The "Death Star" Deposition

by Courtney A. Berlin

The most neglected key witness may be the corporate representative, despite that deposition being one of the most powerful tools available to trial lawyers. When effectively utilized alongside the records deposition of the corporation, this strategy has been called the "Death Star deposition." If the stars align, the corporation will take the stand, divulge information, and either admit that it does or does not have evidence or knowledge to support its counts in the complaint or its defenses.

The deposition is noticed and taken pursuant to Federal Rule of Civil Procedure 30(b)(6). The rule has two basic requirements. First, the deposing party must craft a notice of deposition that identifies the areas of inquiry with "reasonable particularity."[1] Second, once the organization receives the notice, it is obligated to prepare the corporate representative(s) to ensure that he or she can testify about information known or reasonably available to the corporation.

Rule 30(b)(6)'s Unique Components

Unlike a deposition notice for a party witness pursuant to Rule 30(b)(1), a Rule 30(b)(6) notice requires a description with reasonable particularity of the topics to be explored. The notice must provide details about the matters under examination so that the organization can identify the individual(s) whose presence is necessary to offer a comprehensive response.

It is important to remember that a 30(b)(6) deposition is not an individual deposition, meaning, it is not based on individual knowledge. Unlike an individual deposition, the noticing or subpoenaing party does not decide who appears for the deposition. Rather, the party served with the notice or subpoena must designate one or more representatives to testify. In instances where a corporation assigns multiple representatives to testify on the subjects outlined in a Rule 30(b)(6) notice, the depositions of all designees are considered a single deposition regardless of the number of topics covered. As the Advisory Committee on Civil Rules of the U.S. Courts explained, Rule 30(b)(6) has three purposes: (1) to reduce the difficulty a deposing lawyer encounters in determining, before the deposition, whether a particular employee or agent is a "managing agent;" (2) to curb the practice of "bandying," where an entity's officers or managing agents are deposed in turn, but each denies knowledge of facts that are clearly known to people in the organization; and (3) to assist entities that find an unnecessarily large number of their officers and agents being deposed by a party uncertain of who in the organization has the relevant knowledge.[2]

The designated corporate representative is not required to possess the most knowledge about the specified matters. The designee need only be capable of providing binding responses on behalf of the corporation that embody the corporation's collective knowledge.[3] To fulfill this role, the designated individual may need to review past depositions, exhibits, corporate records, financial records, design records, sales records, employee files, etc. The designee may also have to consult individuals within the organization, including former directors, officers, and employees, to gain sufficient understanding of the topics for which they are designated to testify. Additionally, the designee is not limited to presenting facts; they can be questioned regarding the corporation's opinions and beliefs. In essence, the designee does not speak *about* the organization but *for* it. Like any other deposition testimony, the testimony given at a Rule 30(b)(6) deposition is evidence which can be contradicted and used for impeachment purposes.[4]

While there is no mandate for extreme specificity or a comprehensive list of questions, the reasonable particularity standard is "not toothless."[5] Courts interpret what constitutes "reasonable particularity" in the context of the case at issue. The matters must be relevant and structured to address questions related to the claims. Broad or generic notices are deemed insufficient. The following are examples of inquiries that district courts have held to be overbroad: (1) "the areas of inquiry will include but not limited to the areas specifically enumerated[6]" and (2) "to examine such officers and employees of said plaintiff as have knowledge of the matters involved in this action."[7] The *Reed* court explained that adding a provision stating that "the areas of inquiry will 'includ[e], but not [be] limited to' the areas specifically enumerated," subjects the noticed party to an impossible task.[8] The court, citing the first example, *Marker v. Union*, noted that the corporate defendant "cannot identify the outer limits of the areas of inquiry noticed" therefore, the notice was not feasible.[9]

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The second example was deemed too general and improper under Rule 30 due to a lack of proper designation or description of the persons sought to have knowledge of the facts at issue.[10]

In other words, if the deposition notice is drafted too broadly, the deponent may object that the topics are not identified with reasonable particularity. If drafted too narrowly, the deponent may object that a question falls outside the noticed scope. Nevertheless, the obligation to prepare the corporate representative remains even where extensive corporate records need to be reviewed. Asserting the argument that it would be too burdensome to prepare the witness generally lacks merit if the subject matters of inquiry are otherwise relevant.

Sanctions for Failure to Comply

In response to a Rule 30(b)(6) notice, corporations or their legal representatives might be inclined to designate a witness who lacks significant knowledge or proves to be unhelpful. However, if the court determines that the witness was inadequately prepared, uncooperative, or otherwise unwilling or unable to furnish essential factual details on the specified matters, the corporation may face sanctions.[11] Such sanctions are equivalent to a failure to appear.[12]

The noticing party also has the option to move for Rule 37 sanctions by filing a motion to compel.[13] Rule 37(d) "provides for a variety of sanctions for a party's failure to comply with its Rule 30(b)(6) obligations, ranging from the imposition of costs to preclusion of testimony and even entry of default."[14] This provides the noticing party an opportunity to seek reimbursement for expenses incurred in taking the deposition, including attorney fees.[15]

For example, in *Hunter v. WirelessPCS Chicago LLC*, the plaintiffs moved to compel the defendants to appear for further Rule 30(b)(6) depositions and for sanctions including barring certain evidence and assessing fees and costs against the defendants for their failure to produce knowledgeable corporate deponents.[16] The plaintiffs identified seven topics as to which they asserted the deponents' designees were unprepared to testify. Further exacerbating the situation, one of the deponents testified that he had not reviewed any document or otherwise taken any action to prepare for the deposition, and indeed that he had only been informed of the deposition the day before it took place.[17] Contrary to the defendants' assertion that the deponents were adequately prepared, the court noted that it was highly suspect that a corporate witness could have been properly prepared to testify on numerous topics when he was notified the day before a deposition.[18] The court went on to state that plaintiffs were entitled to the reasonable expenses incurred in attending and taking the defendants' further Rule 30(b)(6) depositions on the seven aforementioned topics,

including attorneys' fees and the costs of transcription.[19] In addition, pursuant to Rule 37(a)(5), the defendants were directed to pay plaintiffs' expenses in bringing their motion to compel.[20]

It is important to remember that the noticing party must meet and confer with opposing counsel prior to filing a motion to compel, pursuant to the Northern District of Illinois Local Rules.[21] Though, in cases of non-appearance, sanctions can be enforced under Rule 37(d)(1) without a court order.[22]

Strategic Use of Rule 30(b)(6) Depositions

For a plaintiff facing a large corporate defendant and aiming to obtain information across various departments under diverse management, Rule 30(b)(6) offers an opportunity to streamline the discovery process. Early in a legal proceeding, a Rule 30(b)(6) deposition serves as a valuable tool for a plaintiff to identify relevant witnesses and documents. Specifically, a party may use a "Death Star" deposition under Rule 30(b)(6) to identify all relevant fact witnesses and document custodians, and then take individual depositions of those persons under Rule 30(b)(1). The fact that a person is designated to testify as a corporate representative does not preclude that person's individual deposition as well.

For example, in a slip and fall case, a Rule 30(b)(6) deposition can clarify the accuracy of the plaintiff's account, determine premises ownership, and reveal the origin of the spill or other hazardous conditions. In automobile cases involving a corporate defendant, a Rule 30(b)(6) deposition can bring clarity to matters such as the driver's identity, the trucking company's training policies and programs, and other relevant issues. This too can lead to individual party witness depositions under Rule 30(b)(1).

In medical malpractice cases, a party may use the "Document" 30(b)(6) Death Star deposition to secure a hospital representative's testimony as to its corporate structure. This proves especially beneficial in identifying the entities responsible for employing the individuals who may have deviated from the standard of care. Asking about the hospital's policies and how they are understood, examining similar post incidents, and understanding contract terms can provide insights into the organization's structure. This approach is particularly advantageous to plaintiffs' lawyers when dealing with hospitals and agency-related issues.

The "Document" 30(b)(6) Death Star deposition may also be used to establish the authenticity of documents provided. Its utility is pronounced when dealing with non-parties, given the inability to send them interrogatories. Additionally, it proves valuable when seeking corporate electronically stored information (ESI). The 30(b)(6) deposition allows for the identification of searched repositories and employed search terms, acting as a

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landscape to comprehend the storage of specific ESI, their archival duration, and server locations. Armed with this information, one can subsequently present a compelling case to the court, advocating for the accessibility of such information.

Conversely, attorneys may strategically schedule organization depositions towards the end of the discovery process to fill evidentiary gaps, secure testimony that was previously elusive, and, on occasion, make an additional attempt at favorable designees who were previously deposed. Regardless of the strategic use, depositions under Fed. R. Civ. P 30(b)(6) or its many state law equivalents allow trial lawyers to depose a witness, whose testimony can bind the opposing entity, and who must be fully prepared to address plaintiff-specified topics.

Conclusion

From automobile to medical malpractice cases, the corporate representative deposition is one of the most powerful tools available to plaintiffs' lawyers. The stakes are elevated for corporate deponents as the testimony from their representatives is legally binding. Consequently, when utilizing the corporate representative deposition, plaintiffs' lawyers must be exceptionally well-prepared.

Counsel should anticipate objections to the scope of the notice, no matter how well-drafted. However, by including the proper mix of broad and narrow categories, the plaintiff's trial lawyer can avoid a defense argument that a deposition question exceeds the notice's scope. Furthermore, plaintiff's counsel should equip him/herself with an outline of questions and the proper follow-up inquiries which, within the dictates of Rule 30(b)(6), can lock the deponent-entity into admissions.

Given the formidable nature of what is often termed the "Death Star" deposition, the deponent's counsel will capitalize on any procedural misstep by the plaintiff's attorney. Nevertheless, when conducted meticulously and precisely, the testimony acquired in a Rule 30(b)(6) deposition can significantly benefit the plaintiff's trial lawyer.

Endnotes

[1] Fed. R. Civ. P. 30(b)(6).

[2] Fed. R. Civ. P. 30(b)(6) advisory comm. n. to 1970 amendments.

[3] See generally *Chicago Reg'l Council of Carpenters Pension Fund v. Woodlawn Cmty. Dev. Corp.*, No. 09 CV 3983, 2011 WL 6318605 (N.D. Ill. Dec. 15, 2011).

[4] *Indus. Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000); see also *W.R. Grace & Co. v. Viskase Corp.*, No. 90 C 5383, 1991 WL 211647, at *2 (N.D. Ill. Oct. 15, 1991).

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[5] Howard A. Merten & Paul A. Kessimian, *The Pitfalls, Opportunities and Potential Landmines Presented by Federal Rule 30(b)(6)*, FDCC, 2011, at 11.

[6] *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000).

[7] *Morrison Exp. Co. v. Goldstone*, 12 F.R.D. 258, 260 (S.D.N.Y. 1952).

[8] *Reed*, 193 F.R.D. at 692.

[9] *Id.* at ¶ 7, citing *Marker v. Union Fid. Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989).

[10] *Morrison Exp. Co.*, 125 F.R.D. at 260.

[11] *See S.E.I. U. Local No. 4 Pension Fund v. Pinnacle Health Care of Berwyn, LLC,* 560 F.Supp.2d 647, 651 (N.D.Ill.2008) (awarding sanctions, citing to a Third Circuit case where the party's production of a witness who was unprepared for the deposition-and lacked knowledge of subjects in the 30(b)(6) notice-also warranted sanctions).

[12] https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2018-19/summer/speak-yourself-30b6-deposition/?login

[13] Fed. R. Civ. P. 37(d).

[14] *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 690 (S.D. Fla. 2012).

[15] *Medline Indus., Inc. v. Wypetech, LLC*, No. 20 CV 4424, 2020 WL 6343089 (N.D. Ill. Oct. 29, 2020).

[16] *Hunter v. WirelessPCS Chicago LLC*, No. 18 CV 980, 2021 WL 4621889, at *2 (N.D. Ill. Oct. 5, 2021).

[17] *Id.* at 7.

[18] *Id.* at 8.

[19] *Id.* at 10-11.

[20] *Id.* at 11; see generally Fed. R. Civ. P. 37(a)(5).

[21] IL R USDCTND LR 37.2

[22] Fed. R. Civ. P. 37(d)(1).

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