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Advocate's VIEW

Designate 30(b)(6) witnesses carefully

"Be prepared" is the standard motto for any deposition, but it is especially true for the deposition of a corporation in a federal court case.

Federal Rule 30(b)(6) requires a party that seeks to take a deposition of a corporation, partnership, association or governmental agency to "describe with reasonable particularity the matters on which examination is requested."

At first glance, the requirement appears to place an additional — perhaps unwanted — burden on the party seeking discovery. In fact, the designation of the subject matters to be covered should not be avoided, nor should they be overlooked by the party taking the deposition.

Unlike the deposition procedure under the CPLR, federal rules state it is the corporation that has the right to initially designate who will testify on its behalf. Once the proponent makes a 30(b)(6) request, the corporation must designate a representative(s) who will testify on the corporation's behalf with respect to the subject matter, and who can bind the corporation with his or her testimony. Moreover, the corporation must prepare each witness it produces with respect to the subject matters covered by the deposition notice.

How well prepared must the corporate witness be? To begin with, the rule itself states the witness "shall testify as to the matters known or reasonably known to the organization."

The designated witness is "speaking for the corporation," and that testimony must be distinguished from that of a "mere corporate employee" whose deposition is not considered that of the corporation, and whose presence must be obtained by subpoena. *U.S. v. Taylor*, 166 FRD 356, 361, aff'd, 167 FRD 367 (M.D.N.C. 1996).

It does not take much imagination to envision how difficult that could be for any large organization. The Second Circuit has stated that to satisfy Rule 30(b)(6), the corporate deponent "has an affirmative duty to make available such number of persons who will be able to give complete, knowledgeable and binding answers on its behalf." *Reilly v. Natwest Markets Group Inc.* 181 F3d 253, 268 (Second Circuit 1999).

The obligation has been held to be "the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business." *U.S. v. Taylor*, 166 FRD at 362

A corporation named may be obligated to: "[P]roduce one or

more 30(b)(6) witnesses who were thoroughly educated about the noticed deposition topics with respect to any and all facts known to [the corporation] or its counsel, regardless of whether such facts are memorialized in work product protected documents or reside in the minds of counsel." *In re Vitamins Antitrust Litigation*, 216 FRD 168, 172 (S.D.N.Y., 2003)

While it is not clear that a corporation must go quite that far in every case, an attorney representing a corporate deponent obviously must give serious thought to who will testify and how they will be prepared. The testimony of the designated witness clearly is an admission on the corporation's behalf, and it is likely to be difficult — if not impossible — to avoid the consequences of those admissions at trial or in motion practice.

What happens when a witness is not prepared, or when the corporation fails to designate more knowledgeable witnesses than it intends to call at trial? While discovery matters and sanctions are within the district court's sound discretion, the range of sanctions includes those available under Rule 37.

An unprepared 30(b)(6) witness is deemed tantamount to producing no witness at all, and the corporation and/or its attorneys may be subject to sanctions directly under Rule 37(d), including monetary sanctions. *Id.; Steinman v. Spinal Concepts Inc.*, 2007 WL 4198176 (W.D.N.Y. 2007).

If the corporation is found to have deliberately held back more knowledgeable witnesses on designated subject matters, the party seeking discovery may seek to preclude those witnesses from testifying on the corporation's behalf at trial. *Reilly*, 181 F3d at 269

In light of the potential pitfalls, the designation of witnesses by a corporation in response to a 30(b)(6) notice certainly will require an in-depth analysis of the case by its attorney.

The 30(b)(6) notice is an important and powerful discovery tool; however, the rule must be invoked properly by the party seeking discovery. Counsel who fail to name the corporation as the witness, or fail to properly designate the subject matters of questioning in the notice, may be missing an important opportunity to efficiently and effectively obtain high quality discovery from corporate parties and witnesses.

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