CARLTON FIELDS

Taking and Defending Rule 30(b)(6) Depositions for Young Lawyers

March 30, 2012

Law schools generally do not teach young lawyers the difference between the deposition of a corporate representative and depositions of other fact witnesses. The deposition of a corporate representative is a chance for the corporation being deposed to tell its story, but it has the potential to bind the corporation in ways it did not intend or anticipate.

Federal Rule of Civil Procedure 30(b)(6) appears to be straightforward—it allows a corporation or other entity to designate a witness to testify on the organization's behalf and requires only that the designated witness be able to testify about information "known or reasonably available to the organization." As a practical matter, however, the 30(b)(6) deposition is anything but straightforward. The organization being deposed often struggles to come up with the person or people able fully (but not too fully) to testify about the designated topics, while the lawyer taking the deposition can be frustrated because the designated witness isn't able to testify as thoroughly as the deposing lawyer thinks he or she should. Occasionally, no one in the organization being deposed has actual knowledge of one or more of the topics identified in the deposition notice, and there don't appear to be any materials a corporate designee could review to become educated on the topics. Almost invariably, there is a chasm between the deposing party's (and its lawyers') expectations and those of the organization whose designee is being deposed—which can grow when young lawyers are thrown into the mix.

A recent decision out of the Southern District of Florida, *QBE Ins. Corp. v. Jordan Enterprises, Inc.*, Case No. 10-21107-CIV, ___F.R.D.___, 2012 WL 266431 (S.D. Fla., Jan. 30, 2012), spends several pages outlining the case law governing 30(b)(6) depositions generally. The opinion largely addresses specific alleged discovery violations, but it is worth reading if you are a lawyer, young or old, preparing to take or defend a 30(b)(6) deposition or an in-house lawyer navigating the requirements of the rule. The *QBE* court lays out what it considers to be essential advice derived from the body of federal case law addressing Rule 30(b)(6) depositions.

Rule 30(b)(6) imposes obligations both on the party taking the deposition and the party designating a representative witness. The party noticing the deposition must describe the topics with reasonable particularity, while the organization being deposed must produce a witness or witnesses who can testify about the organization's knowledge about those topics. The rule does not require the organization to provide the person with the most knowledge about the topics; rather, the designee need not have any personal knowledge as long as he or she is able to provide binding answers on behalf of the organization. Young lawyers should note that one purpose of the rule is to prevent a corporation from "bandying" by offering individual officers and employees who disclaim an understanding of facts and policies that should be readily available. This is not an opportunity to "shunt a discovering party from 'pillar to post'" by presenting deponents who each lack knowledge of information held by employees down the hall. *QBE*, 2012 WL 266431, at *9.

The testimony of the 30(b)(6) witness represents the collective knowledge of the organization, so the designated witness may have to review available materials such as deposition testimony and exhibits, relevant documents, and current and former employees' files in order to become sufficiently educated to speak for the organization. Similarly, the designee may have to meet with people from within the organization, from mailroom employees to senior management, even former employees, in order to become educated on the topics for which he or she has been designated to testify. The organization has an obligation to create an appropriate witness, if one is not readily available, from information reasonably available to the organization. Moreover, the witness may be required to testify about the organization's subjective beliefs and opinions. When investigating potential witnesses and other individuals possessing relevant knowledge, young lawyers should know that the corporation cannot be faulted for not interviewing individuals who refuse to speak with it. A corporation's efforts to obtain information need only be reasonable.

A lawyer taking a 30(b)(6) deposition should keep these principles in mind and demand strict compliance with them. If it becomes clear during the deposition that the designee lacks the requisite knowledge and/or has not taken the necessary steps to become sufficiently educated to speak for the organization, you have the right to demand that the organization designate additional witnesses as substitute deponents. Whether taking or defending a 30(b)(6)deposition, bear in mind that the rule provides for a variety of sanctions for a party's failure to comply with the rule's obligations. These sanctions may include the imposition of costs or an order precluding the witness's testimony. Some courts have found that failing properly to designate a 30(b)(6) witness is tantamount to failing to appear for the deposition altogether. In the end, corporations must simply act responsibly in preparing and producing representatives.

Of course, the rule does not impose the burden of omnipotence on the organization or its designated witness. It may be that the designee (and, hence, the organization) legitimately lacks the ability to answer questions on the topics for which he or she was designated. An answer establishing a lack of

knowledge is not necessarily sanctionable, but it can be binding on the organization. If so, the organization will be prohibited from offering contradictory evidence at trial. In other words, "I don't know" is a perfectly legitimate answer as long as the organization accepts that such a response means "we as an organization don't know" and can live with that answer. Practically, however, if the designee doesn't know the answer to a particular (relevant) question the organization reasonably should know, the discovering party may move to compel the production of an additional 30(b)(6) witness with such knowledge or the defending party may offer to produce one. If an organization knows, going into the deposition, that its designee is or may be unprepared to testify on a particular relevant, designated topic, the organization's lawyer should advise the deposing party of the witness's limitations before the deposition begins so the parties can come up with a reasonable solution and the deposing party isn't blindsided during the deposition.

In sum, Rule 30(b)(6) requires that a corporation do more than merely gather documents and produce a witness with general knowledge about the issues in the case. It must produce a witness who has been prepared to provide testimony to bind the corporation and to set forth the corporation's position. Perfect testimony is not required, however—just because a designated witness could not answer every question on a certain topic does not mean that the corporation failed to comply with its obligation. If approached thoughtfully and correctly and with the right witness(es), the 30(b)(6) deposition can be a powerful way for the corporation to tell its story and establish its positions in litigation.

Related Practices

Mass Tort and Product Liability
Pharmaceuticals and Medical Devices
Pharmaceuticals and Medical Devices