Depositions are a critical component of a successful plaintiff’s case. A failed deposition of the plaintiff can mean dismissal on summary judgment or, at the very least, a devastating cross-examination (or limitation of evidence) at trial. An inferior deposition of the defendant or other witnesses can also spell summary judgment or nasty surprises at trial.

Similarly, from the perspective of the defendant employer, the plaintiff’s deposition serves a number of critical functions in employment litigation. Whether it serves as a cornerstone of a summary judgment motion, or an essential evaluation of the merits of the case, preparing for and taking an effective deposition is an essential exercise for the management side attorney. Likewise, a strident defense of the company decision makers’ or witness’s deposition is necessary to preserve the company’s arguments for summary judgment or trial.

The plaintiff must be properly prepared so that s/he can fully tell her/his story in a compelling fashion while at the same time being ready to non-defensively address (and hopefully debunk) whatever shortcomings may exist in her/his case. Likewise, a defendant’s deposition must be prepared for taking into account: the need for missing information, the defendants’ side of the story, the prospect of having to defend a summary judgment motion and the importance of having cross-examination material for trial.

From the defense perspective, when deposing the plaintiff, counsel must exhaustively search for facts, witnesses and probative first-hand testimony that will either illuminate the controversy as one based on speculation and conjecture, or reveal evidence the plaintiff has that may require a re-evaluation of the defendant’s likelihood of ultimately prevailing on the merits. Defending depositions of company witnesses must balance the need to explain the defendants’ side of the story against the risk of revealing too much information that could result in a finding by the court that factual disputes preclude summary judgment.

Regardless of whom counsel represents, though, there is no substitute for preparation. Even though depositions take place during the discovery phase, counsel must know as much as there is to know about her/his case before depositions start. Insist that full document production has been made sufficiently in advance of all depositions so you can analyze the information and fully prepare. This will avoid surprises during the deposition of the plaintiff and holes in the

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1 These materials have been prepared for continuing legal education purposes and do not constitute legal advice. They should not be used in place of independent legal research.

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Depositions you take. If, during a deposition, it comes to light that some documents have not been produced, counsel must keep the deposition open/reserve the right to re-open the deposition upon production of the information.

Remember the time constraints on a deposition (7 hours in federal court) and use the time wisely. Extra time may not be granted later. If you think you will need more time, make a record early and often with clear examples of the basis for your request, e.g. the witness is giving long, rambling, non-responsive answers.

Likewise, the plaintiff, or the defense witnesses if the company is your client, must be fully prepared to answer thoroughly and get it right. The court may not allow incorrect or incomplete answers to be corrected or supplemented via affidavit when bringing or defending a summary judgment motion.

What follows is an overview of the purposes to which depositions can be used and some strategies for taking and defending depositions.

I. How Are Depositions Used?

• To lock in testimony
  • You can read to the jury the deposition testimony of any adverse party (including one who, when deposed, was the party’s officer, director, managing agent, or designee under Fed. R. Civ. Pro. 30(b)(6) or 31(a)(4)). Fed. R. Civ. Pro. 32(a)(1),(3), *but see* Fed. R. Civ. Pro. 32(a)(5) for limitations

• To discover evidence

• To limit evidence
  • Ask the witness: have you told me everything about X?
  • You can use a deposition to cross-examine and impeach the witness. Fed. R. Civ. Pro. 32(a)(2)

• To evaluate the witness based on his or her credibility and likely acceptance with a jury

• To demonstrate to an adversary the weakness of his/her case

• To preserve helpful testimony if the witness may not be around because s/he is sick or old, may be out of subpoena range at time of trial and/or is a non-party
  • You can take a deposition before normally permitted by Fed. R. Civ. Pro 26(d) (i.e. before the parties have met and conferred pursuant to Fed. R. Civ. Pro 26(f)), if you obtain leave of court due to an expectation that the deponent will leave the
United States and be unavailable for examination in this country after that time. Fed. R. Civ. Pro. 30(a)(2)(A)(iii)

- Assuming proper notice, you can read to the jury the deposition testimony of an unavailable nonparty witness, Fed. R. Civ. Pro. 32(a)(1),(4), but see Fed. R. Civ. Pro. 32(a)(5) for limitations

- Consider videotaping but proper notice must be given. Fed. R. Civ. Pro. 30(b)(3)(A)

- Summary Judgment

  - Anticipate the issues on which defendant might move for summary judgment and use depositions to establish questions of material fact

  - From the defense perspective, know in advance what facts must be established for a court to grant summary judgment and, whenever possible, use the plaintiff’s own deposition testimony to demonstrate the occurrence of events or lack of knowledge of key events.

II. How Do You Prepare To Take A Deposition?

- Review Fed R. Civ. Pro. 30, 32 (or state law equivalents) and the local rules of the jurisdiction where your case is filed and where you are taking the deposition

- Review all pleadings and documents that have been produced by you and the opposition

- Prepare a marked complaint so you know what the contended areas are and be prepared to fill in the holes

- Review all interrogatory answers so you can ask follow up questions

- Become familiar with all the legal standards you have to meet and plan how each witness can give you the information you need to achieve those goals

- Prepare an outline, which should be thorough, but don’t write out each question. You can write out the few tough ones to be sure you get them right

- In the outline, anticipate the deponent’s answers to your questions so that you are prepared to probe more deeply if the answer given at the deposition does not match the documents or interviews you conducted in advance

- Get organized: pull together all documents you wish to use and have necessary number of copies made to have one marked as an exhibit by the court reporter, give another to
opposing counsel and use another for your own reference. Organize the documents so you don’t fumble or interrupt the flow of your questioning

- Preparing to defend a deposition requires a similar amount of forethought and preparation. Prepare an outline of questions you anticipate being asked by the opposing side’s lawyer. Review with your witness any documents that you expect the witness will be shown during the deposition, including the answer to the complaint, responses to written discovery, personnel records and company policies. Prepare your witness for tough and repetitive questions on the contested issues.

III. Why You Are Taking this Deposition?

- Under Fed. R. Civ. P. 30(a)(1), any party or non-party’s deposition can be taken without leave of court, except as provided in Fed. R. Civ. P. 30(a)(2). A non-party can be compelled to attend by subpoena under Fed. R. Civ. P. 45

  - Think carefully about whose depositions you want to take. Don’t take them just because you are curious. They are expensive and you may be preserving testimony that harms your case

  - Note the limit of ten depositions per party. Fed. R. Civ. P. 30(a)(2)(A)(I), unless leave is granted by the court to take additional depositions

  - From the defense perspective, the plaintiff is often the only “party” you are able to depose. Carefully consider whether you need to depose other fact witnesses through a subpoena (if they are no longer employed by the company) or whether affidavits will suffice.

- Decide whether you want to notice the deposition of a particular individual or the entity

  - If the entity, be sure to “describe with reasonable particularity the matters for examination.” The named organization must then designate one or more persons to testify on its behalf and which topics each witness will testify on. Fed. R. Civ. P. 30(b)(6). See Section IX below.

- Can this witness help you prove any basic elements of your case?

  - Refer back to your marked complaint

    - Example: if the employer denies or denies knowledge or information sufficient to form a belief as to the number of employees and you are deposing the Human Resources Director, ask the witness how many employees the company has had for each of 20 weeks in the year the alleged violations took place and the preceding year. Note: this requires knowing the applicable legal standard
• Will this witness give you evidence you can use at trial or in bringing or defending a summary judgment motion?
  • If yes, ask questions as if you were putting on a direct examination. The examination should flow so you can read it to a jury
  • Use witnesses to lay foundations for documents you may want to introduce into evidence at trial
• Can this witness fill in the blanks?
  • Example: if you need to understand how the employer is structured, ask witnesses to help you create a table of organization if you don’t already have one.
  • Example: if you cannot read some medical or other records and you have the author or a person who is accustomed to reading the author’s handwriting, establish a foundation and then have the witness read the records into evidence
  • Example: if you cannot figure out the provenance of a document, mark it as an exhibit and ask each witness to identify it until you learn the missing information
• Is this person going to help support your claims, e.g. a fact witness?
  • If yes, try to meet in advance to prep (but be aware of potential ethical issues)
  • If not, consider how to ask questions that will help you learn information without harming yourself more than necessary

IV. What Should You Do When You Take A Deposition?
• Make sure you have given proper notice (“reasonable written notice to every other party”) under Fed. R. Civ. P. 30(b)(1)
  • Failure to object to defects in the notice promptly and in writing will waive objections. Fed. R. Civ. P. 32(d)(1)
  • Depositions to perpetuate testimony before an action is filed or pending appeal are governed by Fed. R. Civ. P. 27
  • If videotaping, be sure to specify that in the notice, Fed. R. Civ. P. 30(b)(3)(A), or in the cross-notice, Fed. R. Civ. P. 30(b)(3)(B)
If documents have not been produced, use a *subpoena duces tecum* in addition to the deposition notice. Fed. R. Civ. P. 30(b)(2)

Non-party depositions

- Remember to issue and serve a subpoena on the non-party witness, in accordance with Fed. R. Civ. P. 45. Failure to serve the subpoena on a non-party who consequently does not attend will expose you to reasonable expenses, including attorney’s fees, of any opposing party who attends. Fed. R. Civ. P. 30(g)(2)

- Be sure to give advance reasonable notice to the other parties. Defense counsel must be particularly careful regarding subpoenas of prior and subsequent employers of the plaintiff.

  - *E.g., Warnke v. CVS Corp.*, 265 F.R.D. 64, 2010 U.S. Dist. Lexis 16399 (E.D.N.Y. Feb. 24, 2010) (motion to quash *subpoenas duces tecum* on plaintiff’s three subsequent employers granted; relevance must be counterbalanced with annoyance, embarrassment and oppression under Fed. R. Civ. P. 26(c); defendant is not entitled to obtain information directly from plaintiff’s employers when it can be obtained from less intrusive means (such as from the plaintiff) where possible);

  - *Conrod v. Bank of New York*, 1998 U.S. Dist. LEXIS 11634 (S.D.N.Y. July 30, 1998 (denying defendant's motion for reconsideration of sanctions for serving Rule 45 subpoena on plaintiff's current employer; “[b]ecause of the direct negative effect that disclosures of disputes with past employers can have on present employment, subpoenas in this context, if warranted at all, should be used only as a last resort.”)

Make sure you have lined up a qualified court reporter and agreed on pricing

- There are many requirements for the proper transcription of a deposition transcript. *E.g.*, Fed. R. Civ. P. 28, 30(b)(5), 30(c)(1), 30(f)

- Objections to the qualifications of the court reporter are waived if not made before the deposition begins or promptly after the basis for disqualification becomes known or could have been known with reasonable diligence. Fed. R. Civ. P. 32(d)(2)

- The parties may stipulate, or the court may order on motion, that the deposition be taken remotely, whereupon the location is deemed to be the place where the deponent answers the questions. Fed. R. Civ. P. 30(b)(4)

Confirm the deposition the day before with your adversary, the court reporter and any non-party witness
• A party who attends in person or by counsel may recover reasonable expenses, including attorney’s fees if the noticing party fails to attend and proceed. Fed. R. Civ. P. 30(g)(1)

• Dress properly and take command

• Begin with an introduction
  • Introduce yourself and who you represent
  • Explain the process and the need to give verbal responses
  • Be sure to get the witness’ name and address on the record
  • Determine that the witness understands English and is competent, i.e., not on drugs/medications affecting memory, etc.
  • Instruct the witness to tell you if s/he doesn’t understand any of your questions
  • Explain that the court reporter will prepare a transcript
  • Tell the witness to advise you if s/he needs a break but that s/he will have to answer any pending questions before leaving the room

• Examination and cross-examination of a deponent must proceed as they would at trial, except Fed. R. Evid. 103 (objections and offers of proof, etc.) and 615 (exclusion of witnesses). Fed. R. Civ. P. 30(c)(1)
  • This rule must be read in conjunction with Fed. R. Civ. P. 26(b)(1), which permits discovery of relevant information not admissible at trial if it appears reasonably calculated to lead to the discovery of admissible evidence
  • Make sure your questions are crystal clear and have no ambiguities - otherwise the answers are useless. Sometimes ambiguous questions make witnesses unnecessarily testy
  • Check your verbal ticks – avoid the habitual use of “ok,” “thank you,” etc.
  • Spell words for the court reporter or give her/him a list of names at the break

• Listen, listen, listen.
• If opposing counsel raises a valid objection, rephrase the question or you will not be able to use the testimony at trial. If you are not sure, ask your adversary off the record about his or her concern

• If the deponent’s answer is not responsive, move to strike and try again

• If the witness tells you something you did not know, follow up with additional questions. If you are not sure exactly how to probe into uncharted territory and fear the revelation of unwelcome testimony, leave the topic, make a note to yourself, think about it during a break and return to the subject matter later in the deposition if you like

• *Don’t be a slave to your outline.* Follow the line of thought by listening to the witness’ answer and go where it takes you; then review your outline and check off areas you’ve covered so you don’t miss anything

• **Witnesses Who May Harm You**

  • If you are deposing defendant’s witnesses, be armed with documents to contradict the testimony. Prior testimony of others may suffice. As an alternative, use documents first so that the witness is afraid to give negative testimony in the first place

  • If you are defending a company witness who may be forced to reveal, if asked a proper and direct question, harmful testimony, you must be alert for questions that approach the topic and be prepared to object to questions that are not properly asked under the applicable rules of procedure

  • Try to set up a logical flow of your questions so that the witness ends up having to agree with you by the end

  • Try to use a witness’ expertise to your advantage - to teach you something or to support a point in your favor

  • Don’t plow into the tough questions right at the beginning; try to establish a rapport with the deponent so that, later in the deposition, he or she is more apt to be amenable to agreeing with the premise of your questions

  • If the witness is totally uncooperative, leave the topic and return to it later, bearing in mind the 7 hour rule. Fed. R. Civ. P. 30(d)(1)

  • Examine documents you fear might harm you and see if you can use the witness to minimize the damage
• If the witness says something bad for your case, press the witness on how he or she knows. This can demonstrate that the conclusion is hearsay or baseless, or lead to other witnesses. From the perspective of defending a deposition, you can use during witness preparation such an example of “opening the door” to extensive further questioning as a good way to train a witness not to volunteer unfounded information.

• Be sure that every witness has told you every detail, e.g. ask “have you now told me every reason you relied on in deciding to fire Jane Doe?”

• Different styles (e.g. friendly vs. cold) work better with different witnesses. Experiment with the witness to see what works best; remembering at all times the strategic decisions you made before the deposition in terms of the information you want to elicit from the witness.

• Witnesses who answer “I don’t remember”
  • Push the witness to commit to whether s/he means it could have occurred, but s/he doesn’t remember vs. to the best of her/his recollection, it did not happen
  • Ask if there is anything that would refresh her/his recollection
  • Ask the witness who s/he would ask if s/he wanted to know

• Watch the clock to make sure you can complete in 7 hours. Fed. R. Civ. P. 30(d)(1)

• Preserve your record so there is no confusion at trial or in motion practice
  • Make sure that any document created by the witness during the deposition (such as a chart or diagram), brought to the deposition in response to your subpoena, or shown to the witness by opposing counsel is marked by the court reporter
    • When you ask the court reporter to mark the document, do so on the record, describing the document, e.g. “I am asking the court reporter to mark as Plaintiff’s Exhibit 5, a three-page letter from John Doe to the EEOC, dated November 3, 2011 and bates paged D1025-1027.”
    • When you question the witness about the document, be specific, e.g. “Mr. Doe, I am showing you what was previously marked as Plaintiff’s Exhibit 5. Can you tell me what this is?” [Witness answers, “this is a letter from me to the EEOC.”] The attorney should then ask, “Directing your attention to page 3 of Plaintiff’s Exhibit 5, Bates page D1027, do you recognize that signature as yours?”
  • If the witness points or makes a gesture, make sure that you verbally describe on the record what the witness did, e.g. “Let the record reflect that the plaintiff
pointed to her left breast as she described James Harasser touching her,” or “Let the record reflect that the defendant used her hands to show a distance of approximately three feet.”

- At the end of the deposition, ask the witness if s/he has remembered anything else
- Always end with “I have no further questions at this time”

V. How Do You Prepare Your Client For Deposition?

- Plan to meet the day before; for management side attorneys, it is advisable to schedule the deposition preparation at least two days in advance of the actual deposition so you can react to new information or confirm areas of uncertainty in the witness’s memory
- Remind the client or witness that the most important instruction is to answer the questions honestly. Inform the witness that he or she will be asked to take an oath to tell the truth
- Explain all the above reasons for a deposition, so your client understands what’s at stake
- Explain that the client should answer the question fully but not volunteer
  - Example: Question: “When did your boss call you in to give you the performance review?” Answer: “It happened on June 4 and I know that because.....” [instruct your client to omit the explanation]
  - Exception: when it comes to pain and suffering, the client should be expansive
- Explain not to be argumentative and why
- Instruct your client to tell the truth! (There is no harm in communicating this point more than one time; it is the most basic instruction.) Counsel your witness not to exaggerate and not to minimize
- Explain that your client is being evaluated for what kind of impression s/he will make on the jury
- Decide whether your client should review any documents, photos, etc. to be prepared
- Explain the attorney-client privilege and not to violate it
- Tell the client to dress appropriately (especially if you are on notice that the deposition is going to be video taped)
• Tell the client if s/he remembers something else during the deposition, s/he should say so and add it

• Warn the client to try to avoid verbal ticks such as “to be honest,” “frankly,” “truth be told”

• Warn the client about standard questions such as swearing in, drugs, prior testimony, previous criminal history (if there is one you need to explore it and determine whether it’s admissible), how much time spent prepping and documents reviewed

• Tell the client to let the opposing attorney finish asking the question before beginning to answer

• Tell the client to take a breath before answering the question

• Avoid unnecessary adjectives and superlatives. I “never” or I “always” have a way of coming back to haunt the witness. There are usually exceptions to “never” and “always.”

• Tell the client to listen closely to the question. Even though you may be thinking along, do not anticipate the question – you do not win any prizes if you answer too early and give the response you thought the attorney was looking for.

• Tell the client to listen to objections and discussions between adversaries

• Tell the client s/he can take a break if s/he needs to

• Tell the client about redirect

• For the management-side witness, instruct them on the difference between “I don’t know” and “I don’t remember” (This seemingly minor distinction can be exceedingly important if the witness later testifies at trial.)

VI. What Should You Do During Your Client’s Deposition?

• Preserve your record
  • Objections must be noted on the record but the examination proceeds. “An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)[to terminate or limit the deposition].” Fed. R. Civ. P. 30(c)(2)
  • Objections to error or irregularity at a deposition are waived if related to the manner of taking the deposition, the form of a question or answer, the oath or
affirmation, a party’s conduct, or other matters that might have been corrected at the time and it is not timely made during the deposition. Fed. R. Civ. P. 32(d)(3)(B).

- But objections to a deponent’s competence or the competence, relevance or materiality or testimony are not waived by a failure to object, unless the ground for the objection might have been corrected at the time. Fed. R. Civ. P. 32(d)(3)(A)

- Refrain from combative or argumentative dialogue with opposing counsel. Neither judges nor juries reflect positively on the rants of counsel and it needlessly takes up lines and even pages of a transcript.

- How Do You Deal With Nasty Adversaries?

  - Put it on the record. Non-verbal interruptions or actions by counsel have to be noted verbally or they will not be captured in the transcript. See, however, the point above about avoiding combative or argumentative dialogue that neither clarifies an objection nor moves the deposition forward.

  - Consider videotaping next time but be sure to give proper notice under Fed. R. Civ. P. 30(b)(3)(A)

  - Use objections with precision and purpose, e.g., “asked and answered,” “assumes facts not of record,” “badgering the witness,” “what could the possible relevance be?” Warn your adversary about the time limit

  - Call the judge or magistrate judge (if in federal court and the judge’s rules permit – occasionally state court). This can chasten your adversary, but be sure you’re likely to win

  - Can disband the deposition, but better have good cause (deposition is “being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.”). The deposition may be suspended for the time necessary to obtain an order terminating or limiting the deposition. Fed. R. Civ. P. 30(d)(3). Attorneys have been sanctioned for abusive deposition behavior. Fed. R. Civ. P. 30(d)(2)

  - Stay focused

  - Avoid the temptation to check your blackberry

  - If you see your client getting tired, take a break
• Counsel your witness that if he or she is distracted even for a moment by an outside thought to request the question be re-stated or even request to take a short break

• Watch the clock to make sure the deposition won’t go over 7 hours. Fed. R. Civ. P. 30(d)(1)

• If some answers need clarification, consider doing a redirect

• Be sure to demand on the record that your adversary serve you with a copy of the transcript and explicitly reserve your right to review and correct the transcript. Fed R. Civ. P. 30(e)

VII. What Do You Do After the Deposition?

• Proofread the transcript of your client’s deposition and review it with your client for corrections, if any
  • Objections to how the court reporter transcribed, prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition are waived unless a motion to suppress is promptly made. Fed. R. Civ. P. 32(d)(4)

• If you took the deposition, serve the transcript on your adversary and give him/her notice that you will use it at trial

• Fed R. Civ. P. 30(e) provides that the deponent or a party must request the opportunity before the completion of the deposition to be allowed 30 days after the completion of the transcript to review and submit signed changes, which must be attached to the officer’s certificate

• If you defended the deposition, follow up with your adversary to make sure you get the transcript as soon as possible. It may help you prepare for future depositions and/or discovery demands

• Get an electronic copy in searchable format so you can easily use it for motion practice and trial

• Many courts prefer the four-panel per page deposition transcript, so ask the court reporter to provide a version that enables you to print the transcript with this feature

• Prepare a digest of the key facts so you will be ready for summary judgment and/or trial

• If you file the deposition in court, you must give prompt notice to the remaining parties. Fed. R. Civ. P. 30(f)(4)
VIII. Taking Expert Depositions

- Review Fed. R. Civ. P. 26 for details on disclosures and expert reports
- Consider the purpose of the expert deposition:
  - To pin the expert down.
    - Take an expert’s deposition to figure out every opinion the expert could have in your case. Bearing in mind that Rule 26 doesn’t require complete disclosure of every opinion an expert has, you want to close the loop with the expert.
    - “I asked every question I could think of, do you have any other opinions you might give in this case?”
  - To exclude the expert.
    - Begin by understanding Daubert in your jurisdiction so that you can ask the necessary questions to get the testimony needed to meet the standards for expert exclusion.
    - No saving your best questions for trial – want to explore all of the details of the methodology in the deposition, not before the jury
      - Informational examination, not just a discovery deposition
      - Want to explore the inconsistencies completely in order to support your Daubert motion
  - Consider that if the expert is not excluded, at trial the jury is not going question his or her authority or knowledge. At that point you will have wanted to have explored the expert’s knowledge of the facts of the case and his or her employment in order to show at trial how the expert misunderstood the facts of the case and/or is biased.
    - Asking questions to show bias by the expert:
      - How many times has the expert worked for this client/lawyer?
      - How much of the expert’s income is expert fees?
      - Does the expert ever testify for the other side?
      - Has the expert ever been excluded from a case (not all cases are reported)?
      - Are the expert’s fees contingent in any respects?
• Ask the expert how the report was drafted
  • Did the lawyers have input?
  • Was it actually drafted by the expert or by his or her assistant?
• Explore how the expert responds to your expert’s opinions and methodology

• Preparation is critical and extensive – Research the expert’s publications and his or her other expert reports – if they were filed in a case, get them; if they weren’t, call the other lawyers in the case to get the report and deposition transcript.
• Bring your expert to the other expert’s deposition
• When the tables are turned, and you are defending an Expert’s deposition, here are a few key tips to keep in mind:
  • Warn your expert about all the above.
  • Practice some deposition questions to get her/him comfortable with the process, especially if s/he hasn’t testified before or recently.
  • Ask the expert to review his/her report and all the other information s/he reviewed in writing the report so s/he is fully ready to answer questions.

IX. Depositions Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure

There’s nothing “fundamental” about a Rule 30(b)(6) deposition. On the contrary, it’s the most complex discovery device authorized by the federal rules. Forty-two years after the relevant rule became effective, the parties’ rights and obligations under Rule 30(b)(6) remain unsettled and a source of frequent dispute. Even experienced lawyers should approach these depositions carefully.

The following is a short introduction to some of the issues you should consider before taking or defending a Rule 30(b)(6) deposition.

• Rule 30(b)(6) Deposition Basics
  • Fed. R. Civ. P. 30(b)(6) allows a party to take the deposition of a corporation, partnership, association, government agency or similar entity
  • The party noticing the deposition must “describe with reasonable particularity the matters for examination”
• The entity receiving a deposition notice must “designate one or more officers, directors or managing agents or other persons who consent to testify on its behalf …”

• “The persons designated must testify about information known or reasonably available to the organization”

• Pros of using Rule 30(b)(6) Depositions
  
  • Relieves the party seeking discovery of the responsibility for determining who at an organization can provide information about particular topics
  
  • Can force an adversary to focus on specific key factual issues
  
  • Combines the subject matter focus of an interrogatory with the opportunity to explore and challenge an answer of a deposition
  
  • Might take the place of depositions of multiple witnesses
  
  • Sometimes might cause corporation to bring to the jurisdiction for deposition an employee who might otherwise have to be subpoenaed and deposed elsewhere

• Cons of using Rule 30(b)(6) Depositions
  
  • Issues relating to a Rule 30(b)(6) deposition can often absorb time and money far out of proportion to the impact of the issues on the outcome of the case.
  
  • Organization has no duty to designate any particular person or persons as its witness(es) and no duty to designate the “person most knowledgeable”
  
  • Often easier to identify knowledgeable witnesses through initial disclosures, interrogatories or review of documents and then depose the knowledgeable individuals in their individual capacities under the normal depositions rules
  
  • Unclear whether testimony at a Rule 30(b)(6) deposition is in any way more binding on a corporation than testimony of a knowledgeable managerial employee at a regular deposition
  
  • Unclear whether testimony at a Rule 30(b)(6) deposition is truly more useful than testimony of a knowledgeable managerial employee at a regular deposition
• Areas in which disagreements sometimes arise
  • Whether the topics for examination are described with enough specificity
  • Whether the topics for examination are within the scope of discovery
  • The extent of an organization’s obligation to obtain information about specific topics for examination
  • Whether the organization fulfilled its obligation to prepare the deponent to testify on the topics identified in the notice
  • Whether particular questions during the deposition are within the topics for examination described in the notice
  • Whether the 30(b)(6) witness can be deposed again in his or her personal capacity
  • How to factor 30(b)(6) depositions of one or more witnesses into limits on the number and duration of depositions

• Considerations in taking a Rule 30(b)(6) deposition
  • If you represent the party with fewer resources to spend on litigation, consider alternatives that might allow you to get the information you need with less risk of spending time and money in procedural disputes
  • Draft the topics of examination with care. The rules do not limit how many topics you can list in the deposition notice, but if your notice is unreasonable, a court may block or narrow the deposition or require you to use interrogatories instead
  • Don’t identify a specific individual in the notice of deposition. The Rules don’t permit the noticing party to determine who the deponent will be and the opposing party is sure to object
  • Communicate with opposing counsel regarding the scope of the deposition and who the witness or witnesses will be
  • Consider and discuss with opposing counsel whether to have one combined deposition that is both a Rule 30(b)(6) deposition and a deposition of the witness in his or her individual capacity
  • Either ask the witness all the questions you have of him or her or obtain opposing counsel’s agreement that the witness may be deposed again in his or her
individual capacity regarding questions outside the scope of the Rule 30(b)(6) notice

- If the witness doesn’t know the answers to questions within the scope of the topics listed in the deposition notice, consider asking him or her about the extent of his or her preparation for the deposition, and seek additional testimony on another day

- Considerations in defending a Rule 30(b)(6) deposition
  - Learn the case inside and out
  - Get a handle on the facts and documents as quickly as possible
  - Don’t defend a Rule 30(b)(6) deposition until you have a full understanding of the facts and documents
  - Resolve scope issues
  - Communicate with opposing counsel early and often about any objections to or questions about the topics of examination described in the notice of deposition
  - Seek judicial relief in advance, if you need it – Rule 26(b) applies to Rule 30(b)(6) depositions and courts have broad discretion to limit the deposition or the topics of examination or even to require use of a different method of discovery instead of a Rule 30(b)(6) deposition, to the extent appropriate in a particular case
  - Designate a witness or witnesses and choose the witness(es) based on who will be the most effective witness, not who at the client is least busy or too low on the totem pole to balk at testifying
  - Consider whether to have one combined deposition that is both a Rule 30(b)(6) deposition and a deposition of the witness in his or her individual capacity
  - Prepare the witness
    - Ordinary deposition preparation is insufficient
    - The witness must be prepared to provide not only personal knowledge but any information known or reasonably available to the corporation
    - The witness must have a complete understanding of the corporation’s position on all topics described in the notice, as well as the same level of familiarity
• Seek more time to prepare if you need it

• Do not count on instructing the witness not to answer during the deposition except to protect a privilege. Courts are divided about whether it is appropriate for counsel to instruct a Rule 30(b)(6) witness not to answer a question outside the scope of the topics listed in the deposition notice. Therefore, unless there is favorable controlling case law on point in your jurisdiction, it’s risky to instruct a witness not to answer based on scope.

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