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CORPORATE DESIGNEE DEPOSITIONS: *A PRIMER FOR IN-HOUSE COUNSEL*

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Although corporations are not live human beings, the law regards them as "persons." Therefore, during a lawsuit's discovery phase, a party has the right to require the corporation to testify during a deposition – whether the corporation is a party in the case or a witness. The corporation must produce one or more "designees" to provide that testimony.[1] The designee's testimony becomes the binding testimony of the corporation.[2]

The obligation to produce a designee for a deposition is a serious one. It involves more than merely directing a corporate employee to show up for the deposition and answer questions. A corporation's failure to appreciate that obligation can result in substantial adverse consequences. From the point of view of a corporation's trial attorney, this article identifies the more notable issues that the corporation (particularly its in-house attorneys) should consider when confronted with a notice to take the deposition of the corporation.

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[1] This article employs the term "corporation" and "corporate" in the generic sense. The principles discussed in this article apply equally to limited liability companies, limited partnerships, and other business organizations. To be precise, a "corporate" designee deposition refers to the deposition of a corporation, and an "organizational" designee deposition refers to the deposition of any other kind of legal entity.

[2] *See Crawford v. Franklin Credit Mgmt. Corp*., 261 F.R.D. 34, 38 (S.D.N.Y. 2009) ("[I]t is settled law that a party need not produce the organizational representative with the greatest knowledge about a subject; instead, it need only produce a person with knowledge whose testimony will be binding on the party.") (quoting *Rodriguez v. Pataki*, 293 F.Supp.2d 305, 311 (S.D.N.Y. 2003)); *Bd. of Trustees of Leland Stanford Junior Univ. v. Tyco Int'l Ltd*., 253 F.R.D. 524, 525–26 (C.D. Cal. 2008) ("[T]he deponent's testimony is the corporation's testimony, and if the corporation is a party, 'the testimony may be used at trial by an adverse party for any purpose.'") (quoting *GTE Prods. Corp. v. Gee*, 115 F.R.D. 67, 68 (D. Ma. 1987) and *Sanders v. Circle K Corp.*, 137 F.R.D. 292, 294 (D. Az. 1991)).

Applicable Rules of Procedure

In a federal court case, a litigant's right to depose a corporate party or corporate witness is governed by Fed R. Civ. Proc. 30(b)(6), which provides:

> *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

In a case pending in Maryland state court, the applicable rule is Maryland Rule 2-412(d), which is substantively similar to, and is based on, the federal rule:

> *Designation of person to testify for an organization*. A party may in a notice and subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, managing agents, or other persons who will testify on its behalf regarding the matters described and may set forth the matters on which each person designated will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization.

An important feature of both the federal and Maryland rules is that the deposing party must, in advance of the deposition, identify the subjects on which the testimony will focus. This is unique to corporate designee depositions. In depositions of human beings, the deposing party is not obligated to announce the subjects of the deposition and, therefore, would be foolish to do so.

Requiring the deposing party to reveal the areas of inquiry before a corporate designee deposition makes sense. Without receiving advance notice of the areas of inquiry, the corporation cannot possibly be expected to produce the right person to testify on the corporation's behalf, thereby resulting in an inefficient and perhaps altogether useless exercise.

In light of the rules' requirement that the deposing party must identify the subject areas of the deposition, to some degree the element of surprise is removed from a corporate designee deposition. Although the corporate designee will not know the specific questions that the

deposing attorney will ask during the deposition, the designee will know, in general, the areas that will be covered. As a result, at least in that respect, the corporate deponent has a slight advantage relative to an ordinary deponent who may have no idea what will be covered during the deposition.

Selecting the Appropriate Witness

Based on the subject areas identified by the deposing party, the corporation must select one or more people to serve as designees during the deposition. Strictly speaking, when the corporate designee testifies during the deposition he or she speaks for the corporation, not for himself or herself individually. Thus, a corporate designee is not selected to explain his or her own personal knowledge or opinion of the matters at issue. Rather, a designee provides the corporation's knowledge or opinions. For example, corporate designees are expected to provide facts related to the corporation's:

- interpretation of documents and events;[3]
- subjective beliefs and opinions;[4]
- knowledge of current and former employees;[5] and
- internal investigations.[6]

Selecting the appropriate person to serve as the corporate designee for a particular subject area can be tricky. Theoretically, anyone can serve as a designee. For example, a corporation may select: (1) officers; (2) directors; (3) managing agents; (4) former employees; and (5) outsiders to the organization hired to serve as witnesses.[7] Indeed, it is not unusual for in-house counsel to serve as designees.[8]

At first blush, it may seem best to identify the person with the most knowledge of the particular subject area. Presumably, that person will be less likely to inaccurately report the facts

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[3] John Randall Whaley & Richard J. Arsenault, *The Duty to Find a Knowledgeable Corporate Designee - or to Educate One*, 55 La. B.J. 168, 169 (2007) (citing *United States v. J.M. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996)).

[4] *Id.*

[5] Lisa C. Wood & Matthew E. Miller, *Serving as the Company's Voice-the 30(b)(6) Deposition*, Antitrust, Spring 2010, at 92.

[6] *Id.*

[7] Michael Lyle *et al*., *How to Prepare for and Successfully Defend a Rule 30(b)(6) Deposition*, Practical Law Company, http://us.practicallaw.com/9-504-9935, at 2.

[8] *New Jersey v. Sprint Corp.*, 2010 WL 610671, at *3 (D. Kan. Feb. 19, 2010) (recognizing that it is not uncommon for in-house counsel to serve as Rule 30(b)(6) witnesses).

and less likely to be stumped by a question that involves information uniquely within that person's possession or that involves the conduct of that person. Therefore, the corporation should start by interviewing employees who are knowledgeable or who participated in the events at issue. One commentator believes that the selected designee should, ideally, be a mid to-senior level official who has experience testifying at depositions or at trial.[9] That view does make sense, although there may be instances where such a person is not available or other considerations dictate a different approach.

Importantly, a corporation's in-house lawyers and outside counsel should recognize that the person with the most knowledge of a particular subject may not always be the best choice. Sometimes the most knowledgeable person is simply not available. For example, he or she may no longer be an employee. Or, he or she may be terribly nervous, easily flustered, or a poor communicator. Designating such a person may be hazardous to the case.[10] Similarly, the person with the most knowledge may have motivations that are contrary to those of the organization. A knowledgeable witness who is hostile to the organization may very well be the worst person to select as a designee. Put bluntly, for a variety of reasons, the most knowledgeable person could be a bad witness.[11]

In that case, corporations can "*create* a witness or witnesses with responsive knowledge."[12] In other words, the corporation can enlist a person with limited or no first-hand knowledge of the facts and, through rigorous preparation, turn that person into a knowledgeable and responsive witness. Obviously, witness preparation – which requires a significant commitment of time by the witness and the lawyers – is the key to this approach.

There are no hard and fast rules that dictate the selection of an appropriate designee. The process should be collaborative, involving in-house counsel, the designee candidates, and outside counsel. Because the process of preparing the witness can be burdensome and time consuming (as discussed below), it is best to start thinking about selection early in the case and no later than immediately upon receipt of the deposition notice.

Those responsible for selecting the designee should keep in mind that it is important to identify a person that will be available and willing to invest the time necessary in preparation. Frequently, business considerations can shape the selection process. For example, if the ideal designee is a substantial revenue generator for the corporation, the corporation may elect not to

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[9] Michael Lyle *et al*., *How to Prepare for and Successfully Defend a Rule 30(b)(6) Deposition*, Practical Law Company, http://us.practicallaw.com/9-504-9935, at 3.

[10] *Id.*

[11] David Sillers & Angela Zambrano, *Tips on Effectively Preparing and Presenting 30(b)(6) Witnesses*, Dallas Bar Association, http://www.dallasbar.org/content/tips-effectively-preparing-and-presenting-30b6-witnesses-833-words.

[12] *Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 238 (D. Md. 2010) (quoting *Wilson v. Lakner*, 228 F.R.D. 524, 528-29 (D. Md. 2005) (emphasis added)).

divert that person from his or her job responsibilities. That decision may make perfect sense if the value of the case is relatively low and the company would be economically better off not pulling the person away from his or her revenue-producing responsibilities. Such a business decision may, of course, have consequences in the litigation. Provided that the corporation understands and appreciates the risks, the corporation may decide to designate someone else.

Whoever is selected must be willing to invest substantial time in preparing for the deposition. It is rarely acceptable for a designee to answer "I don't know" in response to a question that concerns the corporation's position on a particular matter or the corporation's knowledge or understanding of a particular fact. Juries expect corporations, particularly large and wealthy corporations, to have answers and not be stumped by questions. Indeed, as illustrated by the following examples, it is easy to see that "I don't know" can prove to be the most damaging answer a designee can give during a deposition: Why did the corporation fire my client? (employment case); Why did the corporation fail to deliver the products on February 1, 2010? (breach of contract case); Why did the corporation decide not to run a background check before hiring Mr. Smith to serve as director of the onsite daycare facility? (child molestation case).

In addition, the selected person should have the right temperament. Depositions can be long and exhausting, and the deposing lawyer may be aggressive and difficult. Frequently, corporate designee depositions are videotaped so that they can be played for a jury during trial. As a result, corporations should seek a designee who is patient, has strong mental endurance, and has a sharp memory. An ill-tempered witness can spell disaster.

No Easy Task

Once a designee is selected, that person must be fully prepared before the deposition. Ideally, the preparation process should involve the participation of the witness, in-house counsel, and outside counsel. Courts recognize that the process of preparing for a corporate designee deposition is onerous. For example, in *United States v. J.M. Taylor*, the court observed:

> Rule 30(b)(6) explicitly requires [a corporation] to have persons testify on its behalf as to all matters known or reasonably available to it and, therefore, implicitly requires such persons to review all matters known or reasonably available to it in preparation for the Rule 30(b)(6) deposition. This interpretation is necessary in order to make the deposition a meaningful one and to prevent the "sandbagging" of an opponent by conducting half-hearted inquiry before the deposition but a thorough and vigorous one before the trial. This would totally defeat the purpose of the discovery process. The Court understands that preparing for a Rule 30(b)(6) deposition can be burdensome. However, this is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business.[13]

[13] *United States v. J.M. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C.1996).

Corporations must "prepare [their corporate designees] in order that they can answer fully, completely, and unevasively, the questions posed . . . as to the relevant subject matters."[14] While absolute perfection in preparation is not required, courts require corporations to make a "good faith effort" to collect and review all relevant information, and to "interview employees with personal knowledge just as a corporate party is expected to do in answering interrogatories."[15] An unprepared designee is tantamount to a failure to appear for a deposition.[16]

Further, courts recognize that the consequences of failing to be adequately prepared can be severe. *Paul Revere Life Ins. Co. v. Jafari*,[17] highlights, in stark terms, the risks associated with a poorly prepared witness. In that case, a disability insurance company, after paying disability benefits for many months to a physician, discontinued the payments, declaring that the physician had intentionally injured himself in order to collect benefits. Specifically, the insurance company concluded that the doctor, a surgeon, shot off his own finger with a shotgun. The doctor's counsel served the insurance company's counsel with a deposition notice that identified several subject areas, including the facts to support the company's decision to discontinue benefits. The company designated its director of claims to serve as its sole designee – the same person who authored detailed letters to the doctor denying his claim for benefits. After deposing the designee, the doctor filed a motion for sanctions, arguing that the witness was not prepared as required under Rule 30(b)(6).

Judge James K. Bredar (then a Magistrate Judge; now a District Judge) authored the opinion in *Jafari*. Relying heavily on *United States v. J.M. Taylor*, Judge Bredar framed the issue as follows:

> The substantive issue raised by [the doctor's] motion for sanctions is whether the designee of the [the insurance company] was satisfactorily prepared for the Rule 30(b)(6) deposition. Accompanying [the doctor's] motion is an exhibit binder that contains *inter alia* a complete transcript of the deposition. The Court has reviewed the entire transcript and concludes that the designee of the [insurance company] was woefully unprepared. The [insurance company] argues, however, that there was no duty to prepare the designee in the various areas in which she admittedly was unprepared. To wit, the [insurance company] contends that the designee need not have been prepared to provide testimony regarding how the facts upon which it relies for its contentions support those contentions, to

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[14] *Wilson v. Lakner*, 228 F.R.D. at 528 (quoting *Mitsui & Co. v. Puerto Rico Water Res. Auth.*, 93 F.R.D. 62, 67 (D.P.R. 1981)).

[15] *Id.* at 528-29.

[16] *Crawford v. Franklin Credit Mgmt. Corp.*, 261 F.R.D. at 38-39.

[17] 206 F.R.D. 126 (D. Md. 2002). The article's author and his firm were counsel of record for Robin Jafari, M.D.

> provide testimony regarding facts obtained by counsel during discovery, or to provide testimony supporting the contention ERISA applies to the case. Those arguments and contentions are meritless, and the thinking behind them would render Rule 30(b)(6) depositions useless.[18]

Judge Bredar concluded that the insurance company's "misunderstanding of its duty to properly prepare a designee or designees for deposition is palpable and, given the circumstances, the Court unfortunately must question whether it was deliberate."[19] Accordingly, Judge Bredar imposed several sanctions.[20] First, Judge Bredar re-opened discovery to allow the doctor to take another deposition of the insurance company – and to give the insurance company another chance to present knowledgeable designees.[21] Second, the Court ordered the insurance company to pay the expenses of the deposition, including the fees and travel expenses of the doctors' lawyers.[22] The insurance company was also ordered to compensate the doctor for the time and expense related to preparing the motion for sanctions.[23]

After the Court issued that opinion, the same witness was deposed for a second time and, after that second deposition, the doctor filed *another* motion for sanctions arguing that the witness was still unprepared. In response to that motion, Judge Bredar issued a Report and Recommendation to the presiding District Judge. [24]

Quoting liberally from the transcript of the second deposition, Judge Bredar's Report and Recommendation explained that the witness was woefully unprepared and was unable to answer the most basic questions about the case. For example, Judge Bredar wrote:

> Review of the transcript was frustrating and torturous, and the Court can only imagine how much more that must have been the case for counsel and for the witness herself. Notwithstanding the crystalline directive embodied in the language from *Taylor* to which the Court had pointed [the insurance company], [the witness] *conceded that she had talked to no one involved in the case, other than her lawyer in preparation for the deposition*. Dr. Jafari's counsel expended all of the first day of the deposition attempting to obtain from [the witness] a direct answer to his question seeking the facts that [the insurance company] then

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[18] *Id.* at 127.

[19] *Id.* at 128.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Paul Revere Life Ins. Co. v. Jafari*, Civil Action No.: MJG-00-2705, January 15, 2003 Report & Recommendation (unpublished).

contended were in support of its contention that the individual policies were covered by ERISA. Almost every response provided by [the witness] was nonresponsive. At one point, even [the witness's] counsel showed frustration. In response to a long line of questions through which Dr. Jafari's counsel had attempted to nail down the issue referenced above, [the witness] was asked whether she was the person with whom to have a discussion about the facts upon which [the insurance company] relied. She replied:

> A: Again, as a claim – I would not, sitting here today, I would not make that decision, if ERISA applies or not. So –
>
> [INSURANCE COMPANY'S COUNSEL]: That's not what he's asking you. Answer his question.
>
> Are you prepared to testify as to the facts? You've identified the sources of those facts. Can you identify – he's also asking if you're prepared to testify as to those facts – can you identify facts? That's the question he's asking of you. You have to answer the question. Do you know what the question is?
>
> THE WITNESS: No, I'm sorry, I don't.

The previous question from Dr. Jafari's counsel – whether [the witness] was the person with whom the facts could be discussed was then read back to her and she replied: "No."

[The witness] then was asked by her counsel to leave the room and, in her absence, he said:

> [INSURANCE COMPANY'S COUNSEL]: I just wanted to represent to both of you that, despite what [the witness] believes, she is the person who [the insurance company] believes is prepared to testify about those facts, and can testify about those facts, I want to make that representation to you, and make that representation on the record.
>
> I will add, as an aside, I think she has attempted to set what some of those facts are, and I think, as a practical matter, I think she got derailed on the issue of where those facts might be, but I think if you ask her the question specifically what facts, specifically what facts [the insurance company] relies upon to support its contention as it applies to these policies, she will be able to and is prepared to testify to as many of those facts as she can recall sitting here today, having none of the documents that she identified in front of her.
>
> So that's what I wanted to say on the record.

> Once questioning resumed, [the witness] continued to provide a seemingly endless, repetitive and nonresponsive series of answers.[25]

Based on the foregoing and several other examples of the witness's lack of preparation, Judge Bredar recommended that the insurance company "be precluded from offering evidence to support its defenses."[26] The presiding judge declined to adopt the sanction, and ultimately the doctor prevailed in a multi-day jury trial. Nevertheless, Judge Bredar's Report and Recommendation became relevant after the trial when attorneys' fees were sought from the insurance company.

The lesson of *Paul Revere Life Ins. Co. v. Jafari* is that a corporation should not take lightly its obligation to adequately prepare its designee. The discovery rules provide a broad range of sanctions that can be imposed against the corporation, including the award of costs and fees or an order precluding a party from introducing evidence to support its position at trial. And, generally, the presiding judge has wide discretion to impose sanctions.

Preparation Pointers

The following pointers should be considered when preparing the designee:

Subject Areas. The subject areas identified in the deposition notice are the starting point for preparing the witness. Corporate counsel and outside counsel should consider potential candidate witnesses in light of the subject areas. Depending on the number of subjects, the corporation should consider assigning subjects or groups of subjects to different designees. That approach can avoid overburdening a single individual who must be prepared on many different subjects.

Organize Key Documents for the Witnesses. Immediately upon receipt of the Rule 30(b)(6) notice, counsel should begin collecting all of the key documents that must be used to prepare the witness. Although the documents may be voluminous and the review may be burdensome, courts have declared that corporate deponents are still required to review and understand them.[27] For that reason, it is imperative that designees be selected early, in order to ensure adequate time to meet and discuss the key documents.

Review the Organization's Answers to Interrogatories. A corporation's answers to interrogatories are typically prepared after a factual investigation and in a collaborative process between counsel and the client. Moreover, the information discussed in the answers was, presumably, carefully considered and analyzed by counsel during that process. Consequently, if the corporation has answered interrogatories before the deposition, those answers can be very

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[25] *Id.* at 5-7.

[26] *Id.* at 25.

[27] *TIG Ins. Co. v. Tyco Intern. Ltd.*, 919 F. Supp. 2d 439, 454 (M.D. Pa. 2013) (collecting cases).

valuable to the witness in preparing for the deposition. They can serve as an outline for the major subjects at issue in the case, and they can reinforce major themes of the corporation's narrative about the case.

Meet with the Key Witnesses and Counsel. Counsel, corporate officials, and designees should arrange to meet to discuss the problem areas and weakness in the case. Witnesses should be aware of those issues in order to effectively respond to inquiries during the deposition. The designee should talk to the employees who were involved in the underlying events.

Learn the Narrative of the Organization's Position. Corporate designee testimony is not always limited to facts. Indeed, designees should be prepared to testify about the organization's positions, subjective beliefs, and interpretation of events as they relate to the notice areas.[28] Moreover, corporations should introduce designees to the organizational themes related to the particular case.

Review the Testimony of Other Witnesses in the Case. The witness should become familiar with the deposition process, the case's pertinent facts, and the opposing attorney's style. Counsel should utilize any fact witness deposition transcripts or videos in the case as learning tools for the corporate designee. Prior exposure to the process, facts, and style of the opposing counsel will be particularly useful for the deponent during a mock deposition (discussed below). If the schedule permits before the corporate designee deposition, the designee should attend the deposition of the key witnesses. Attending live depositions is extremely informative.

Mock Depositions. The preparation process, particularly for witnesses who have never given deposition testimony, should include a mock deposition. Mock depositions can build the designee's confidence.[29] They also foster a creative environment for brainstorming and addressing subtle nuances that may not arise in the absence of the question-and-answer process.

Prepare to Testify on the Subject of Preparation. Deposing lawyers may spend substantial time in deposition asking about the steps that the designee took to prepare for the deposition. The designee should, therefore, be prepared to talk in detail about those steps. A motion for sanctions against the corporation is much more likely if the witness describes a very limited amount of preparation.

Talking Points Memorandum. Although corporate designees speak on behalf of the corporation and are expected to give binding testimony, designees are not expected to be robots who commit everything to memory. Counsel can prepare an outline or talking-points memo of

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[28] Michael Lyle *et al*., *How to Prepare for and Successfully Defend a Rule 30(b)(6) Deposition*, Practical Law Company, http://us.practicallaw.com/9-504-9935, at 4 (citing *Krasney v. Nationwide Mut. Ins. Co*., No. 06-cv-1164, 2007 WL 4365677 (D. Conn. Dec. 11, 2007)).

[29] *Id.* at 4.

important facts and dates for the designee.[30] Although the witness should not have such a document with him or her during the deposition, the document can be a useful study tool in the days leading up to the deposition.

Review the Complaint and Answer. It is important to review with the designee the complaint and answer filed in the case. If the complaint was filed by the corporation, the designee should be familiar with each fact alleged in the complaint and the source of information that supports that allegation. The same goes for a corporation's answer. In addition, it is important for the designee to be prepared to answer questions about the corporation's affirmative defenses. For example, if the corporation raised contributory negligence as an affirmative defense, the designee must be able to articulate the facts that support that defense.

Conclusion

It is recommended that, early in the case, counsel should advise key decision makers about the burdens of a corporate designee deposition and stress the importance of producing a well-prepared and articulate witness. Ideally, given the harmful consequences that can flow from the deposition of an ill-prepared designee, outside counsel and inside counsel should work together throughout the deposition process to select and prepare the right person to serve as designee.

Mr. Shuster is a Principal of Kramon & Graham, P.A., a full service civil litigation and transactions firm. This article is a summary only, and should be used for informational purposes only. The information above is not legal advice and should not be relied on for that purpose. For specific legal advice for your particular circumstances and concerns, you should consult an attorney.

[30] David Sillers & Angela Zambrano, *Tips on Effectively Preparing and Presenting 30(b)(6) Witnesses*, Dallas Bar Association, http://www.dallasbar.org/content/tips-effectively-preparing-and-presenting-30b6-witnesses-833-words.