

Five strategies for Rule 30(b)(6) depositions

An effective deposition of a corporate representative is the strongest discovery weapon you have against a powerful opponent. Follow these tips to use the rule to your best advantage.

ADAM BLANK

Plaintiff attorneys litigating against big corporations face the daunting prospect of fighting an opponent with many more resources—one that can afford to impede the case’s progress and frustrate the plaintiff’s pursuit of justice. Fortunately, the Federal Rules of Civil Procedure arm you and your client for just this sort of fight.

Rule 30(b)(6) gives you the opportunity to directly question corporate deponents or deponents from other organizational entities about the elements of the case. And the rule requires the deponents to answer your questions, providing you with strong ammunition to fight discovery abuse.

At the heart of the rule is its requirement that, once you have given the defendant (or any third-party corporation deponent) notice of the deposition, it must designate one or more people to testify to the matters listed in the notice. It is required to prepare those people so they can testify on all the listed matters.¹

As the Advisory Committee on Civil Rules of the U.S. Courts explained, Rule 30(b)(6) has three purposes:

- to reduce the difficulty a deposing lawyer encounters in determining, before the deposition, whether a particular

employee or agent is a “managing agent” to curb the practice of “bandying,” where an entity’s officers or managing agents are deposed in turn, but each denies knowledge of facts that are clearly known to people in the organization

- to assist entities that find an unnecessarily large number of their officers and agents being deposed by a party uncertain of who in the organization has the relevant knowledge.²

Whether the entity is a public or private corporation, a partnership, an association, or a government agency, the designation of the deponent allows one person to speak for the entire organization.³ The deponent’s testimony represents the knowledge of the entity, not of the person being deposed. By placing the burden of identifying responsive witnesses on the organization, the rule streamlines the discovery process.⁴

Deposition to-do list

For a plaintiff facing a large corporate defendant and seeking information that may reside in multiple departments under many different managers, Rule 30(b)(6) offers an opportunity to conduct discovery efficiently. If you take the following steps, you’ll get the

best results from the deposition of the corporate designee.

Craft a deposition notice of adequate scope. As the deposing party, you must craft a notice of deposition that identifies the areas of inquiry with “reasonable particularity,” but there is no requirement that your notice be more specific or list every question you’ll ask.⁵ If your opponent’s defenses are broad, your deposition notice may be similarly broad. Because courts disagree as to whether you may question the deponent on subjects that were not enumerated in the deposition notice, you should craft your notice to cover all possible topics of inquiry.⁶

If your jurisdiction permits you to question the deponent on subjects that were not enumerated in the deposition notice, the additional questions must comply with Rule 26(b)(1). Also, the deponent is not required to know the answers to questions outside the scope of the notice, and the deponent’s answers to those questions do not speak for the company.⁷

The federal rules require that a deposition of an individual be conducted in one day of seven hours.⁸ This rule might make you craft a narrow deposi-

tion notice intended to cover only as many subjects as can be covered in seven hours. However, according to the Advisory Committee, “[F]or purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition.”⁹ If the defendant designates more than one person for your 30(b)(6) deposition, you may depose each person for a day.

If the defendant designates only one person and you think you’ll need more than seven hours for his or her deposition, you must get the defendant’s attorney to agree to allow the deposition to span additional days or you’ll need to ask the court for more time. Therefore, if you believe you will require more than seven hours to conduct your corporate deposition, you should craft a notice that will require the corporation to designate more than one deponent.

Make sure the defendant selects an appropriate deponent. The rule requires the corporation to designate a deponent who can testify to the knowledge of the entire company on every area designated in your deposition notice. The corporation must produce as many deponents as is necessary to respond to the areas of inquiry in your notice.¹⁰ If the defendant intends to designate more than one deponent, it should identify them and describe the areas on which each person will testify.¹¹

The corporate designee need not have firsthand knowledge of the events in question, but to make the deposition meaningful, the designee must be prepared to provide “complete, knowledgeable, and binding answers on behalf of the corporation.”¹² The designee’s preparation should include a review of prior fact witness deposition testimony as well as documents and deposition exhibits, even if that review would be burdensome.¹³

In some cases, a party may resist identifying a deponent, forcing the deposing party to press the court to require compliance with the rule. Because a 30(b)(6) deposition requires the deponent to conduct a significant amount of preparation, the defendant may argue that you should be required to pur-

sue less onerous discovery practices.

For example, in *Van Emon v. State Farm Mutual Automobile Insurance Co.*, the plaintiff’s 30(b)(6) deposition notice concerned State Farm’s handling of the plaintiff’s insurance claim. The insurer objected to the proposed deposition, arguing that it was standard practice in no-fault litigation to depose the claims representative without imposing 30(b)(6) requirements.

State Farm maintained that a claims representative could not be compelled to testify under Rule 30(b)(6) because

notice covering 14 topics on Foster-Miller. Because Babcock had already deposed the employees whom Foster-Miller regarded as most knowledgeable on five of those topics, Foster-Miller did not produce witnesses competent to testify on those five topics. Instead, it asked whether Babcock wanted it to recall those witnesses, produce additional witnesses, or designate the prior deposition testimony as Rule 30(b)(6) testimony.

The court granted Babcock’s motion for an order compelling Foster-Miller to

The corporate designee need not have firsthand knowledge of the events, but he or she must provide ‘complete, knowledgeable, and binding answers on behalf of the corporation.’

the claims representative was not an officer, director, or managing agent, and if a 30(b)(6) deposition were allowed, State Farm might be required to have the claims representative educate another person who would testify to the claims representative’s knowledge. State Farm argued that this education process would be impossible since the claim was 16 years old. The court overruled State Farm’s objection, noting that the insurer had pointed to no authority that would require the plaintiff to depose a fact witness instead of a Rule 30(b)(6) witness.¹⁴

If you have already deposed a company’s employees, what happens if, at a later time, you give notice of a Rule 30(b)(6) deposition that includes matters already covered in the previous depositions? Your opponent could move for a protective order under Rule 26(c), contending that the additional deposition request was unduly burdensome, or seek to avoid compliance with the rule and merely ask if the plaintiff wants the corporation to produce the same witnesses again.

The First Circuit rejected such a strategy in *Foster-Miller, Inc. v. Babcock & Wilcox Canada*.¹⁵ During discovery, Babcock served a Rule 30(b)(6) deposition

comply with the 30(b)(6) deposition notice, finding that Foster-Miller was improperly attempting to shift to Babcock the burden of identifying who best spoke for the company on the matters in question. It also awarded Babcock the costs and fees it incurred in bringing the motion.

Ask the right questions. Begin the deposition by reviewing each area of inquiry with the designee and confirming that he or she is fully prepared to provide all the information known to the organization regarding each area. Be careful with the word “you.” A typical deposition question might ask, “When did you first learn that my client was engaged in negotiations with Mr. Jones?” In a Rule 30(b)(6) deposition, it may be unclear whether this question is directed to the designee personally or to the company as a whole. In most instances, it makes sense to define “you” as the individual

ADAM BLANK practices law at Wofsey, Rosen, Kweskin & Kuriansky in Stamford, Connecticut. He can be reached at ablank@wrkk.com. Stewart I. Edelstein and Monte E. Frank, both of Cohen & Wolf in Bridgeport, Connecticut, contributed to this article.

designee, so you should phrase most of your questions in terms of what the organization knew.

Don't settle for nonanswers. Occasionally a deponent will respond to a question by saying "I don't know," "I can't recall," "I'm not sure," or "Maybe." In an ordinary deposition, you have few options for dealing with these types of responses, particularly when you have no basis to claim the deponent is intentionally being evasive.

Under Rule 30(b)(6), you need not settle for the nonanswer, because an

considering whether and when to file a motion to compel under Rule 37. If the designee is unresponsive and you are aware, or become aware, that the company could have produced a more knowledgeable witness, you should file a motion to compel and seek sanctions as soon as practicable. If you delay for tactical reasons and do not insist that the company provide a better Rule 30(b)(6) designee at that time, a court may refuse to impose sanctions.²³

Hold your opponent to its designee's testimony. Don't let your op-

plaintiff company's primary claim for damages was lost profits. At the Rule 30(b)(6) deposition, the plaintiff's designated deponent testified that his company had not actually suffered some of the claimed damages. As for the rest of the claim, the designee stated that he had no idea what his company's damages were.

Shortly before trial, the plaintiff disclosed a different employee who would be its trial witness on damages and stated that that employee would testify that the company suffered damages in every area in which it claimed damages and that the company could identify the exact amount of its lost profits. We filed a motion in limine to preclude the admission of the evidence. While the dispute was resolved at this stage, a motion in limine is your best response when confronted with such a situation.

Whenever a corporation or other organization holds information important to your case, you should take a Rule 30(b)(6) deposition. Don't let the company hide behind its representatives. A Rule 30(b)(6) deposition provides an effective way for you to tap into the organization's entire knowledge from one authoritative source. ■

Notes

1. Many states have adopted similar civil procedure rules. See e.g. Cal. Civ. Proc. Code §2025.230 (West 2006); Conn. Prac. Book §13-27(h) (2007); Fla. R. Civ. P. 1.310(b)(6); Ill. Sup. Ct. R. 206(a)(1); Tex. R. Civ. P. 199.2(b).

2. Fed. R. Civ. P. 30(b)(6) advisory comm. n. to 1970 amendments.

3. *United States v. Taylor*, 166 F.R.D. 356, 361 (D.N.C. 1996), *aff'd*, 166 F.R.D. 367 (D.N.C. 1996).

4. *Resolution Trust Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993); see also *Hooker v. Norfolk S. Ry.*, 204 F.R.D. 124, 126 (D. Ind. 2001).

5. See ABA Civil Discovery Standards §19(a), www.abanet.org/litigation/discoverystandards (Aug. 2004).

6. *Compare Paparelli v. Prudential Ins. Co.*, 108 F.R.D. 727 (D. Mass. 1985) (the examining party must confine the questioning to the matters stated "with reasonable particularity" in the deposition notice) with *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (if the examining party asks questions outside the scope of the 30(b)(6) notice, the general deposition rules govern). The general deposition rules may be found at Fed. R. Civ. P. 26(b)(1).

7. *King*, 161 F.R.D. at 476.

You need not settle for the nonanswer, because an entity's designation of a witness who lacks knowledge of the matters specified in the notice amounts to a failure to appear to testify.

entity's designation of a witness who lacks knowledge of the matters specified in the notice amounts to a failure to appear to testify.¹⁶ You then may seek sanctions, including reasonable attorney fees incurred because of the failure to appear.¹⁷ Courts have imposed sanctions when:

■ the designee was not knowledgeable about relevant matters¹⁸

■ the designee was not properly prepared to testify¹⁹

■ the plaintiffs' designee in a case with multiple plaintiffs did not have authority to speak for all plaintiffs.²⁰

Even if the organization's conduct does not warrant sanctions, a court may still require it to provide additional designees if, for example, there are gaps in the designee's knowledge or the designee provides evasive answers.²¹

If the designee testifies "I don't know" on one or more areas of inquiry, you can consider this an admission by the company that it has no corporate knowledge or position on that matter. As a result, you may later seek to prohibit the company from introducing documentary or testimonial evidence as to that area of inquiry, regardless of the source of the evidence.²²

Timing is important when you are

ponent change its story when you get to trial. For example, a 30(b)(6) designee may deny knowledge of a particular area of inquiry during the deposition and then at trial may seek to introduce documents and testimony concerning the same area. Or the designee may state "A" during the deposition and then at trial may seek to introduce documents and testimony tending to show "B." The court may preclude the company from introducing such documents or testimony at trial unless it can prove that the information was not known or was inaccessible at the time of the deposition.²⁴

On the other hand, the court may rule that a Rule 30(b)(6) deposition is no different from any other deposition. In such a case, the deponent's testimony may be used for impeachment if it differs from his or her trial testimony, but it is not an irrefutable judicial admission.²⁵ Courts do, however, agree that the examining party from the Rule 30(b)(6) deposition may have any portion of the deposition transcript admitted into evidence.²⁶

You also may occasionally run into a bait-and-switch attempt. Recently, a colleague and I represented the defendant in a breach-of-contract case where the

8. Fed. R. Civ. P. 30(d)(2).
9. Fed. R. Civ. P. 30(b)(6) advisory comm. n. to 2000 amendments. This represented a major shift from prior practice. The Advisory Committee, in its notes on the 1993 amendments, stated, "A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify." Fed. R. Civ. P. 30(b)(6) advisory comm. n. to 1993 amendments. Despite the change (or perhaps being unaware of the change), some courts continue to limit depositions under Rule 30(b)(6) to seven hours without regard to the number of designees. See *Motoi v. Bristol Group, Inc.*, 2007 WL 30604 (E.D. Ky. Jan. 3, 2007).
10. *Poole v. Textron, Inc.*, 192 F.R.D. 494, 504 (D. Md. 2000); *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989). The court in *Poole* provides a useful discussion of the duties and responsibilities of a corporation and its counsel when served with a 30(b)(6) deposition notice.
11. ABA Civil Discovery Standards, *supra* n. 5, at §19(c).
12. *Marker*, 125 F.R.D. at 126; *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168 (D.D.C. 2003); see also ABA Civil Discovery Standards, *supra* n. 5, at §19(b), (f).
13. *Calzaturificio S.C.A.R.P.A. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 36-37 (D. Mass. 2001); *Concerned Citizens v. Belle Haven Club*, 223 F.R.D. 39, 43 (D. Conn. 2004).
14. 2007 WL 216138 (E.D. Mich. Jan. 26, 2007).
15. 210 F.3d 1 (1st Cir. 2000).
16. See e.g. *Black Horse Lane Assn. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000) ("In reality if a Rule 30(b)(6) witness is unable to give useful information he is no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it.").
17. See Fed. R. Civ. P. 37(d). Although Rule 37 permits a court to apply more substantial sanctions as well, courts rarely do so.
18. *Res. Trust Corp.*, 985 F.2d at 197; *Black Horse Lane Assn.*, 228 F.3d at 275; *Paul Revere Life Ins. Co. v. Jafari*, 206 F.R.D. 126 (D. Md. 2002).
19. *T&WFunding Co. XII, LLC v. Pennant Rent-A-Car Midwest, Inc.*, 210 F.R.D. 730 (D. Kan. 2002); *Intl. Assn. of Machinists & Aerospace Workers v. Werner-Masuda*, 390 F. Supp. 2d 479 (D. Md. 2005).
20. *T&WFunding Co. XII*, 210 F.R.D. at 730.
21. *Sony Elecs., Inc. v. Soundview Techs., Inc.*, 217 F.R.D. 104, 112 (D. Conn. 2002).
22. *Taylor*, 166 F.R.D. at 362-63 (citing Fed. R. Civ. P. 37(b)(2)(B)).
23. See *Gutierrez v. AT&T Broadband, LLC*, 382 F.3d 725, 733 (7th Cir. 2004).
24. See *Rainey v. Am. Forest & Paper Assn.*, 26 F. Supp. 2d 82, 94 (D. D.C. 1998); *Taylor*, 166 F.R.D. at 362.
25. *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001).
26. Fed. R. Civ. P. 32(a)(2).