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FEAR AND LOATHING ON THE WITNESS CHAIR

Preparing Your Soul for Rule 30(b)(6) Depositions

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PREPARING YOUR SOUL FOR RULE 30(B)(6) DEPOSITIONS

It has kept all of us awake at night. The biggest case on our desk may sink or swim based on the testimony of a particular company witness. It may be an officer or manager whose testimony will bind the company. It could be a current or former rank and file employee, which presents an even different set of concerns. It goes without saying that the better the witness is prepared, the less likely he or she is to compromise the company's position in the case. This paper will discuss some suggested approaches to avoiding the catastrophe that is a poorly prepared company witness.

A. Choosing the Right Witness

Typically, the starting point for preparing a company witness to testify is receipt of a Rule 30(b)(6) deposition notice. For convenience, this paper references the federal rule, but most state rules track the federal rule in significant respects. Rule 30(b)(6) of the Federal Rules of Civil Procedure provides:

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 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. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a non-party organization of its duty to confer with the serving party and to designate each person who will testify. 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.

At the outset, it should be noted that there is nothing in the text of Rule 30(b)(6) that requires the witness presented by the company to be the “most knowledgeable” witness on the topic(s) contained in the notice. This is a frequent presumption that both counsel and clients make that should be avoided. Pursuant to the plain language of the rule, the witness is testifying about “information known or reasonably available to the *organization*” – not information known or reasonably available to the witness. Fed. R. Civ. P. 30(b)(6) (emphasis added). Frequently, questioning counsel bristle when given a negative answer to the question “Well, are you the most knowledgeable person in the company on this topic?” In those situations, be prepared to argue that nothing in Rule 30(b)(6) requires that the witness presented must meet that standard. As long as the witness has a firm grasp of information known or reasonably available to the organization, the standard set by Rule 30(b)(6) is met.

Against that backdrop, counsel should give significant consideration to which witness is chosen to speak on behalf of the company. It could be that the most knowledgeable witness also communicates effectively and makes the best presentation. It's quite possible, however, that the witness whom everyone in the company identifies as the “most knowledgeable” is not the most polished, but that a witness who puts a

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better face on the company is adequately armed to testify in compliance with the obligations of Rule 30(b)(6). Consequently, avoid the temptation to default to the “most knowledgeable” witness in the company on a particular topic as the representative company witness. Evaluate all available options before making this critical selection.

While evaluating options, remember that a witness with high aptitude can be “trained up” to testify on behalf of the company. Again, in the Rule 30(b)(6) context, the witness is testifying about information known or reasonably available to the organization. There is nothing in the rule that prohibits educating a charismatic critical thinker to meet this obligation and thereby enjoy the residual benefits of employing that strategy.

B. The Propriety of Presenting Multiple Witnesses

When preparing to present testimony on behalf of the corporate client, the inclination is often to settle on a single witness who has sufficient knowledge of the stated topics of inquiry to satisfy the standards of Rule 30(b)(6). Sometimes, it may be prudent to consider presenting different witnesses on different topics. Again, Rule 30(b)(6) demands that the witness presented have information known or reasonably available to the organization. Often, that is the same information possessed by the company’s employees. Where particularly specialized knowledge may be critical to a case, one strategy is to present multiple witnesses – each with specific expertise on the varying topics. That way, the company gets the benefit of the broader range of knowledge possessed by multiple witnesses. There are risks to this approach as well. For example, in many jurisdictions there are time limits on the length of depositions. One could argue that presenting multiple witnesses in response to a single deposition notice (even a Rule 30(b)(6) notice containing multiple topics) effectively lengthens the time limit of the deposition. If you plan to present multiple witnesses, it may be worthwhile to address that argument through motion practice and avoid potential marathon questioning. Similarly, it can frequently prove difficult to limit a witness’s testimony strictly to the topic(s) for which he or she is presented to the exclusion of the other topics contained in the notice. In those circumstances, skillful questioning counsel will find ways to elicit testimony from the witness that bears on topics for which he or she has not been designated by the company. Once the answer is recorded, the chances of distancing the company from that testimony are slim and none since the company designated the witness to offer testimony on its behalf. In sum, utilizing the multiple witness approach can prove beneficial but it carries risks as well.

C. “Did She Really Say That?”

Irrespective of whether the witness is a Rule 30(b)(6) designee or a current or former employee fact witness, there are some admonitions that unequivocally serve a company witness well when testifying. Many of them are intuitive like “tell the truth” and “don’t guess.” Instructions like those cannot be overemphasized. However, there are other tactical tools that the author has found useful in preparing company witnesses to testify. Here are five of them for your consideration:

- **Meet in advance.** There is no substitute for meeting the witness in advance on his or her turf. It can be intimidating enough for a witness to walk into a fancy law office all the while knowing that he or she is about to face questioning from a skilled attorney – in many instances for the

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first time. Couple that apprehension with having the witness show up at 10:00 a.m. with plans to prep and start the deposition at 11:00 a.m., and you have a recipe for disaster. It is unrealistic to think that such a witness will digest the key issues in the case on top of your instructions in such short order. Take the time to meet the witness days (or weeks if necessary) in advance to begin preparations. Meet the witness at a location familiar to him or her – on the company premises, in the witness’s office or at a mutually chosen location to help lessen anxiety. Preparing the witness in familiar environs will aid the preparation process.

- **Dress the part of an ally.** There is something to be said for looking authoritative in your power suit and red tie. In the author’s experience, however, witnesses prepare better when they can relate to the attorney as more of a friend or confidant, than as hired legal counsel. Ditch the power suit and don the company swag¹. Of course, every witness responds to stressful situations differently, but wearing the company logo is a nice touch and sends the signal that you are on their team. If you would rather keep the professional look, try a sport coat with the company polo or lapel pin. If the witness feels that you are in this with them, they will embrace your advice more readily.
- **Prepare talking points.** More likely than not, the case is in litigation because there is a genuine dispute and reasonable minds can differ over the issues. Counsel should frankly warn corporate witnesses that they will likely face difficult questions. The preparation exercises will have anticipated them as best we can, but smart lawyers can craft questions in the moment that take even the best lawyers by surprise. In challenging cases, always prepare a set of talking points to help equip the witness to testify. When the witness faces a difficult question (hopefully an anticipated one, but even if not), the witness can pull an arrow from the quiver of talking points to fashion an answer that incorporates the company’s best arguments or defenses.
- **Short answers are better.** How many times have you suffered through the painful experience of having opposing counsel ask your witness how long he or she has been with the company, and thirty minutes later (after abandoning nearly every caution you provided during preparation) the soliloquy finally ends and counsel poses the next question? Caution your company witnesses that opposing counsel is here to get information from us about the case, but they want to use that information against us. Accordingly, it is better for our case that we do not volunteer information unnecessarily. Advise the witness to listen to the question and answer what is asked. If counsel wants more information, he or she can ask another question. Also condition the witness that shorter answers will likely shorten the deposition - that is an attractive notion for most witnesses.
- **Don’t swing for the fences.** Some witnesses self-impose a burden that they must perform perfectly, or the case will be lost. Try to alert witnesses that we have done our due diligence in our preparation, but no matter how this deposition turns out the case will continue. Perhaps some corporate deposition somewhere has ended with an apology by opposing counsel followed

¹ Be sensitive to the client’s preferences in this regard. If the company sells or distributes its promotional materials freely, have at it. If not, look before you leap.

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by a prompt dismissal but acclimate the witness that this is not likely to be one. The witness should not be made to feel like he or she has to hit a home run. Challenge the witness to stick to the preparation pointers and all will be fine.

D. Conclusion

I am fond of saying “There is no substitute for a well-prepared witness.” Hopefully, these practice pointers generated over years of experience litigating cases against good lawyers will help you avoid having to ask the rhetorical question “Did she really say that?”

APPENDIX

*The Honorable Jonathan Goodman's Thirty-Nine (39) Commandments
for Rule 30(b)(6) Depositions*

The below excerpt was taken from the Honorable Jonathan Goodman's January 30, 2012 Order² granting in part and denying in part defendant's motion for sanctions in the Southern District of Florida for failure to comply with Rule 30(b)(6):

If the case law outlining the guiding principles of 30(b)(6) depositions could be summarized into a de facto Bible governing corporate depositions, then the litigation commandments and fundamental passages about pre-trial discovery would likely contain the following advice:

1. The rule's purpose is to streamline the discovery process. In particular, the rule serves a unique function in allowing a specialized form of deposition.
2. The rule gives the corporation being deposed more control by allowing it to designate and prepare a witness to testify on the corporation's behalf.
3. It is a discovery device designed to avoid the bandying by corporations where individual officers or employees disclaim knowledge of facts clearly known to the corporation.
4. Therefore, one purpose is to curb any temptation by the corporation to shunt a discovering party from "pillar to post" by presenting deponents who each disclaim knowledge of facts known to someone in the corporation.
5. Rule 30(b)(6) imposes burdens on both the discovering party and the designating party. The party seeking discovery must describe the matters with reasonable particularity and the responding corporation or entity must produce one or more witnesses who can testify about the corporation's knowledge of the noticed topics.
6. The testimony of a Rule 30(b)(6) witness represents the collective knowledge of the corporation, not of the specific individual deponents. A Rule 30(b)(6) designee presents the corporation's position on the listed topics. The corporation appears vicariously through its designees.
7. A corporation has an affirmative duty to provide a witness who is able to provide binding answers on behalf of the corporation.
8. Thus, a Rule 30(b)(6) witness need not have personal knowledge of the designated subject matter.
9. The designating party has a duty to designate more than one deponent if necessary to

² *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 687–91 (S.D. Fla. 2012) (citations omitted).

respond to questions on all relevant areas of inquiry listed in the notice or subpoena.

10. The rule does not expressly or implicitly require the corporation or entity to produce the “person most knowledgeable” for the corporate deposition. Nevertheless, many lawyers issue notices and subpoenas which purport to require the producing party to provide “the most knowledgeable” witness. Not only does the rule not provide for this type of discovery demand, but the request is also fundamentally inconsistent with the purpose and dynamics of the rule. As noted, the witness/designee need not have any personal knowledge, so the “most knowledgeable” designation is illogical. Moreover, a corporation may have good grounds not to produce the “most knowledgeable” witness for a 30(b)(6) deposition. For example, that witness might be comparatively inarticulate, he might have a criminal conviction, she might be out of town for an extended trip, he might not be photogenic (for a videotaped deposition), she might 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.
11. Although the rule is not designed to be a memory contest, the corporation has a duty to make a good faith, conscientious effort to designate appropriate persons and to prepare them to testify fully and non-evasively about the subjects.
12. The duty to prepare a Rule 30(b)(6) witness goes beyond matters personally known to the designee or to matters in which the designated witness was personally involved.
13. The duty extends to matters reasonably known to the responding party.
14. The mere fact that an organization no longer employs a person with knowledge on the specified topics does not relieve the organization of the duty to prepare and produce an appropriate designee.
15. Faced with such a scenario, a corporation with no current knowledgeable employees must prepare its designees by having them review available materials, such as fact witness deposition testimony, exhibits to depositions, documents produced in discovery, materials in former employees’ files and, if necessary, interviews of former employees or others with knowledge.
16. In other words, a corporation is expected to create an appropriate witness or witnesses from information reasonably available to it if necessary.

17. As a corollary to the corporation's duty to designate and prepare a witness, it must perform a reasonable inquiry for information that is reasonably available to it.
18. A corporate designee must provide responsive answers even if the information was transmitted through the corporation's lawyers.
19. In responding to a Rule 30(b)(6) notice or subpoena, a corporation may not take the position that its documents state the company's position and that a corporate deposition is therefore unnecessary.
20. Similarly, a corporation cannot point to interrogatory answers in lieu of producing a live, in-person corporate representative designee.
21. Preparing a Rule 30(b)(6) designee may be an onerous and burdensome task, but this consequence is merely an obligation that flows from the privilege of using the corporate form to do business.
22. Not only must the designee testify about facts within the corporation's collective knowledge, including the results of an investigation initiated for the purpose of complying with the 30(b)(6) notice, but the designee must also testify about the corporation's position, beliefs and opinions.
23. The rule implicitly requires the corporation to review all matters known or reasonable available to it in preparation for a Rule 30(b)(6) deposition.
24. If a corporation genuinely cannot provide an appropriate designee because it does not have the information, cannot reasonably obtain it from other sources and still lacks sufficient knowledge after reviewing all available information, then its obligations under the Rule cease.
25. If it becomes apparent during the deposition that the designee is unable to adequately respond to relevant questions on listed subjects, then the responding corporation has a duty to timely designate additional, supplemental witnesses as substitute deponents.
26. The rule provides for a variety of sanctions for a party's failure to comply with its Rule 30(b)(6) obligations, ranging from the imposition of costs to preclusion of testimony and even entry of default.
27. The failure to properly designate a Rule 30(b)(6) witness can be deemed a nonappearance justifying the imposition of sanctions.
28. When a corporation's designee legitimately lacks the ability to answer relevant questions on listed topics and the corporation cannot better prepare that witness or obtain an adequate

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substitute, then the “we-don’t-know” response can be binding on the corporation and prohibit it from offering evidence at trial on those points. Phrased differently, the lack of knowledge answer is itself an answer which will bind the corporation at trial.

29. Similarly, a corporation which provides a 30(b)(6) designee who testifies that the corporation does not know the answers to the questions “will not be allowed effectively to change its answer by introducing evidence at trial.”
30. The conclusion that the corporation is bound at trial by a legitimate lack of knowledge response at the 30(b)(6) deposition is, for all practical purposes a variation on the rule and philosophy against trial by ambush.
31. If the corporation pleads lack of memory after diligently conducting a good faith effort to obtain information reasonably available to it, then it still must present an opinion as to why the corporation believes the facts should be construed a certain way if it wishes to assert a position on that topic at trial.
32. There is nothing in the rule which prohibits a corporation from adopting the testimony or position of another witness in the case, though that would still require a corporate designee to formally provide testimony that the corporation’s position is that of another witness.
33. The rule does not expressly require the designee to personally review all information available to the corporation. So long as the designee is prepared to provide binding answers under oath, then the corporation may prepare the designee in whatever way it deems appropriate - as long as someone acting for the corporation reviews the available documents and information.
34. Rule 30(b)(6) means what it says. Corporations must act responsibly. They are not permitted to simply declare themselves to be mere document-gatherers. They must produce live witnesses who have been prepared to provide testimony to bind the entity and to explain the corporation’s position.
35. Despite the potentially difficult burdens which sometimes are generated by Rule 30(b)(6) depositions, the corporation is not without some protection, as it may timely seek a protective order or other relief.
36. Absolute perfection is not required of a 30(b)(6) witness. The mere fact that a designee could not answer every question on a certain topic does not necessarily mean that the corporation failed to comply with its obligation.
37. A corporation cannot be faulted for not interviewing individuals who refuse to speak with it.
38. There are certain cases, such as subrogation cases or those involving dated facts, where a corporation will not be able to locate an appropriate 30(b)(6) witness. In those types of

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scenarios, the parties “should anticipate the unavailability of certain information” and “should expect that the inescapable and unstoppable forces of time have erased items from . . . memory which neither party can retrieve.”

39. A corporation which expects its designee to be unprepared to testify on any relevant, listed topic at the corporate representative deposition should advise the requesting party of the designee’s limitations before the deposition begins.