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A Solution To Complex Problems In 30(b)(6) Depositions

Law360, New York (July 18, 2012, 1:49 PM ET) -- "Corporate designee" depositions can be one of the most potent discovery tools available to a party in a lawsuit. For corporate parties, for the same reasons, such depositions can be fraught with peril. Although there is ample authority suggesting that these depositions are unavoidable and inevitable in any litigation, corporate defense attorneys should not take such conclusions for granted.

Despite their utility, Rule 30(b)(6) depositions present a number of challenging issues. These issues include concerns as to whom and how many people to designate as the corporate representative(s), what steps must be taken to adequately prepare the witness(es), how to protect information subject to the attorney-client privilege and/or work product doctrine, and how to manage the significant costs to be incurred in preparing the witness(es).

Because the deposition responses are binding on the corporation, the corporation's claims or defenses often hang on the common vulnerabilities of any individual witnesses. Although these issues are at the forefront of traditional Rule 30(b)(6) analyses, an equally important — and often overlooked — elementary issue exists: Are the circumstances of a given case even appropriate to allow the deposing party to employ the Rule 30(b)(6) discovery mechanism?

The Problem

You represent a company in a piece of complex litigation involving multiple legal issues and thousands of documents. During the course of the litigation, you receive a Rule 30(b)(6) deposition notice setting forth over 100 broad areas of examination.

However, for any one of a number of reasons, such as the passage of time since the underlying events took place or the multiple corporate acquisitions and divestitures that have occurred over the years, your client is unaware of any individual with personal knowledge of the events in the case. Still, your client is required to testify knowledgeably as to the perceived wealth of "corporate knowledge" relating to the events that are the subject of the litigation.

In order to satisfy its Rule 30(b)(6) obligations, the corporation must somehow ascertain the knowledge necessary to respond to the topics for examination and teach that knowledge to a corporate designee. While gathering the "corporate knowledge" is frequently a challenging chore in its own right, it is equally burdensome to prepare one or more individuals to be able to adequately testify as to matters known or that could reasonably become known to the company.

In addition to the substantial expenditures of time and resources associated with preparing the corporate designee, the company becomes legally bound by the testimony given by the corporate representative. What's more, the testimony provided by the representative often amounts to merely that which he or she can recall from his or her countless hours of classroom-like preparation for the deposition.

In effect, the deposition becomes no more than a memory test, and, in many cases, a memory test that no person(s) could reasonably be expected to pass given the thousands of documents to be processed in preparing to testify as to the wide spectrum of complicated topics that are noticed. As a result, the testimony given frequently will not accurately reflect the "company's knowledge," as is intended by Rule 30(b)(6), yet will be binding upon the company.

Under such circumstances, notions of fairness dictate that a company should not be required to produce a witness and become bound by testimony provided by an individual (or individuals) who simply cannot possibly digest the expansive amounts of information at issue in the action in a manner that allows the individual(s) to adequately serve as the company's binding mouthpiece.

Where such circumstances exist, the federal rules and federal case law will support a company's position that the information to be communicated during a Rule 30(b)(6) deposition can be discovered just as effectively and more efficiently through written discovery.

Corporate counsel should therefore be mindful of the opportunity to save their clients the significant time, expense, burden and risk of submitting to a Rule 30(b)(6) deposition where the circumstances support the utilization of more reasonable methods of discovery.

Pertinent Considerations Regarding Discovery Under the Federal Rules

In evaluating the appropriateness of a Rule 30(b)(6) deposition in a given case, it is important to consider the underlying purpose of discovery under the federal rules. Generally, that purpose is "to provide a mechanism for making relevant information available to litigants." Kinetic Concepts Inc. v. Convatec Inc., 268 F.R.D. 255, 257 (M.D.N.C. 2010) (citing FED. R. CIV. P. 26 Advisory Committee's Notes, 1983 Amendment)).

The advisory committee has recognized that "the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons[,] rather than to expose the facts and illuminate the issues[,] by overuse of discovery ... " See FED. R. CIV. P. 26 Advisory Committee's Notes, 1983 Amendment.

Further, the advisory committee has also recognized that "[e]xcessive discovery ... pose[s] significant problems." Id. Indeed, as the committee notes suggest, the discovery methods available to parties should be used judiciously and in a manner that does not unnecessarily burden opposing parties. Id.

Perhaps in view of these considerations, Rule 26(b)(2)(C) requires a federal court, on motion or on its own, to "limit the frequency or extent of discovery ... if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome or less expensive ..." FED. R. CIV. P. 26(b)(2)(C)(i).

The provisions of this subsection are mandatory, not permissive, and can and should be relied upon where opposing parties proceed with discovery in a manner inconsistent with these provisions.

Moreover, the rules are designed to "secure the just, speedy and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1. These considerations are critically important in evaluating the appropriateness of a Rule 30(b)(6) deposition in a given case.

Judicial Concern for Excessive Costs and Burdens and Unrealistic Expectations of Corporate Representatives Lead Courts to Favor Alternative Discovery Mechanisms in Some Circumstances

Although the federal rules expressly provide for depositions of corporate representatives, this discovery tool, like all others provided for by the federal rules, is subject to the requirements of Rule 26.

Indeed, courts have recognized circumstances under which a Rule 30(b)(6) deposition is not the appropriate discovery mechanism for acquiring the desired information and have therefore denied motions to compel — or granted motions for protective orders against — Rule 30(b)(6) depositions in favor of other forms of discovery.

See, e.g., McCormick-Morgan Inc. v. Teledyne Indus. Inc., 134 F.R.D. 275, 286 (N.D.Cal. 1991), overruled on other grounds by, 765 F. Supp. 611 (N.D.Cal. 1991) (assessing whether contention interrogatories or a Rule 30(b)(6) deposition "would yield most reliably and in the most cost-effective, least burdensome manner information that is sufficiently complete to meet the needs of the parties and the court in a case like this").

See also SmithKline Beecham Corp. v. Apotex Corp., et al., No. 99-CV-4304, (concluding that determination as to whether contention interrogatories are more appropriate than Rule 30(b)(6) depositions will be made on a case-by-case basis, and will be guided by concerns for minimizing costs and burdens) (internal quotations and citations omitted); Exxon Research & Engineering Co. v. United States, 44 Fed. Cl. 597, 601 (Fed. Cl. 1999) (holding that under the circumstances contention interrogatories were more appropriate than Rule 30(b)(6) depositions); United States v. Taylor, 166 F.R.D. 356, 363 n.7 (M.D.N.C. 1996) (recognizing that "[s]ome inquiries are better answered through contention interrogatories wherein the client can have the assistance of the attorney in answering complicated questions involving legal issues"); Lance Inc. v. Ginsburg, 32 F.R.D. 51 (E.D.Pa. 1962) (requiring contention interrogatories on the question of whether a trademark was valid).

As gleaned from these cases, courts have most notably found Rule 30(b)(6) depositions inappropriate where the information sought to be discovered through the deposition could just as easily be obtained through a set of well-crafted contention interrogatories.

These courts have expressed multiple areas of concern with regard to requiring a company to submit to a Rule 30(b)(6) deposition. One such concern is that "no one human being can be expected to set forth, especially orally in deposition, a fully reliable and sufficiently complete account of all the bases for the contentions made and positions taken by a party" in circumstances involving complex facts and numerous legal issues. McCormick-Morgan Inc., 134 F.R.D. at 286.

See also Exxon Research & Eng'g Co., 44 Fed. Cl. at 602 (citing Protective Nat. Ins. Co. v. Commonwealth Ins., 137 F.R.D. 267 (D.Neb. 1989) for the proposition that a Rule 30(b)(6) deposition may not be appropriate when the topic is very complex).

This concern apparently derives, at least in part, from the fact that a corporate representative cannot be expected to digest and regurgitate the volume of information necessary to satisfy the company's Rule 30(b)(6) obligation in complex litigation.

See, e.g., Camp v. Correctional Med. Servs., No. 2:08cv227, ("The court is doubtful a single corporate representative could provide to the plaintiffs the information they seek. Accordingly, ... plaintiffs' motion to compel will be denied and the defendants' motion for a protective order will be granted.").

Additionally, courts have also expressed concerns that requiring Rule 30(b)(6) depositions will impose greater costs and burdens upon corporate litigants than would written discovery that is equally capable of eliciting the desired information.

See, e.g., Exxon Research & Eng'g Co., 44 Fed. Cl. at 601 (stating that "contention interrogatories should be a less expensive method and are a less invasive method of letting the United States learn the required information"); McCormick-Morgan Inc., 134 F.R.D. at 286-88 (denying a Rule 30(b)(6) deposition where contention interrogatories were more cost-effective and less burdensome).

But see Jennifer A. v. United Healthcare Ins. Co., No. CV 11-1813, (allowing Rule 30(b)(6) deposition where "[t]here is no evidence in the record that a Rule 30(b)(6) deposition would be unduly burdensome").

This concern reflects the courts' application of Rule 26 and the committee notes discussed above insofar as it recognizes the need for litigants to refrain from engaging in discovery injudiciously and in a way that unnecessarily burdens opposing parties.

The Better Approach: Requiring the Use of Written Discovery as the More Practical and Less Burdensome Discovery Tool Where the Company Does Not Already "Know" the Information Requested

Both the federal rules and above-cited cases recognize the need to manage discovery in a way that minimizes inconvenience, burdens and expenses imposed upon party litigants.

With regard to corporate parties, one such way to do so is by limiting the use of Rule 30(b)(6) depositions to those situations where such depositions are truly useful and unavoidable. Indeed, Rule 26 mandates that such limitations be imposed where appropriate.

In the case of complex litigation involving circumstances like those described in Section II, supra, considerations of convenience, burdens, and expenses favor the utilization of written discovery over Rule 30(b)(6) depositions.

Under these circumstances, where there is simply too much information for a corporate representative to sufficiently learn, the deposition will often reflect nothing more than the representative's ability to retain information communicated to him or her during an intensive preparation period.

Of course, the representative will only retain some of the information, and will be unable to testify as to certain topics for which he or she cannot recall the information learned during preparation. Thus, the company will be presumed to know whatever that individual recalled, and will be presumed to not know whatever that individual could not recall.

The better approach under such circumstances is to require the party seeking the deposition to submit written discovery — whether interrogatories or requests for admission — that seek the same information and do not rely on an individual to learn and regurgitate the company's response.

Instead, the company, which itself will have only recently ascertained what the company "knows," will have the benefit of reviewing all information available to it in responding to the discovery requests, and will be more equipped to provide useful discovery responses.

Equally important, the company will not be required to suffer through the burdensome task of discovering the corporate "knowledge" and then preparing an individual to verbally supply this knowledge to the opposing party.

Ultimately, requiring the use of written discovery will reduce the costs and burdens of discovery, promote more accurate discovery responses and rectify the incongruity of requiring the company to designate an individual who cannot fairly be expected to fully and accurately articulate the company's response to countless and complicated topics for examination.

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