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DISCOVERY

Civil and criminal litigator Robert D. Rose encourages attorneys seeking discovery from a company by deposing the ''persons most knowledgeable'' (PMK) about a particular matter to issue a notice under Federal Rule of Civil Procedure 30(b)(6). Issuance of the notice places the burden on the company to designate one or more representatives as ''PMK witnesses,'' and saves the attorney from having to conduct additional depositions after a witness called for a deposition claims limited knowledge of the matter.

'Are You the Person Most Knowledgeable About PMK Discovery?'

BY ROBERT D. ROSE

A corporate party has more than one employee with relevant evidence for the lawsuit. You think you know who they are, but each deposition results in a claim of limited personal knowledge and a ''best guess'' as to another employee who may know more. After a few rounds, it turns out the most knowledgeable witness no longer works for the corporation—and has moved away. Even if you find the former employee, the value of that person's testimony may be minimal: not binding on the corporation and not a party admission.

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Why go through this, when you can use Federal Rule of Civil Procedure 30(b)(6)?

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

Issuing a 30(b)(6) notice places the burden on the corporation to designate one or more representatives to cover the topics. It places the burden on the corporation's counsel to properly prepare those representatives to give testimony that will bind their employer. If the best representative is a former employee, that former employee may consent to become the corporation's designee. The corporation may benefit from having an informed yet former employee speak, rather than an active but ignorant one. Of course, the choice may hinge on the circumstances of the departure.

Rule 30(b)(6) discovery raises three key concerns: carefully identifying the topics; selecting the designee(s); and preparing the designee(s). Regardless of whether you are on the sending or receiving end of a

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30(b)(6) notice, here are a few questions that you, the lawyer, need to consider before the witness is sworn:

1. **Is 30(b)(6) applicable only to corporations?** No. The term ''other entities'' was added in 2007 ''to ensure that the deposition process can be used to reach information known or reasonably available to an organization no matter what fictive concept is used to describe the organization.'' 2007 Notes of Advisory Committee.

2. **Must the representative witness be the ''most'' knowledgeable person?** Actually, that is not required. The corporation has ''a duty to make a conscientious, good-faith effort to designate knowledgeable persons.'' *Great American Insurance Co. of New York v. Vegas Construction Co.*, 251 F.R.D. 534, 539 (D. Nev. 2008). Personal knowledge is not required. *See generally Federal Civil Rules Handbook,* 2012 Ed., at p. 838 (''the individual will often testify to matters outside the individual's personal knowledge''). The person with the greatest knowledge, or the highest-ranking officer, might not be the best 30(b)(6) witness. ''A corporation may have good grounds not to produce the ''most knowledgeable'' witness. For example, that witness might be comparatively inarticulate, have a criminal conviction, be out of town for an extended trip, not be photogenic (for a videotaped deposition), or prefer to avoid the entire process, or the corporation might want to save the witness for trial. From a practical perspective, it might be difficult to determine which witness is the ''most'' knowledgeable on any given topic. And permitting a requesting party to insist on the production of the most knowledgeable witness could lead to time-wasting disputes over the comparative level of the witness' knowledge. For example, if the rule authorized a demand for the most knowledgeable witness, then the requesting party could presumably obtain sanctions if the witness produced had the *second* most amount of knowledge. This result is impractical, inefficient, and problematic, but it would be required by a procedure authorizing a demand for the ''most'' knowledgeable witness. But the rule says no such thing.'' *QBE Insurance Corp. v. Jorda Enterprises Inc.*, 2012 WL 266431, at *10 (S.D. Fla. 2012).

3. **Can more than one 30(b)(6) representative be required to testify?** Yes, if that is what it takes to provide complete testimony on all of the topics properly identified in the notice. There is no absolute right to produce a single witness for all issues. *Id*. at 543.

4. **Can the examining party designate someone to speak for the corporation?** Yes, if it is a director, officer, and/or managing agent. *In re Honda American Motor Co. Dealership Relations Litigation*, 168 F.R.D. 535, 540 (D. Md. 1996). The law concerning who may properly be designated as a managing agent is sketchy, to be determined largely on a case-by-case basis. *See Petition of Manor Investment Co.*, 43 F.R.D. 299, 300 (S.D.N.Y. 1967); *Kolb v. A.H. Bull Steamship Co.*, 31 F.R.D. 252, 254 (S.D.N.Y. 1962). The deponent need not have a formal association with the corporation to be deemed to be its managing agent. *Founding Church of Scientology of Washington, D.C. v. Webster*, 802 F. 2d 1448, 1451, n. 4 (D.C. Cir. 1986) (district court properly required Church of Scientology to produce its founder, L. Ron Hubbard, as a managing agent because Hubbard still exercised ''ultimate control'' over church despite his ostensible resignation from official position).

5. **Must the corporation's designee be a current employee?** No. The rule permits the corporation to designate ''other persons who consent to testify on its behalf.'' That could be someone who was never an employee, such as an adviser. Unlike a Rule 30(b)(6) deposition, the testimony of a former employee in an ordinary deposition would not legally bind the corporation and may not qualify as a party admission under Fed. R. Evid. 801(d)(2). However, the general rule is that former employees cannot be managing agents of a corporation and a corporation cannot be compelled to produce a former employee. *In re Honda*, 168 F.R.D. at 541.

6. **Must a 30(b)(6) designee (or designees) respond to every topic on the notice?** Not if the notice lacks ''reasonable particularity.'' Absent an agreement by the examining party to be more specific, the corporation will need to seek a protective order. *Reed v. Bennett*, 193 F.R.D. 689 (D. Kan. 2000). Simply objecting at the deposition is insufficient. *Mitsui & Co. (USA) Inc. v. Puerto Rico Water Resource Authority*, 93 F.R.D. 62, 67 (D.P.R. 1981). Topics that require a witness to state a legal position are generally more appropriately addressed by contention interrogatories. But, if the designee is unable to respond to relevant inquiries, the corporation has a duty to substitute someone who can. Failure to do so can lead to sanctions, including the preclusion of evidence. Fed. R. Civ. P. 37(b)(2)(B); *Reilly v. Natwest Markets Group Inc.*, 181 F. 3d 253, 269 (2d Cir. 1999).

7. **What happens if there is no one who can be designated because, for example, a privilege waiver would result?** Seek a protective order. *United States v. Kordel*, 397 U.S. 1, 9 (1970). However, there is authority that the absence of a knowledgeable witness (e.g., death, memory loss, Fifth Amendment assertion) does not excuse the corporation from designating someone. *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996).

8. **May the same witness be deposed twice—in an individual capacity and as a 30(b)(6) designee?** Yes. Unless there is an agreement or court order to the contrary, each is a separate deposition and is subject to separate time limits. For purposes of the 10-deposition limit of Fed. R. Civ. P. 30(a)(2)(A), a Rule 30(b)(6) deposition should be treated as a single deposition regardless of how many witnesses are produced to cover the topics. 2000 Notes of Advisory Committee.

9. **Can a designee be asked about more that just facts?** Yes: a 30(b)(6) designee may be required to speak for the corporation about facts and also the corporation's subjective beliefs and opinions. The designee must testify about ''information known or reasonable available'' to the corporation. But it is not a memory test. *Equal Employment Opportunity Commission v. American International Group Inc.*, 1994 WL 376052, at *3 (S.D.N.Y. 1994).

10. **Should the corporation educate a designee on topics about which he lacks personal knowledge?** Yes, because the corporation has the duty ''to educate a witness to provide complete, knowledgeable and unevasive answers to questions on the noticed topics, to state the corporation's position, and to provide binding answers on behalf of the corporation.'' *Great American*, 251 F.R.D. at 543. It is a ''sworn corporate admission that is binding on the corporation.'' *Murphy v. Kmart Corp.*, 255 F.R.D. 497, 504 (D.S.D. 2009). ''Producing an unprepared witness is tantamount to a failure to appear.'' *Taylor*, 166 F.R.D. at 363. Thus, the designee should review fact witness testimony and exhibits and all corpo-

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rate documents relevant to his designated topics, even if voluminous. *Id.* at 361 Producing documents and responding to written interrogatories ''is not a substitute for providing a thoroughly educated Rule 30(b)(6) deponent.'' *Great American*, 251 F.R.D. at 541.

11. **Must a designee also become familiar with information about corporate affiliates?** The answer depends on whether such information is ''reasonably available'' to the corporation receiving the 30(b)(6) notice. In *Twentieth Century Fox Film Corp. v. Marvel Entertainment Inc.*, 2002 WL 1835439, at *4 (S.D.N.Y. 2002), the court used the ''control'' guideline of Fed. R. Civ. P. 34(a) in requiring the designee to testify with knowledge of a subsidiary. In *Gerling International Insurance Co. v. Commissioner of Internal Revenue*, 839 F. 2d 131, 140-141 (1988), the U.S. Court of Appeals for the Third Circuit found that Rule 34(a) ''control'' exists when the corporation either can obtain documents from the related entity to meet its business needs or acted with the related entity in the transaction that gave rise to the suit. Location of the documents is irrelevant. The common element in decisions requiring a designee's knowledge of a related entity has been the legal or practical ability to obtain affiliate information.

12. **Is the examining party restricted to only the topics designated in the notice?** No. Most courts have held that questions in a 30(b)(6) deposition are not limited to the designated areas. ''If the examining party asks questions outside the scope of the matters described in the notice, the general deposition rules govern, so that relevant questions may be asked and no special protection is conferred on the deponent by virtue of the fact that the deposition was noticed under 30(b)(6).'' Further, it is improper to instruct a designee not to answer a question on the ground that it is outside the scope of the notice. Fed. R. Civ. P. 30(c)(2); *Detoy v. City & County of San Francisco*, 196 F.R.D. 362, 366 (N.D. Cal. 2000). As happens frequently, a designee has relevant knowledge of facts that are not specified in the notice. Such a witness should be prepared to address those—in the witness's individual capacity. Of course, defending counsel can and should object when a question is beyond the designated topics, so that the record is clear that the answer is not binding on the corporation. Failure to object may result in a waiver. Once the deposition is underway, the only mechanism to limit questioning is to terminate the deposition and seek a protective order. Fed. R. Civ. P. 30(d)(3)(A).

13. **Should a designee be prepared to state whether an answer is in a corporate capacity versus within the designee's own personal knowledge?** Yes, as well as be prepared to state when the designee does not know the answers to questions that are outside the scope of the designated topics.

14. **Can a designee be required to disclose whom she spoke with and the substance of those discussions?** Yes, even if counsel was present. Any notes taken may help a designee remember—and, thus, become discoverable. If a designee is shown privileged materials or attorney work product in the course of preparing to testify, that, too, becomes discoverable. *Mohawk Industries v. Interface Inc.*, 2008 WL 5210386, at *12 (N.D. Ga. 2008) (Rule 30(b)(6) witness waived attorney-client privilege by testifying about a conversation he had with counsel, which was the sole source of his information on a topic).

15. **Can the corporation rely on advice of counsel to avoid providing 30(b)(6) testimony about its position(s) in the suit?** No. While a designee may not be required to reveal mental impressions of counsel and a lawyer's advice, the designee must reveal the facts upon which the corporation relied to support its positions in the suit, even though such information was transmitted through or from the corporation's lawyer. *Protective National Insurance Co. v. Commonwealth Insurance Co.*, 137 F.R.D. 267, 283 (D. Neb. 1989)

16. **Is not it hearsay when a designee testifies solely on the basis of statements made to the designee in preparing to testify?** The law is not clear as to admissibility. On one hand, the designee does not give a personal opinion, but is designated to present the corporation's position on the topics. *Sabre v. First Dominion Capital LLC*, 2001 WL 1590544, at *1 (S.D.N.Y. 2001). On the other hand, 30(b)(6) testimony is simply evidence, which may be explained or contradicted—unlike judicial admissions. *W.R. Grace & Co. v. Vikase Corp.*, 1991 WL 211647, at *2 (N.D. Ill. 1991). Some courts have excluded 30(b)(6) testimony as hearsay. *Cooley v. Lincoln Electric Co.*, 693 F. Supp. 2d 767, 791 (N.D. Ohio 2010) (''the fact that a witness is a 30(b)(6) designee does not create a hearsay exception allowing him to simply repeat statements made by corporate officers and employees, if those statements are offered for their truth.''). Other courts have admitted 30(b)(6) testimony if it falls within an exception to the hearsay rule, such as the business records exception, *In re Enron Creditors Recovery Corp.*, 376 B.R. 442, 453-56 (Bankr. S.D.N.Y. 2007); or have admitted it as an admission against interest, rather than as a judicial admission, *Taylor*, 166 F.R.D. at 362.

Ready to begin? Now raise your right hand. . . .