Avoiding Catastrophe and Scoring Points --

Preparing Witnesses for a Rule 30(b)(6) Corporate Designee Deposition

Perhaps nowhere in the discovery process are the stakes for the ultimate outcome of a lawsuit as high as when a party is served with a notice for a corporate representative deposition. State and federal court rules require the receiving party to designate a witness who is capable of answering questions on the topics listed in the deposition notice, and the witness's answers on those topics are deemed binding on the organization – it cannot later produce another company witness to "undo" or alter damaging answers given by the designee. Likewise, if the designated witness professes a lack of knowledge on a topic – *e.g.,* -- did the defendant have plaintiff's consent to place a call to the latter's cell phone – that lack of knowledge may be attributed to and binding upon the defendant. These high stakes make proper identification and preparation of a company's designated witness one of the most important phases of any civil lawsuit. How well those tasks are completed may very well prove to be outcome determinative.

This article will discuss the background of the federal and Missouri corporate representative deposition rules and common pitfalls that arise under them. It will also outline several steps an organization can take to ensure the best possible outcome for the deposition(s).

Rule Background

Federal Rule of Civil Procedure 30(b)(6) permits the deposition of a corporation via a corporate designee. Nothing can be as dismaying for an organization defendant as receiving a notice for such a deposition. At the very least, identifying and preparing witnesses will likely be time-consuming and expensive. At worst, those efforts – if not successfully completed – can lead to an unfavorable factual record. The party moving for the deposition must prepare and serve deposition topics "with reasonable particularity," and the responding corporate party must "designate one or more officers, directors, or managing agents" to testify on its behalf.[1] The corporate designee "must testify about information known or reasonably available to the" corporation.[2]

Federal Rule 30(b)(6) and Missouri's corporate designee rule (Rule 57.03(b)(4)) are similar, except Missouri does not require the parties to "confer in good faith about the matters for examination" like its federal counterpart.[3] Still, counsel tasked with preparing the corporate designee for the deposition should confer with opposing counsel to limit the deposition topics to fall within the permissible scope of discovery and be prepared to seek a protective order with the court limiting the topics if necessary. This strategy speaks for itself—the narrower the topics, the less burdensome it is to satisfy the "proper preparedness" obligation imposed by the courts.[4]

Rule 30(b)(6) Deposition Standard and Preparation Burden

The testimony elicited at a Rule 30(b)(6) deposition represents the knowledge of the corporation, and not that of the individual opponent.[5] Accordingly, the deponent is not permitted to cite lack of personal knowledge to avoid testimony.[6] Rather, the deponent must testify as to the corporation's "position" on the topic, including not only facts within the corporation's knowledge, but also the corporation's beliefs and opinions such as its interpretation of documents and events.[7] "I don't recall" is not going to cut it. A court may well hold that a witness's profession of a lack of knowledge will be attributed to the corporation.

The requesting party is entitled to seek testimony on information known or "reasonably available" to the corporation, meaning the responding party must conduct a thorough factual investigation. The reasonably available standard includes information held by third-party sources, such as corporate affiliates, and a number of courts stress that a corporation must take steps to educate a 30(b)(6) designee, whether from "documents, past employees, or other sources," in order to obtain responsive information.[8]

Identification and preparation of the corporate designee are critical and burdensome tasks because: (1) the designee must be prepared "to fully and unevasively answer questions about the designated subject matter,"[9] otherwise the Court may levy appropriate sanctions or order a second deposition of the corporation;[10] and (2) the deponent's testimony is a binding answer for the corporation and is properly admissible as a party opponent admission.[11]

One Possible Preparation Strategy – the Written Summary:

The first task facing an organization receiving a Rule 30(b)(6) notice is to identify who it shall designate as its witness (or witnesses). Anyone can be designated by the company, so long as they appear at the deposition well prepared and able to knowledgeably answer questions on the listed topics. Former employees, contractors, consultants and others who are not currently working for the company should be considered. The best designee is someone who is bright and knowledgeable about the subject matter, who understands the dispute, can handle the rigors of a deposition and can learn and articulate the company's knowledge and positions on the listed deposition topics. In short, pick the best available witness (even if others may have superior personal knowledge) and then fully prepare them.

One effective preparation strategy is to instruct the designee to prepare a written summary or table, outlining the designee's efforts to collect the information sought in the deposition (through reviewing documents and interviewing individuals) and setting out the actual substantive information that will help the designee answer deposition questions. This summary (and the underlying factual investigation) should, of course, be prepared and undertaken with the extensive assistance of counsel. In a case where there is a large and complicated set of facts that will be examined at the deposition, it is even permissible and advisable for the witness to have this summary before them during the deposition and to refer to it when answering questions. (In this event, the document would need to be provided to opposing counsel under Fed. R. Evid. 612). Utilizing the summary ensures that the corporate designee will testify consistently and correctly, and allows the designee to refer to the written summary rather than answering "I don't recall."

To help the corporate designee prepare the written summary, counsel should prepare an outline to identify and gather the potential sources of relevant and responsive information. For example, in an antitrust case involving product pricing and several defendants that operate in the relevant industry, a corporate defendant would likely be expected to testify in a Rule 30(b)(6) deposition as to all the meetings and communications it had with the other co-defendants.

To prepare the corporate designee(s), counsel will have to interview the corporation's management team regarding their communications. It should be made clear to all relevant company employees that this fact gathering process is broad, and in this example the interview should begin with something similar to:

> "Here is a list of the people who held the positions at issue at the co-defendants for the times indicated. We need to go through each contact that you had with these people. Contacts include meetings in person, telephone calls, video conferences, e-mail, letters, faxes, telegrams – in other words, communications of any sort. Contacts include both formal and informal gatherings and both business and social events. I need to learn about your contacts with these people no matter what you talked about, even if you only talked about the weather."

After counsel emphasizes the scope of the factual investigation, counsel should gather details:

- Please identify the individuals you have had a contact with from ____ [ask this question for each defendant; make a list of persons the executive has had a contact with].

- Tell me everything you recall about specific contacts with [specific named person].

- When have you had contact with [specific named person]? Do you recall the date(s)? Please give me as much information as possible about when you have had contact with [specific named person].

Going further, for each such contact each executive had:

- What was the format of the contact? [in person, on phone, etc.]
- Where was the contact?
- Who was present?
- What was said during the contact? What topics were discussed?
- Did you discuss the price of any individual product generally? (follow up as appropriate)
- Did you discuss pricing policies for products? (follow up as appropriate)
- Was pricing of products discussed in any way? (follow up as appropriate)
- Any documents that reflect or refer to the contact? Where?

Of course, this list of questions is not exhaustive, but rather shows the wide net counsel must cast to ensure a thorough factual investigation. With counsel's assistance, the corporate designee can take all the information gathered and prepare a written summary or table to use during the deposition.

As discussed above, contrary to the usual practice at deposition where it is often impressed upon a witness that they should bring nothing into the conference room but themselves, on deposition day it may well be advisable to have the designated deponent attend the deposition with their summary and any documents that may be especially relevant to the topics to be discussed. Having this summary available should ensure accuracy of testimony and assist the witness in recalling specific facts or data. Bear in mind, however, that to the extent the witness brings the summary into the deposition and relies upon it, it will need to be produced to the other side. The better practice would be to let opposing counsel know that the witness will be relying upon the summary and provide a copy at the outset of the deposition. The witness should be prepared to testify truthfully that the summary was prepared by them, with the assistance of counsel, and represents the facts known to and discovered by the organization in preparation for the deposition.

Through thorough investigation, informed selection of the witness to testify and proper preparation of that witness, the corporate representative deposition need not be the dreaded event that is first envisioned when the 30(b)(6) notice arrives. Instead, it can be the opportunity to hand-select the organization's best witness (whether or not an employee) and prepare them to testify in a way that puts the company in the best possible position for trial.

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[1] FED. R. CIV. P. 30(b)(6).
[2] *Id*.
[3] FED. R. CIV. P. 30(b)(6); MO. R. CIV. P. 57.03(b)(4).
[4] *Fed. Trade Comm'n v. Am. Screening, LLC*, No. 4:20-CV-1021 RLW, 2021 WL 3021419, at *2 (E.D. Mo. July 16, 2021).
[5] *Id*.
[6] *State ex rel. Reif v. Jamison*, 271 S.W.3d 549, 551 (Mo. 2008).
[7] *Lapenna v. Upjohn Co*., 110 F.R.D. 15, 20-21 (E.D. Pa. 1986).
[8] *Fed. Trade Comm'n*, 2021 WL 3021419, at *2; *Sanofi-Aventis v. Sandoz, Inc.*, 272 F.R.D. 391, 394 (D.N.J. 2011).
[9] *Fed. Trade Comm'n*, 2021 WL 3021419, at *2.
[10] *RONNOCO COFFEE, LLC, d/b/a RONNOCO BEVERAGE SOLUTIONS, Plaintiff, v. KEVIN CASTAGNA & JEREMY TORRES, Defendants*., No. 4:21-CV-00071 JAR, 2021 WL 2105000, at *2 (E.D. Mo. May 25, 2021).
[11] *Payne v. Cornhusker Motor Lines, Inc*., 177 S.W.3d 820, 838 (Mo. Ct. App. E.D. 2005).