Depositions of Entities Under FRCP 30(b)(6) and Ill.R.206(a)(1)

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Introduction – Depositions of an Entity

- Deposing an entity is not the same as deposing a person

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- Companies may not have neurons or vocal cords, but they have memories and can be given a voice
- FRCP 30(b)(6) and Ill.R.206(a)(1) allow the obtaining of corporate knowledge through live witness testimony
- Entity depositions can wind up being similar to fact witness depositions, totally different, or somewhere in between

Introduction – Depositions of an Entity

- Our focus today is on entity depositions, not fact witness depositions generally

- Broadly speaking, we will cover:
  - For the deposing party:
    - How to notice the deposition?
    - How to lock in answers that help your case?
    - How to use the deposition at summary judgment and/or trial?
  - For the defending party:
    - How to choose a spokesperson?
    - How to prepare your witness?
    - How to minimize damaging testimony?

Federal Rule 30(b)(6)

(6) *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 then 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. A subpoena must advise a nonparty organization of its duty to make this designation. 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.

Illinois Rule 206(a)(1)

(1) *Representative Deponent*. A party may in the notice and in a subpoena, if required, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more offices, directors, or managing agents, or other persons to testify on its behalf, and may set forth, for each person designated, the matters on which that person will testify. The subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization.

Illinois Rule 206(a)(1)

- No reported *Illinois* Supreme or appellate court decisions specifically addressing Rule 206(a)(1)
- But Federal cases likely to be persuasive
  - Text of Rule 206(a)(1) nearly identical to FRCP 30(b)(6)
  - Committee Notes:
    "The procedure is substantially similar to the procedure set forth in Federal Rule of Civil Procedure 30(b)."
- Rule 212 requires designation of a Rule 206(a)(1) deposition of a third party as a Rule 212(b) "evidence" deposition in order to be used at trial for any purpose other than impeachment.

What Do the Rules Require?

I. *Deposing Party*

- May name appropriate entity as deponent in notice or subpoena
- Must describe with reasonable particularity the matters for examination
- Subpoena must advise nonparty of duty to make the designation

II. *Responding Entity*

- Shall designate one or more officers, directors, managing agents, or other persons to testify on its behalf
- May set out the matters on which person(s) designated will testify
- Designated person must testify about information known or reasonably available to the organization

PART I

DEPOSING PARTIES

Who May Be Deposed?

- Federal Rule – any "Entity":
  - public or private corporation
  - partnership
  - association
  - governmental agency
  - ***other entity***
- Illinois Rule – Text Slightly More Limited:
  - public or private corporation
  - partnership or association
  - governmental agency
  - ***No "other entity" exception***
    - No published case law on scope

Why (Why Not) Depose an Entity?

Why?

- Forces entity to locate and provide information known or reasonably available to it
- Better chance of useful admissions and follow-up than interrogatories
- Answers binding on entity (to a point)
- May streamline discovery: entities often (not always) designate most knowledgeable witness
- All 30(b)(6) topics together count as one deposition no matter how many persons are designated

Why Not?

- Cannot choose particular witness
- Must give notice of topics to be covered (less surprise)
- Scope of deposition limited to topics in notice

Description of Matters for Examination

- Rules require notice or subpoena to describe "matters for examination" with "**reasonable particularity**"
  - Overbroad notices are subject to objection. See, e.g., Tri-State Hosp. Supply Corp. v. United States, 226 F.R.D. 118, 125 (D.D.C. 2005) (topics listed as "including, but not limited to" impermissibly overbroad).
  - General notice referencing and accompanied by detailed letter describing topics permitted. Alexander v. FBI, 186 F.R.D. 137, 140 (D.D.C. 1998).
- Advantages of more detailed description:
  - Increases chances of getting information
  - Stronger argument for getting a second witness if requested information not provided
  - Greater likelihood that failure to supply information can be used to preclude evidence
  - But can a description be too specific and too burdensome?

Testimony "Binds" the Entity

- Testimony is generally "binding", but practical effect for summary judgment or at trial depends on specifics
- Testimony of a party is an **evidentiary admission**:
  - 30(b)(6) and testimony is a party admission under Fed.R.Evid. 801(d)(2)
  - A Ill.R.206(a)(1) deposition of a party opponent is "an admission made by a party or by an officer or agent of a party" whether or not noticed as a discovery or evidence deposition under Ill.R. 212
- Testimony is not a **judicial admission** giving rise to estoppel or deeming matter proven without trial

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- Party cannot present a different version or overall theory of facts from those articulated by the 30(b)(6) designee
  - Rainey v. American Forest and Paper Ass'n, Inc., 26 F.Supp.2d 82 (D.DC 1998)
    - Defendant introduced affidavit on summary judgment containing new, totally different series of factual allegations regarding the nature of the plaintiff's employment.
    - Affidavit "contrasts sharply with the positions taken by" 30(b)(6) designees and "works a substantial revision of defendant's legal and factual positions."
    - "This eleventh hour alteration is inconsistent with Rule 30(b)(6), and is precluded by it."
  - Reasoning based on necessity for full and fair disclosure.
  - Similar to summary judgment rule that party cannot contradict own prior deposition testimony through affidavit or argument. See, e.g., Hayes v. New York City Dept. of Corrections, 84 F.3d 614, 619 (2d Cir.1996).

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- Practical examples of where Rainey "substantial revision" rule might apply:
  - Deposition – "The widgets had nothing to do with the accident."
  - Trial / SJ – "The widgets caused the accident but they were improperly installed by the customer."
  - Deposition – "We believed the financial statements were 100% accurate."
  - Trial / SJ – "We thought the numbers were suspicious but our accountants assured us everything was fine. Obviously they were lying to cover their mistakes."

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- **Not** a "**judicial admission**"
  - Unlike an Answer or response to a Request to Admit*
  - Examples of what might be permitted:
    - Deposition: "According to a report, the widgets were out of spec by .5 mm."
    - Cross-Examination at Trial:
      - Q: Your own tests showed the widgets were out of spec, right?
      - A: We did conduct preliminary tests that suggested that but that's not what our engineers ultimately concluded.
    - Deposition: "I'm not aware of anyone expressing concern about the financial statements."
    - Cross-Examination at Trial:
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*See *Lindquist v. City of Pasadena, Tex.*, 656 F.Supp.2d 662 (S.D. Tex. 2009)

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- Questions outside deposition topics **do not** bind the entity and are objectionable.
- **But** parties usually (though are not required to) inform the other side of the identity of their 30(b)(6) designees some time in advance; if designee is already someone you want, withdraw the individual deposition notice and conduct simultaneous 30(b)(6) and "personal knowledge" deposition before or after representative deposition.

Testimony "Binds" the Entity

- Practice Tips
  - Do not assume that a favorable answer from a representative witness means a slam dunk for summary judgment or at trial
  - One question / answer is rarely enough to win a case. Consider following up on a favorable answer before the next break to tie the witness down if the answer left possible wiggle room
  - Questions directed to corporate knowledge, policies, history, and high-level aspects of claims or contentions are more likely to tie opponent's hands at trial than details about specific documents or incidents, which can be contradicted with other evidence and chalked up to poor memory or simple error

Lack of Knowledge or Failure to Obtain It

- In practice, unless party receiving notice appears to have deliberately flaunted rules, a lack of knowledge or half-hearted effort to obtain it may leave noticing party with little recourse but to try to compel further discovery.
- LG Elecs. v. Whirlpool Corp., 2010 WL 3714992 (N.D.Ill. Sept. 14, 2010)
  - Court refused to exclude *in limine* evidence not disclosed in 30(b)(6) deposition testimony
  - "While the three corporate designees were unable to answer each and every question asked of them, they provided extensive testimony n the designated topics. **Whirlpool neither sought to compel further testimony in this area nor to have another 30(b)(6) witness deposed.**"

Lack of Knowledge or Failure to Obtain It

- Cat Iron, Inc. v. Bodine Env. Svcs., Inc., 22011 WL 2457486 (C.D. Ill. 2011)
  - Defendant moved for summary judgment based upon plaintiff's 30(b)(6) designee being unable to cite any facts establishing "willful and wanton" misconduct.
  - "While Rule 30(b)(6) testimony can be contradicted and used for impeachment purposes, it is not a judicial admission that ultimately decides an issue."
  - "[T]he court will allow in as evidence in the motion for summary judgment, over the objection of Plaintiff's counsel, the testimony given at the Rule 30(b)(6) deposition that Davis has no knowledge of any facts to support Plaintiff's claim of wanton and willful misconduct. However, the court does not find that this testimony necessarily results in judgment for Defendant on Plaintiff's claim of wanton and willful misconduct."

Lack of Knowledge or Failure to Obtain It

- Georgia-Pacific Consumer Prods. v. Kimberly-Clark Corp., 749 F.Supp.2d 787 (N.D. Ill. 2010)
  - Court refused to exclude *in limine* evidence not disclosed in 30(b)(6) deposition testimony and refused to make a negative inference from the designee's lack of knowledge
  - "[I]ncomplete testimony in some areas does not overshadow the overall thoroughness and relevance of [the designee's] testimony."

Lack of Knowledge or Failure to Obtain It

- "I don't know"'s present a strategic choice. Do you:
  - Demand a second deposition and/or new designee?
    - You may not like the answer you get
  - Move to compel and for attorney fees for second deposition?
    - Probably will only get fees if party clearly flaunted rules
  - Move in limine?
    - Probably won't be successful unless you've tried other options first
  - Let the answer stand and only make a fuss if the party tries to introduce evidence at trial? – Often the Best Choice
    - If there was disclosure after the deposition but reasonably in advance of trial, you still may be out of luck
- In the end, you may get lucky, but entity depositions are usually best suited for discovery, not for generating "gotcha" moments
  - "I don't know"'s are more often than not just an annoyance to the party taking the deposition

Lack of Knowledge or Failure to Obtain It

- Practice Tips:
  - Do not assume an "I don't know" from a 30(b)(6) witness will preclude the party from presenting evidence in summary judgment or at trial
  - The objections of the party receiving notice will likely be broad enough to at least arguably cover your question
  - If issue is important enough, and you genuinely need an answer, move to compel the party to answer or present another designee on the topic, and seek attorney fees
  - Always find out what witness did to prepare; if facially inadequate, move to compel a second deposition with a new designee

Use of Testimony on Summary Judgment

- Affirmative Testimony / Admissions
  - Same rules on changing testimony to avoid summary judgment apply to entities just as to individual parties
    - See Rainey, Hayes, supra.
  - If earlier testimony is merely erroneous, incomplete, or ambiguous, court may be more lenient
    - See Lindquist, supra.
- Inability/Failure to Answer
  - Testimony that entity **has no information** might establish that there is no disputed issue of fact
  - But simple "I don't know" by the designee without procedural follow ups available under the rules may not be helpful

Use of Testimony at Trial - Parties

- FRCP 32(a)(3): “An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or **designee under Rule 30(b)(6)** or 31(a)(4).”
  - Testimony must be admissible to the same extent it would be if the witness were present and testifying. FRCP 32(a)(1)(B).
- Ill. R. 206, Ill.Evid.R. 801(d)(2): Any deposition of a party can be used against party at trial as an admission.
- Appropriate for judge or attorney to inform jury that testimony is that of a “corporate representative” of a party
- Note: Some judges may limit use of opponent’s 30(b)(6) deposition testimony to impeachment if actual designee is expected to be called as a live witness

Use of Testimony at Trial – Nonparties

- Entity testimony often not based on firsthand knowledge and may be hearsay
  - See Sara Lee Corp. v. Kraft Foods, Inc., 2011 WL 3325802 (N.D. Ill. 2011) (Denlow):
    - "For instance, the Court doubts that a Rule 30(b)(6) witness should be allowed to testify about the details of a car accident in lieu of the corporation's truck driver who actually witnessed the event. If he could, Rule 30(b)(6) would severely undercut the requirement, fundamental to our adversary system, that fact witnesses have personal knowledge of the matters upon which they testify."
    - Third-party must be unavailable to play 30(b)(6) deposition to jury
- Ill.R.206: Only "evidence" depositions of third-parties may be used at trial and only if third-party is unavailable
- Possibility of hearsay-within-hearsay objections high if third-party's designee does not have personal knowledge

PART II

RESPONDING ENTITIES

Duties of the Party Receiving Notice

- Party "**must** then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf"
- Party "**may** set out the matters on which each person designated will testify"
- Designee "**must** testify about information known or reasonably available to the organization"

Who Can Be Designated? – ANYONE!

- FRCP 30(b)(6): "one or more officers, directors, or managing agents, or … **other persons** who consent to testify on its behalf"
- Ill. S. Ct. R. 206(a)(1): "one or more offices, directors, or managing agents, **or other persons** to testify on its behalf"
- But must have or obtain knowledge regarding matters on which testimony requested
  - *Smithkline Beecham Corp. v. Apo-tex Corp.,* No 98 C 3952, 2000 WL 116082, * 8 (N.D. Ill. Jan.24, 2000) (duty to designate "individual to testify on behalf of the corporation who ***has knowledge responsive to subjects requested*** in the Rule 30(b)(6) requests of its opponents")

Who Can Be Designated?

- Noticing party cannot require a specific witness
  - See, e.g., University of Kansas v. Sinks, 565 F.Supp.2d 1216 (D. Kan. 2008); *Booker v. Massachusetts Dept. of Public Health*, 246 F.R.D. 387 (D.Mass.2007)
  - But see Moore v. Pyrotech Corp., 137 F.R.D. 356 (D.Kan.1991). (noticing party who wants particular officer or director can name individual but cannot require testimony outside personal knowledge)
- No requirement to designate "person most knowledgeable"
  - No *firsthand* knowledge required, so long as witness appears at deposition prepared to provide entity's knowledge

Whom *Should* the Entity Designate?

- Pick a *good witness* who will help the case
  - Good testifier
  - Loyal representative who is willing to work hard
- The more on-point knowledge the witness has, the less investigation and education will be required
  - But, too much knowledge may be a disadvantage
  - Avoid *bad witnesses*, even if knowledgeable
  - If no good knowledgeable witnesses available, consider educating a representative
- Can designate witnesses to cover different topics
  - Serve notice under the applicable rule
  - Insist on limiting testimony to designated topics

Whom to Designate – Trial Considerations

- Designating a witness with significant personal knowledge outside designated topics exposes him or her to full range of questioning they might not be prepared for
- However, designating a witness with no personal knowledge or connection to case might rub the wrong way with the jury if testimony is played by other side
- Juries expect corporate officers to be well prepared, knowledgeable and direct
- Your 30(b)(6) designee(s) can't testify for you at trial unless they have personal knowledge

Reasonable Inquiry Requirement

- Rules require designees to testify "about information known or reasonably available to the organization"
  - Lawyers must perform a reasonable investigation of information available to the entity, including from other witnesses, entity's records
  - Not sufficient to rely on one knowledgeable person
  - *See, e.g., LG Elecs. v. Whirlpool Corp.*, 2010 WL 3714992 (N.D. Ill. Sept. 14, 2010):
    - Duty "to perform a **reasonable inquiry** for information and prepare the selected deponent to adequately testify **not only on matters known by the deponent**, but also on subjects that the **entity should reasonably know**."

Teaching the Entity's Knowledge

Ways of Transmitting Information to Designee

- Document review
- Work-product memorandum / study outline
- Teaching sessions with attorneys
- Discussions with people with knowledge
- "Cheat Sheets"

Discoverability of Teaching Materials

- What can clearly be discovered:
  - Documents reviewed or relied upon
    - Rule of Evidence 612: “if a witness uses a writing to refresh memory for the purpose of testifying … an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.”
  - Overall preparation strategy might be considered work product, but “did you have a chance to review document X?” is almost certainly permissible.
  - Contents of discussions with others

Discoverability of Teaching Materials

- What about privileged materials or communications?
  - Suss v. MSX Intern. Engineering Services, Inc., 212 F.R.D. 159 (S.D.N.Y. 2002)
    - To break privilege, party "must show not only that the witness reviewed the documents in preparation for his deposition, but that he relied upon them in testifying"
    - "The mere fact that a deposition witness looked at a document protected by the attorney-client privilege in preparation for a deposition is an inadequate reason to conclude that the privilege was destroyed."

Witness Preparation

- Prepare 30(b)(6) witness to focus on documents or conversations, e.g. “According to document X, ...” or “Per my conversation with Person Y, …”
- Witness should think twice before giving an absolute answer, and never say “never.” “Not to my knowledge”, “Not that I’m aware”, etc. are preferable because knowledge and awareness can always change
- Aggressively object to questions which seek legal contentions or contentions as to an ultimate issue (e.g., “willful and wanton” misconduct)

Witness Preparation

- It can be awkward for a witness with no firsthand knowledge to testify under oath
  - Make sure witness understands duty under rules to provide *entity's* knowledge
  - Witness is attesting to company's knowledge of facts, not to his personal beliefs therein
  - Work out appropriate qualification phrase, e.g.:
    - "It is my understanding that …"
    - "XYZ Corp's information is that …"
- Rehearse entity's message on key points
- Prepare witness to stay within boundaries of topics

Witness Preparation

- To maximize preservation of all privileges:
  - As preparing / defending attorney, don't "teach" the witness the facts so that he's relying on you, but "guide" him to them so he can teach himself
  - Attorney outlines and notes shared with the witness probably are not discoverable but don't take the risk if you don't have to
  - If designee is already in "core group" for privilege purposes (e.g., management), line between deposition preparation and general litigation preparation will be much more blurry

Objections

- Delicate balance:
  - Corporate representatives who speculate can damage a case
  - Inability to answer may be embarrassing or even a basis for summary judgment
- Critical to protect entity with objections
  - Consider serving written objections to the vagueness, scope, etc. of the noticing party's list of topics
  - At the deposition, vigorously object to questions as outside topic (or beyond what topics provided fair notice of)
- Questions Outside the Noticed Topics
  - Technically not a basis for an instruction not to answer but
  - Objection necessary or else answer might be binding on entity
  - Typical: "Objection, outside the scope of the 30(b)(6) topics. The witness may answer in his personal capacity only, if he is able."

Combined Fact and Entity Depositions

- Noticing party may notice fact deposition of designee to follow or precede entity deposition
- Defending lawyer should keep the depositions separate:
  - Insist on separate transcripts and clean start and end of each deposition
  - Make clear record of what capacity witness is testifying
  - Prepare witness to understand the different depositions
  - Insist that the entity deposition stay within the topics provided

Conclusions

- Entity depositions are effective and efficient discovery tools when used for their intended purpose and the rules are followed
- An entity deposition is no substitute for the sworn testimony of the key actors
- Like most things in litigation, taking an entity deposition alone rarely wins you your case, but defending a bad entity deposition can lose you your case if you are not careful

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Q&A

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Locke Lord LLP

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Lack of Knowledge or Failure to Obtain It

- Georgia-Pacific Consumer Prods. v. Kimberly-Clark Corp., 749 F.Supp.2d 787 (N.D. Ill. 2010)
  - Court refused to exclude *in limine* evidence not disclosed in 30(b)(6) deposition testimony and refused to make a negative inference from the designee's lack of knowledge
  - "[I]ncomplete testimony in some areas does not overshadow the overall thoroughness and relevance of [the designee's] testimony."

Lack of Knowledge or Failure to Obtain It

- "I don't know"'s present a strategic choice. Do you:
  - Demand a second deposition and/or new designee?
    - You may not like the answer you get
  - Move to compel and for attorney fees for second deposition?
    - Probably will only get fees if party clearly flaunted rules
  - Move in limine?
    - Probably won't be successful unless you've tried other options first
  - Let the answer stand and only make a fuss if the party tries to introduce evidence at trial? – Often the Best Choice
    - If there was disclosure after the deposition but reasonably in advance of trial, you still may be out of luck
- In the end, you may get lucky, but entity depositions are usually best suited for discovery, not for generating "gotcha" moments
  - "I don't know"'s are more often than not just an annoyance to the party taking the deposition

Lack of Knowledge or Failure to Obtain It

- Practice Tips:
  - Do not assume an "I don't know" from a 30(b)(6) witness will preclude the party from presenting evidence in summary judgment or at trial
  - The objections of the party receiving notice will likely be broad enough to at least arguably cover your question
  - If issue is important enough, and you genuinely need an answer, move to compel the party to answer or present another designee on the topic, and seek attorney fees
  - Always find out what witness did to prepare; if facially inadequate, move to compel a second deposition with a new designee

Use of Testimony on Summary Judgment

- Affirmative Testimony / Admissions
  - Same rules on changing testimony to avoid summary judgment apply to entities just as to individual parties
    - See Rainey, Hayes, supra.
  - If earlier testimony is merely erroneous, incomplete, or ambiguous, court may be more lenient
    - See Lindquist, supra.

- Inability/Failure to Answer
  - Testimony that entity **has no information** might establish that there is no disputed issue of fact
  - But simple "I don't know" by the designee without procedural follow ups available under the rules may not be helpful

Use of Testimony at Trial – Parties

- FRCP 32(a)(3): "An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or **designee under Rule 30(b)(6)** or 31(a)(4)."
  - Testimony must be admissible to the same extent it would be if the witness were present and testifying. FRCP 32(a)(1)(B).
- Ill. R. 206, Ill.Evid.R. 801(d)(2): Any deposition of a party can be used against party at trial as an admission.
- Appropriate for judge or attorney to inform jury that testimony is that of a "corporate representative" of a

Use of Testimony at Trial – Nonparties

- Entity testimony often not based on firsthand knowledge and may be hearsay
  - See Sara Lee Corp. v. Kraft Foods, Inc., 2011 WL 3325802 (N.D. Ill. 2011) (Denlow):
    - "For instance, the Court doubts that a Rule 30(b)(6) witness should be allowed to testify about the details of a car accident in lieu of the corporation's truck driver who actually witnessed the event. If he could, Rule 30(b)(6) would severely undercut the requirement, fundamental to our adversary system, that fact witnesses have personal knowledge of the matters upon which they testify."
    - Third-party must be unavailable to play 30(b)(6) deposition to jury
- Ill.R.206: Only "evidence" depositions of third-parties may be used at trial and only if third-party is unavailable
- Possibility of hearsay-within-hearsay objections high if third-party's designee does not have personal knowledge

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PART II

RESPONDING ENTITIES

Duties of the Party Receiving Notice

- Party "**must** then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf"
- Party "**may** set out the matters on which each person designated will testify"
- Designee "**must** testify about information known or reasonably available to the organization"

Who Can Be Designated? ANYONE!

- FRCP 30(b)(6): "one or more officers, directors, or managing agents, or . . . **other persons** who consent to testify on its behalf"
- Ill. S. Ct. R. 206(a)(1): "one or more offices, directors, or managing agents, **or other persons** to testify on its behalf"
- But must have or obtain knowledge regarding matters on which testimony requested
  - *Smithkline Beecham Corp. v. Apo-tex Corp.,* No 98 C 3952, 2000 WL 116082, * 8 (N.D. Ill. Jan.24, 2000) (duty to designate "individual to testify on behalf of the corporation who ***has knowledge responsive to subjects requested*** in the Rule 30(b)(6) requests of its opponents")

Who Can Be Designated?

- Noticing party cannot require a specific witness
  - See, e.g., University of Kansas v. Sinks, 565 F.Supp.2d 1216 (D. Kan. 2008); *Booker v. Massachusetts Dept. of Public Health*, 246 F.R.D. 387 (D.Mass.2007)
  - But see Moore v. Pyrotech Corp., 137 F.R.D. 356 (D.Kan.1991). (noticing party who wants particular officer or director can name individual but cannot require testimony outside personal knowledge)
- No requirement to designate "person most knowledgeable"
  - No *firsthand* knowledge required, so long as witness appears at deposition prepared to provide entity's knowledge

Whom *Should* the Entity Designate?

- Pick a *good witness* who will help the case
  - Good testifier
  - Loyal representative who is willing to work hard
- The more on-point knowledge the witness has, the less investigation and education will be required
  - But, too much knowledge may be a disadvantage
    - Avoid *bad witnesses*, even if knowledgeable
    - If no good knowledgeable witnesses available, consider educating a representative
- Can designate witnesses to cover different topics
  - Serve notice under the applicable rule
  - Insist on limiting testimony to designated topics

Whom to Designate – Trial Considerations

- Designating a witness with significant personal knowledge outside designated topics exposes him or her to full range of questioning they might not be prepared for
- However, designating a witness with no personal knowledge or connection to case might rub the wrong way with the jury if testimony is played by other side
- Juries expect corporate officers to be well prepared, knowledgeable and direct
- Your 30(b)(6) designee(s) can't testify <u>for you</u> at trial unless they have <u>personal knowledge</u>

[VIDEO?]

Reasonable Inquiry Requirement

- Rules require designees to testify "about information known or reasonably available to the organization"
  - Lawyers must perform a reasonable investigation of information available to the entity, including from other witnesses, entity's records
  - Not sufficient to rely on one knowledgeable person
  - *See, e.g., LG Elecs. v. Whirlpool Corp.*, 2010 WL 3714992 (N.D. Ill. Sept. 14, 2010):
    - Duty "to perform a **reasonable inquiry** for information and prepare the selected deponent to adequately testify **not only on matters known by the deponent**, but also on subjects that the **entity should reasonably know**."

Teaching the Entity's Knowledge

Ways of Transmitting Information to Designee

- Document review
- Work-product memorandum / study outline
- Teaching sessions with attorneys
- Discussions with people with knowledge
- "Cheat Sheets"

Discoverability of Teaching Materials

- What can clearly be discovered:
  - Documents reviewed or relied upon
  - Rule of Evidence 612: “if a witness uses a writing to refresh memory for the purpose of testifying … an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.”
- Overall preparation strategy might be considered work product, but “did you have a chance to review document X?” is almost certainly permissible.
- Contents of discussions with others

Discoverability of Teaching Materials

What about privileged materials or communications? Suss v. MSX Intern. Engineering Services, Inc., 212 F.R.D. 159 (S.D.N.Y. 2002)

- To break privilege, party "must show not only that the witness reviewed the documents in preparation for his deposition, but that he relied upon them in testifying"
- "The mere fact that a deposition witness looked at a document protected by the attorney-client privilege in preparation for a deposition is an inadequate reason to conclude that the privilege was destroyed."

Witness Preparation

- Prepare 30(b)(6) witness to focus on documents or conversations, e.g. “According to document X, ...” or “Per my conversation with Person Y, …”
- Witness should think twice before giving an absolute answer, and never say “never.” “Not to my knowledge”, “Not that I’m aware”, etc. are preferable because knowledge and awareness can always change
- Aggressively object to questions which seek legal contentions or contentions as to an ultimate issue (e.g., “willful and wanton” misconduct)

Witness Preparation

- It can be awkward for a witness with no firsthand knowledge to testify under oath
  - Make sure witness understands duty under rules to provide *entity's* knowledge
  - Witness is attesting to <u>company's</u> knowledge of facts, not to his personal beliefs therein
  - Work out appropriate qualification phrase, e.g.:
    - "It is my understanding that …"
    - "XYZ Corp's information is that …"
- Rehearse entity's message on key points
- Prepare witness to stay within boundaries of topics

Witness Preparation

- To maximize preservation of all privileges:
  - As preparing / defending attorney, don't "teach" the witness the facts so that he's relying on you, but "guide" him to them so he can teach himself
- Attorney outlines and notes shared with the witness probably are not discoverable but don't take the risk if you don't have to
- If designee is already in "core group" for privilege purposes (e.g., management), line between deposition preparation and general litigation preparation will be much more blurry

Objections

- Delicate balance:
  - Corporate representatives who speculate can damage a case
  - Inability to answer may be embarrassing or even a basis for summary judgment
- Critical to protect entity with objections
  - Consider serving written objections to the vagueness, scope, etc. of the noticing party's list of topics
  - At the deposition, vigorously object to questions as outside topic (or beyond what topics provided fair notice of)
- Questions Outside the Noticed Topics
  - Technically not a basis for an instruction not to answer <u>but</u>
  - Objection necessary or else answer might be binding on entity
  - Typical: "Objection, outside the scope of the 30(b)(6) topics. The witness may answer in his personal capacity only, if he is able."

Combined Fact and Entity Depositions

- Noticing party may notice fact deposition of designee to follow or precede entity deposition
- Defending lawyer should keep the depositions separate:
  - Insist on separate transcripts and clean start and end of each deposition
  - Make clear record of what capacity witness is testifying
  - Prepare witness to understand the different depositions
  - Insist that the entity deposition stay within the topics provided

Conclusions

- Entity depositions are effective and efficient discovery tools when used for their intended purpose and the rules are followed
- An entity deposition is no substitute for the sworn testimony of the key actors
- Like most things in litigation, taking an entity deposition alone rarely wins you your case, but defending a bad entity deposition can lose you your case if you are not careful

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