but 'this is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business.'" *Id*.

Requirement #4: What Is Known or Reasonably Available (cont'd)

Three takeaways from *Taylor*:

- It is not uncommon to have a situation where a corporation indicates that it no longer employs individuals who have memory of a distant event or that such individuals are deceased.
- These problems do not relieve a corporation from preparing its Rule 30(b)(6) designee to the extent matters are reasonably available, whether from documents, past employees, or other sources.
- The corporation must prepare a witness by having them review prior fact witnesses, deposition testimony as well as documents and deposition exhibits.

Requirement #4: What Is Known or Reasonably Available (cont'd)

In *Teamsters,* the court addressed the issue of whether information known to an affiliate or related party is "reasonably available" to the organization.

In considering the issue, the court employed the "control" standard of Rule 34(a) as a guideline to determine whether the information of a corporate affiliate is "reasonably available" to the deponent. *Int'l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc.,* 2013 WL 627149, at *5, citing *Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.,* No. 01 Civ. 3016, 2002 WL 1835439, at *4 (S.D.N.Y. Aug. 8, 2002).

The court, citing with the majority, provides that "information is within a deponent's 'control' and thus 'reasonably available' for purposes of Rule 30(b)(6) when the deponent 'either can secure [information] from the related entity to meet its business needs or acted with it in the transaction that gave rise to the suit.'"

Id. (citations omitted).

A Thoughtful Approach

- Counsel should discuss Rule 30(b)(6) when preparing the discovery plan and at the discovery conference.
- The Rule 30(b)(6) notice should be provided well in advance of the discovery and the parties should work together to define the topics, scope and designation of witnesses (although that last point is not required by rule).
- If the parties cannot reach an agreement, they should seek early court intervention and instruction.

Additional Points

- Admission gained in the Rule 30(b)(6) are "evidentiary admissions" as opposed to "judicial admissions."
- A judicial admission is an act done in the course of a judicial proceeding, which waives or dispenses with the production of evidence, by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true.
- An evidentiary admission (quasi judicial) is a statement made by a party or its agent regardless of whether it is made out of court or in court, typically used to contradict or otherwise impeach the party's current assertion.

Finally, Things to Note

- Pursuant to Local Rule 30.1, there is a presumptive limit of 10 depositions per side.
- For purposes of durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition.
- For purposes of the numerical limit, the Rule 30(b)(6) deposition should be considered a single deposition no matter how many people are designated.