Practical Considerations in Identifying and Preparing Your Rule 30(b)(6) Witnesses

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As you know, Rule 30(b)(6) of the Federal Rules of Civil Procedure and state counterparts allow a party to depose organizations, including corporations. The party requesting this type of deposition must describe with reasonable particularity the matters for examination. In turn, the organization must name a person or persons to testify on its behalf by designating a specific individual for each matter on which examination is requested. Importantly, the resulting testimony binds the organization and may be used by the discovering party for any purpose.

Because an organization (and its attorneys) must prepare witnesses to testify on topics that may encompass broad timeframes, complicated processes, and the knowledge of many current and former employees, the potential pitfalls in preparing witnesses to testify are plentiful. As such, one of the most important decisions an organization and its counsel must make is *who* to produce to testify on a designated topic.

Identifying the "Right" Witness

Although, in many instances, the deponent organization will try to determine who are the most knowledgeable persons regarding the categories listed in the 30(b)(6) notice, that should not be the only consideration. An organization has a broad range of options in designating witnesses for a Rule 30(b)(6) deposition. The designated witnesses need not have personal knowledge on the matters identified in the notice, nor be the persons in the organization with the most personal knowledge. Instead, the rule requires that the persons designated need testify only about information known or reasonably available to the *organization*. In reality, an organization can select anyone who consents to testify on its behalf, including officers, directors, managing agents, former employees, and even complete outsiders to the organization.

So, who should an organization designate as its witness? There is no one right answer. It depends upon the nature of your case and the designated topics to be covered. For instance, if the case involves multiple categories of highly technical knowledge, it is probably best to designate an individual who is most knowledgeable about those areas of inquiry, as it would be difficult to educate a lay witness in those areas. On the other hand, if the case involves facts that are fairly straightforward and can easily be learned, then you probably want to designate a witness who presents well and has experience being deposed. Consideration should be given to whether the potential witness is credible, articulate, inspires confidence, and uses positive body language. If you have multiple witness candidates, you should also keep in mind whether potential witnesses will be able to take time from their organizational roles to focus on preparation. As discussed below, an otherwise competent witness that is unprepared or that gives preparation short shrift could bear adversely on your case.

To the extent a designated witness lacks personal knowledge, he or she must be prepared in advance of the deposition on the institutional knowledge, documents, and other relevant information reasonably available to the organization that is adequately set forth in the deposition notice. Moreover, the preparation undertaken by the witness (and counsel) should be thorough because courts require it and opposing counsel can explore the steps taken by the witness to prepare for the deposition.

The preparation should include reviewing documents that are pertinent to a particular topic, communicating with past and present employees that may have specific knowledge of that topic, and reviewing prior testimony, admissions, discovery responses, and pleadings filed on behalf of the organization. Although a Rule 30(b)(6) deposition is not meant to be a "corporate memory test," an organization may be forced to address matters such as isolated historical documents and events that pre-date the knowledge of any corporate employees. While an organization may plead lack of institutional memory, courts have held that such a claim precludes the organization from offering any evidence at trial on that same subject matter.

Preparing for and defending a Rule 30(b)(6) deposition is one of the most important parts of any lawsuit. Two keys to successfully managing a 30(b)(6) deposition are witness selection and preparation. The heavy preparation burden placed on a deponent organization underscores the need to think through these issues in advance, and not on the eve of a deposition. A corporate litigant should designate a witness who is knowledgeable on the core subject matters, who can clearly articulate the organization's factual and legal positions, and can, with the assistance of counsel, quickly get up to speed on potential areas of inquiry about which they are not already informed.

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