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NEWSLETTERS

Rule 30(b)(6) Depositions: Who Speaks For The Company?

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When your company gets sued, the “discovery” process of exchanging evidence begins. One discovery method full of peril is the Rule 30(b)(6) deposition. Unlike a deposition of an individual, a Rule 30(b)(6) deposition is noticed to the company itself, and designates specific topics on which the company must be prepared to answer questions. Because the company must prepare a witness (or witnesses) to testify on these 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 many.

Among the most important decisions the company and its counsel must make is who to produce to testify on a designated topic. The choices are many--almost limitless under the rule--and usually, the company selects an employee who is most knowledgeable about the case and the topic on which testimony is sought.

You may want to rethink that choice.

Presumably, the party noticing a 30(b)(6) deposition has designated specific topics they want to explore, and feel that a prepared company representative is the fastest and/or least expensive way to obtain the information. This is a good bet when the company is large and written interrogatory answers don’t provide enough information about who knows what. But since the company is legally bound by the 30(b)(6) deponent’s testimony, it may be a good idea to select someone whose knowledge of case-relevant information is limited to his preparation for the 30(b)(6) topics on which he will testify.

Why does it matter? After all, the noticing party can only inquire about the topics designated in their 30(b)(6) notice, right? Unfortunately, this is most likely not true.

While some courts have held that the deposition notice establishes the outer boundaries of permissible topics for the 30(b)(6) examination, most courts have rejected this view, and interpret the requirement as defining a company’s minimum obligation regarding who it must produce for examination and what he or she must be able to answer. Under this broad, majority interpretation, once the minimum standard is met, the scope of the deposition is determined solely by relevance. In other words, as long as the opposing attorney’s question is “relevant” (a very loose requirement under the discovery rules), the 30(b)(6) deponent must answer, even if the question has nothing to do with the topics designated in the deposition notice.

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Although there are certainly situations when it is desirable to produce a 30(b)(6) deponent with the most extensive knowledge of the case, it is not necessary, nor always desirable to do so. A witness with knowledge, unprepared to testify on a particular issue, may easily fall prey to cunning questioning by an attorney employing surprise to obtain admissions from the company's designated witness. When faced with unexpected questions, anyone can become confused, incorrectly recall events or timeframes, or otherwise give faulty testimony.

Remember that the obligation is only to produce someone for examination who has been prepared to testify to the company's knowledge of the matters stated in the notice. Keeping in mind that the law (and Rule 30(b)(6) itself) may differ from one jurisdiction to another, in most cases, the deposing party is free to ask questions outside the scope of the noticed topics. So, if deposing counsel chooses to ask questions outside the notice, he or she bears the risk that the deponent will not know the answers. If the designated deponent doesn't know the answers to questions beyond the scope of the noticed topics, the problem is the noticing party's.

In summary, producing a witness with the minimum level of knowledge may be the best way to ensure that the company meets its obligation under the rules while minimizing the risk of inadvertent disclosure of confidential, irrelevant or sensitive information. Someone with limited or no knowledge apart from the noticed topics is less likely to testify to anything that could later haunt you. Your attorney should work through the strategy and options when helping your company select the right deponent under the circumstances presented by your case.

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