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Corporate Representative Depositions: Notice Provision of Rule 30 (b)(6)©

by Carter E. Strang and Arun J. Kottha

Federal Rule 30(b)(6) is the vehicle for taking depositions of corporate representatives in civil cases. Such depositions are unique in many respects and contain traps for the unwary. A lack of familiarity with the Rule's provisions can be disastrous for the noticed corporation and a bonanza for the noticing party.

This is the first of a series that will be published in *Inter Alia* regarding corporate representative depositions under Rule 30(b)(6). It will focus on the Rule's notice provision.

Notice Provision

Rule 30(b)(6)'s notice provision states:

> 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.[1]

Following the truism that "you cannot understand the present if you do not understand the past," we will begin discussion of the Rule's notice provision by looking at the history that gave rise to it.

Pre-rule practice placed the burden on the party taking the deposition to designate a specific corporate representative that possessed knowledge about the areas at issue and was an officer, director or managing agent whose testimony would be binding on the corporation.[2]

Denial of knowledge was common by the corporate representatives so designated, leading to successive depositions to find someone with knowledge who could provide testimony binding on the corporation, causing one commentator to note: "[t]his dance of the ignorant witnesses became so common it earned a nickname: 'bandying.'"[3]

Rule 30(b)(6), adopted in 1970, shifted the burden to the corporation to produce a representative whose testimony is responsive to the notice, which testimony is then binding on the corporation, no matter the representative's corporate status. This burden is one familiar to litigators, and one more fairly placed on the noticed corporation:

> This burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of any examining party ignorant of who in the corporation has knowledge.[4]

The Notice

The noticing party still retains an initial burden of providing a notice that describes "with reasonable particularity" the matters on which examination is requested.[5] This means that a notice must be specific and not over broad or unduly burdensome. Thus, a challenge to a notice as being "too specific" was denied because—the court held—the more precise the request, the easier it should be for the noticed party to produce a witness to testify.[6] Providing a "specific" notice is what, in fact, the Rule envisioned.[7]

Judge Gwin of our Northern District of Ohio Court held that a notice was both over broad and unduly burdensome where it 1) sought information relating to a vast array of strategic, financial, and contractual information from a non-party corporation; 2) provided little time for a response; 3) included areas of questioning beyond the issues in the underlying litigation; 4) would require a costly review/analysis of thousands of documents and witness preparation in order to respond; 5) requested information already available from other sources; and 6) sought potentially privileged information.[8]

Also held improper was a request—deemed "too broad and burdensome" given its "almost limitless" scope—for the deposition of corporate representatives to address some 143 categories of questions, many with questions within questions, that sought information about every fact, conception, intention, understanding, belief and sense impression regarding the disputed topic (patents) covering a 20-year period.[9]

Where a notice properly identified the areas of inquiry but ended each with "including but not limited to" language, the notice was rendered improper because one responding cannot properly identify the outer limits the areas of inquiry noticed, subjecting it to an impossible task in attempting to comply.[10]

A notice that simply requested information from those "with knowledge of the facts" was similarly improper.[11]

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And, where a notice sought the "evolution" and meaning of certain insurance contract language but did not state a time period, it was "unbounded" and thus improper.[12]

Objecting to the Notice

On receipt and review of a 30(b)(6) notice, counsel for the noticed corporation should carefully review it for any potential objections and should object where appropriate. A failure to object prior to the deposition can result in an award of sanctions against the noticed party.[13]

A motion to compel was granted against a company that provided no written objections to the 30(b)(6) notice prior to the deposition of its representative; rather, it waited to assert them at the deposition of its representative, who knew little or nothing about the items contained in the notice.[14] The court characterized such conduct as an improper "self-help" measure and held that the failure to provide written objections prior to the deposition was in violation of the "spirit" of the Civil Rules.[15]

How to properly raise a 30(b)(6) notice dispute with the court is dependent on many factors, including the applicable Federal Civil Rules as well as any local rules and/or standing orders.[16] For example, Local Rule 37.1 for the U.S. District Court for the Northern District of Ohio places the burden on the "party seeking the disputed discovery" to make a "good faith" effort to resolve the dispute prior to seeing court intervention.[17] Thus, under the local rule, once counsel for the noticed corporation provides written objections to the 30(b)(6) notice, the party that noticed the deposition (the "party seeking the disputed discovery") is required to take the initiative to resolve any dispute arising from it prior to the deposition, and failing that, to bring it to the attention of the Court. The U.S. District Court for the Southern District has a similar local rule.[18]

Conclusion

Rule 30(b)(6) provides the mechanism for taking depositions of corporate representatives. The party seeking the deposition is obligated to provide a 30(b)(6) notice that describes "with reasonable particularity" the matters on which examination is sought. Upon receipt of a notice, the noticed corporation must properly assert its objections prior to the start of the representative's deposition.

Endnotes

[1]Federal Rules of Civil Procedure, Rule 30(b)(6).

[2]Bradley M. Elbein, *How Rule 30(b)(6) Became a Trojan Horse: A Proposal for a Change*, FICC Quarterly 365, 366-367 (Spring, 1996).

[3]*Id.*

[4]Notes of Advisory Committee on Rules (1970), Rule 30(b)(6).

[5]Black's Law Dictionary, 5th Ed., defines "reasonable" as "not immoderate or excessive," and "particular," while defining "particularity" as "partial in extent," "not universal," "Individual," and "specific." The authors will use the term "notice" to include both a notice provided to parties as well as a subpoena provided to non-parties.

[6]*E.E.O.C. v. Goodyear Tire and Rubber Co.*, 1979 WL 86, at *2 (N.D. Ohio) (the 30(b)(6) request was in the form of an administrative subpoena); *see also Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 125-126 (M.D.N.C. 1989) (notice is "sufficiently specific" and understandable that requested person knowledgeable about claims processing, claims records and general file keeping, storage, and retrieval systems utilized by the noticed corporation could be identified).

[7]See E.E.O.C. at *2.

[8]*Recycled Paper Greetings, Inc. v. Davis*, 2008 WL 440458, at *4 (N.D. Ohio) (the 30(b)(6) request—in the form of a subpoena—sought information about "all similar product lines" not just the one at issue), compare with *Scovill Mfg. Co. v. Sunbeam Corp.*, 62 F.R.D. 598, 603 (D. Del. 1973) (court held notice was proper seeking drawing, manufacturing data and other information about the steam iron patent at issue but the request for information about all small appliances was over broad because other small appliances were not at issue). The issue surrounding privileged information will be addressed in a subsequent *Inter Alia* article in this series. It is, of course, an important objection to timely and properly assert in response to the notice.

[9]*General Foods Corp. v. Computer Election Systems, Inc.*, 211 U.S.P.Q. 49, 50 (S.D.N.Y. 1980) (the 30(b)(6) request was in the form of a subpoena directed to non-party IBM, which had previously produced thousands of responsive documents).

[10]*Reed v. Gennett*, 193 F.R.D. 689, 692 (D. Kan. 2005); *Tri-State Hospital Supply Corp. v. U.S.*, 226 F.R.D. 118, 125 (D.C. 2005); *Innomed Labs, LLC v. Alza Corp.*, 211 F.R.D. 237, 240 (S.D. N.Y. 2000).

[11]*Budget Dress Corp. f. Joint Bd. Of Dress & Waistmakers' Union of Greater New York*, 24 F.R.D. 506, 507 (S.D.N.Y. 1959) (construing Rule 30 of the Federal Rules of Civil Procedure).

[12]*Falcone v. Provident Life & Accident Ins. Co.*, 2008 WL 2323528, at **6-7 (S.D. Ohio) (court also refused to enforce the notice because it was presented no authority showing that insurance contracts other than the one at issue were relevant under ERISA); see also Comstock v. Conros Corp., 1996 WL 194268, at *4-6 (N.D. Ohio) (notice—issued via subpoena—was improper that sought information not pertinent to the issue litigated).

[13]*See Artic Cat, Inc. v. Injection Research Specialist, Inc.*, 210 F.R.D. 680, 681 (D. Minn. 2002) (failure to respond to an allegedly vague notice).
[14]*Prosonic Corp. v. Stafford*, 2008 WL 2323628, at *4-5 (S.D. Ohio).
[15]*Id*.
[16]*See* Federal Civil Rules 26(c) and 37(a)(1) (both require the party seeking a motion to include with such motion a certification of a "good faith" effort on the movant's part to confer or attempt to confer with the party from whom discovery is sought).
[17]Local Rule 37.1(a)(1) states: "[d]iscovery disputes shall be referred to a Judicial Officer only after counsel for the party seeking the disputed discovery has made, and certified to the Court the making of, sincere, good faith efforts to resolve such disputes." *See Comstock v. Conros Corp.*, 1996 WL 194268 (N.D. Ohio) (parties brought dispute to court's attention before motions to quash and for protective order were filed).
[18]Local Rule 37.1 for the U.S. District Court for the Southern District of Ohio states: "[o]bjections, motions, applications, and requests relating to discovery shall not be filed in this Court … unless counsel have first exhausted among themselves all extrajudicial means for resolving the differences. After extrajudicial means for the resolution of differences about discovery have been exhausted, then in lieu of immediately filing a motion … any party may first seek an informal telephone conference with the judicial officer assigned to supervise discovery in the case"; *see Passa v. City of Columbus*, 2006 WL 1071866 (S.D. Ohio) (held local rule must be followed and includes a discussion of what constitutes compliance); *Star Lock Systems, Inc. v. Dixie-Narco, Inc.* 2006 WL 2265886 (S.D. Ohio) ("good faith" effort discussed and held that a cryptic e-mail response—that the noticed party provided all it was "willing" to provide—satisfied movants' obligation under the local rule to attempt to resolve dispute).

CLE Welcomes New Lawyers

by Robert B. Port

When I wanted to get admitted to practice in the Northern District of Ohio, I had to sit in a small conference room and sit through a half-day video of talking heads discussing the federal rules and practice in the district. No longer. On Jan. 9, 2009, the Northern District of Ohio Chapter of the Federal Bar Association and the U.S. District Court for the Northern District of Ohio sponsored the "Introduction to Federal Practice" CLE. In place of the video, a packed court room of newly-minted lawyers were treated to presentations by federal judges and the clerk of court, all in the lavish surroundings of the ceremonial court room at the federal court house, and culminating in the administration of the oath for admission to practice in the northern district.

Judge Donald Nugent opened the proceedings with a warm welcome. Magistrate Judge Kenneth McHargh followed with an insightful discussion on the role of the magistrate judge in the federal court system. Some of the topics covered by Judge MacHargh included the process of the assignment of cases to judges and magistrates and, generally, the issues that a magistrate may typically handle.

Next on the docket, Geri M. Smith, the Clerk of Courts of the Northern District of Ohio, gave a detailed presentation on the information available on the court's Web site, the courthouse amenities for attorneys, and practical pointers and information on electronic filing and the role of the clerk's office. Chris Malumphy, the Chief Deputy Clerk of Court, followed with a discussion of the most pertinent local rules covering topics including differentiated case management, discovery motion practice, and alternative dispute resolution. Both Malumphy and Smith's presentations were loaded with practical tips for practicing in the northern district. The attendees were then treated to a demonstration of all the electronic courtroom technology by John Bianco and David Zendlo—including a game of tic-tac-toe demonstrating the telestration technology. At the end of the seminar, Geri Smith administered the oath, swearing in all the new attorneys to practice in the Northern District of Ohio. Finally, Toni Paoletta, provided the newly admitted attorneys with a tour of the courthouse.

The courtroom was packed, the presentations were informative and interesting and, in the end, a courtroom-full of new attorneys joined our thriving bar.

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