

Top 10 Pointers for Dealing With a Corporate Representative Deposition Notice in a Product Liability Case

Pharmaceutical Law Update

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A well-worded, targeted corporate representative deposition notice garners the attention of even the most experienced in-house product liability counsel. If not approached vigilantly, a response to the corporate representative deposition notice can result in major problems for a product manufacturer—not only in the underlying litigation but also in future lawsuits. While a corporation itself may have many positions on a single issue addressed in a lawsuit, the Federal Rules of Civil Procedure require that an organization speak with "one voice" on the issue in its corporate representative deposition. Because a product manufacturer must answer questions on which the corporation otherwise does not have knowledge and the testimony binds the corporation, the ramifications of a 30(b)(6) deposition are far reaching.

Adequately preparing for the defense of a corporate representative deposition takes time and a detailed understanding of the rules and case law concerning 30(b)(6) depositions. However, one must also have a keen understanding that the rules can be a disadvantage to the corporate defendant and that counsel must extensively prepare the witness for handling difficult lines of questioning. Not only must corporate counsel comply with the black letter law, but the strategic situations of defending a corporate representative deposition must not be overlooked.

The following are the top 10 rules for dealing with a corporate representative deposition notice in a product liability lawsuit. To stay as broad as possible, this article addresses mostly federal law because a great majority of state corporate deposition rules are patterned after the federal rule. It should also be noted that local practice may dictate deviations from the recommendations and strategy set forth below.

1. Understand and Acknowledge the Importance of Corporate Representative Deposition

It is well known that Rule 30(b)(6) testimony is binding upon the corporation. A corporation's "Rule 30(b)(6) deposition is a sworn corporate admission." *In re Vitamins Antitrust Litigation*, 216 F.R.D. 168, 172 (D.D.C. 2003). In addition, "[u]nless [the corporation] can prove that the information was not known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition." *Ieradi v. Lorillard, Inc.*, 1991 WL 158911, at *3 (E.D. Pa. 1991).

The interrogating party may read or publish portions of a Rule 30(b)(6) deposition at any point of time in trial. Accordingly, depending on the whims of the particular judge, harmful admissions could be read by the opponent's attorneys in the opening, in between witnesses at trial or as part of comment by examination of any witness. Further, a 30(b)(6) deposition transcript from one case is routinely reviewed and used by counsel in other litigation.

2. Prepare the Proper Response to the Notice

Rule 30(b)(6) requires the delineated areas of inquiry be designated in the notice with "reasonable particularity." The basis for the particularity prerequisite "is to give the opposing party notice of the areas of inquiry that will be pursued so that it can identify appropriate deponents and ensure they are prepared for the deposition." *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 125 (D.D.C. 2005). There is a shortage of case law addressing the degree of specificity required. However, the ABA's Civil Discovery Standards provide that the notice should accurately and concisely identify the designated areas of inquiry, giving due regard to the nature, business, size and complexity of the entity being asked to testify. ABA SECTION OF LITIGATION, CIVIL DISCOVERY STANDARDS, §19a (2004).

The lack of authority on the issue should be used to the responding corporation's advantage. Seldom should a corporation simply take the Rule 30(b)(6) notice at face value without comment, find a corporate designee and show up for the deposition without negotiation of scope. Depending on local practice, the responding party should work to narrow the breadth of the scope of the particular topics and seek clarification from the interrogating party on any unclear issues. Similarly, although there is no limit in the Rule on how many topics (related or unrelated) can be specified in a single Rule 30(b)(6) notice, outside counsel should work on the front end to limit the scope and number of topics. If the issues cannot be worked out among the parties, a motion for protective order with the court may be the only option to limit the scope of the deposition notice.

3. Designate as Few Deponents as Possible

Generally put, the fewer the number of designees one can put up for deposition, the better. However, sometimes the facts, the knowledge base and testifying ability of witnesses require multiple designees. If so, an attempt to limit the scope of the deposition to particular topics, take the deposition in topic stages or take the deposition only of certain designees should be addressed with the requesting party.

4. Locate the Appropriate Witness(es)

Courts have interpreted the corporate representative deposition rule as prohibiting a 30(b)(6) representative from disclaiming the corporation's knowledge of a subject at the deposition and later introducing evidence on that subject. See *Ierardi v. Lorillard, Inc.*, 1991 WL 158911, at *3 (E.D.Pa. 1991). Unless the corporation can prove that the information was

not known or accessible, a corporation cannot later put forth new or different allegations that could have been made at the time of the 30(b)(6) deposition. Id. Thus, the importance of locating the appropriate witness(es) and adequately preparing those witnesses cannot be overemphasized. One must always keep in mind counsel's duty to present the corporate deponent with the requisite "information known or reasonably available to the corporation." The corporation "must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the interrogator] and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed by [the interrogator] as to the relevant subject matters." *Mitsui & Co. v. P.R. Water Res. Auth.*, 93 F.R.D. 62, 67 (D.P.R. 1981). On the flip side, however, if the corporation simply does not have any information to provide a representative under a specified topic, the corporation has fulfilled its duty. *Dravo Corp. v. Liberty Mutual Insurance Co.*, 164 F.R.D. 70, 76 (D. Neb. 1995).

5. Make Sure the Corporation Has 'Organizational Buy-In'

The cornerstone of an effective response to the Rule 30(b)(6) deposition request is to obtain the appropriate corporate counsel and employees' involvement and have "organizational buy-in" to the selection process and gathering of information on the subject matters in the notice. Notably, the designated witness need not be the person in the organization with the most knowledge. To the extent the witness lacks personal knowledge, he or she must be prepared on all knowledge of the corporation and reasonably available to the corporation.

6. Devote the Appropriate Time and Detail to Preparation

Preparing for and testifying in lawsuits is many times not the corporate job of the representative. However, sufficient preparation time and effort must be devoted to adequately prepare a corporate representative for deposition balancing the time commitment and other corporate obligation of the witness. Accordingly, it is important to supply the deponent with information and appropriate time for preparation especially due to the binding nature of the testimony.

If there are multiple designees, separate preparation of each witness should occur so that a particular witness is not confused by information that others have on other subjects not germane to his or her designation and so that "cross-pollination" of information does not occur. While you want the corporate designee to be knowledgeable about the areas upon which he or she is designated, unless he or she has personal knowledge on other areas, he or she does not need to even have a response for other subject areas. In fact, it is advisable to not have testimony wander into other areas or otherwise, a conflict with the corporate position may occur.

7. Know How to Properly Deal With Questions Outside of the Scope of Designation During the Deposition

In a large majority of Rule 30(b)(6) product liability depositions, the attorney taking the deposition will stray outside the scope of the noticed topics. More problematic even is where the opposing counsel stays within the scope of the notice but strays outside of the area designated for the particular witness. This presents a quandary: should the deponent answer?

The obligations of the corporate deponent under a majority of the authority may surprise some. See *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995), aff'd, 213 F.3d 646 (11th Cir. 2000). In *King*, the examining party sought to exceed the scope of its topics contained in its notice. *Id.* The presenting party objected, halted the deposition and sought a protective order to limit the scope of questioning to those areas described in the notices by stopping the deposition. *Id.* at 476. The *King* court found that that Rule 30(b)(6) does not limit the scope of a deposition. *Id.* The court wrote: "If the examining party asks questions outside the scope of the matters described in the notice, the general deposition rules govern, (i.e., Federal Rule 26(b)(1)), so that relevant questions may be asked and no special protection is conferred on a deponent by virtue of the fact that the deposition was noticed under 30(b)(6). ... [I]f the deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party's problem." *Id.*

Many other courts have followed this rule. See e.g., see also *Cabot Corp. v. Yamulla Enters., Inc.*, 194 F.R.D. 499, 500 (M.D. Pa. 2000) (scope of Rule 30(b)(6) deposition is not limited to matters described in the notice); *Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 366 (N.D.Cal. 2000) (same). However, it should be noted a minority of jurisdictions follow the opposite approach. See, e.g., *Paparelli v. Prudential Insurance Co. of America*, 108 F.R.D. 727, 728 (D. Mass. 1985).

Thus, in general and in most jurisdictions (particularly the federal practice of corporate representative depositions), once the company identifies Rule 30(b)(6) witnesses, such witnesses are witnesses for all purposes available subject only to limitation of relevancy and scope under Rule 26. This means that any areas of examination that are reasonably calculated to lead to the discovery of admissible evidence are permissible. Defense counsel should see this factual scenario as a "trap deposition," and react and prepare accordingly. The witnesses must also know the limits of their "corporate knowledge." One thing is clear in most of jurisdictions with the majority approach: counsel may not object and instruct the witness not to answer.

8. Prepare Your Witness to Relate the Corporate Story

The traditional deposition rules certainly apply to corporate representative depositions, including the initiative that one should answer only the actual questions asked in a concise manner. However, corporate representative deponents should be able to go one step further and be able to tell the corporate story. In other words, while it is also important to limit the

preparation to the topics requested, the deponent should be savvy enough to be able to relay the company's trial themes. While this tool somewhat overlaps with the necessity to adequately prepare the corporate witness, it is also important to realize that defense counsel should be able to use corporate representatives to bolster the defense of the case. Where so many cases are settled prior to trial, this may be the corporation's "one shot" to get its story out. Thus, using the deposition testimony at mediation or otherwise as a bargaining tool should be a consideration. Thus, the corporation's "story" or "theme of the case" should always be expressed and developed by the corporate deponent.

9. Prepare Your Witness to Avoid Non-Answers on Well-Formed Topics

Under Rule 30(b)(6), the interrogating party's attorney need not settle for the "non-answer answer." This is obviously because the corporation's designation of a witness who lacks knowledge of the matters specified in the notice (and within the witness designation) amounts to a failure to appear to testify. The witness can be required to disclose the exact preparation or lack thereof on the particular subject. The defending corporation and its counsel should be prepared to respond to an inquiry by separate motion of both the selection process of the witness and the preparation of the witness for the questioning anticipated.

The interrogating party's attorney may seek sanctions as a result of the failure to respond. Thus, the corporate representative deponent will be forced to use judgment to decide if the question is in fact in the purview of his or her designated topic. A properly prepared corporate representative should be ready to explain why his or her answer is so limited.

10. TO REPEAT THE FIRST PRACTICE POINTER, Understand and Acknowledge the Importance of Corporate Representative Deposition!

The first point deserves repeating. The importance of a corporate representative deposition cannot be emphasized enough. Without proper planning and preparation, a corporate representative deposition can create adverse testimony that will haunt the company, not only in the case in which it is given, but in future litigation as well. Few events in a product liability case are as significant or require as much attention and skill from counsel as a corporate representative deposition.

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