Be Thoughtful In Your Rule 30(b)(6) Deposition Preparation to Avoid The Threat of Sanctions

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Failing to adequately prepare a corporate witness for his or her 30(b)(6) deposition can have serious consequences. In fact, courts treat an unprepared 30(b)(6) witness as a witness who simply never bothered to show up for the deposition at all, and sanction the corporation accordingly. Not only does the corporation have the initial obligation to prepare the witness, but if, at some point in the deposition, it becomes clear that the preparation was insufficient, the corporation is then obligated to substitute in another witness who can fully and unevasively testify about the subject matter.

Under Rule 37(d), courts have wide discretion to impose sanctions on the recalcitrant corporate party who fails to fulfill its 30(b)(6) obligation to appropriately prepare its witness. While the full spectrum of discovery sanctions are technically available to a court, ranging from an award of money to the dismissal of the company's case or entry of default judgment against the company, sanctions for failing to produce a knowledgeable 30(b)(6) witness are most likely to include: costs and attorneys' fees, monetary sanctions against the party and/or its counsel, an order compelling 30(b)(6) testimony, and requiring a new deposition to take place at the corporation's expense. On occasion, courts may also preclude the corporation from offering any evidence about those topics for which its witness was unprepared.

Preparing for and participating in a Rule 30(b)(6) deposition is a significant undertaking that most companies will experience on more than one occasion. Because preparation can be so burdensome, however, the deposing party has a duty to describe the requested topics of inquiry with "reasonable particularity" so that the company understands the specific subjects on which to prepare its witness. Despite this obligation to notice narrow topics, many attorneys draft them much like they would a broad request for documents (*e.g.*, all communications with John Doe, all facts related to your claims or defenses), wanting to leave no potential line of inquiry untapped. Rarely will such all-encompassing and unparticularized topics withstand challenge, and it is an exceptional 30(b)(6) notice that doesn't include at least one topic worthy of objection. Because sanctions are a real possibility for inadequate preparation, the company should carefully scrutinize the designated topics for areas in which an objection or motion for protective order is appropriate. Most often, the topics are objectionable because of overbreadth, ambiguity, vagueness, and undue burden. Upon objection, the deposing attorney can agree to narrow, refine, or withdraw the offending topic(s) or seek to have the court resolve the dispute, but if he elects to move forward with the deposition without resolution, the corporation is unlikely to be sanctioned for inadequate preparation unless the objection is lodged in bad faith.

Assuming all noticed topics are unobjectionable and the deposition moves forward, what right does the defending attorney have to limit the scope of the deposition to just those itemized topics? While there is some, scant authority supporting the view that a deposing attorney can't stray from the list of noticed topics, the more reasoned and widely-accepted view is that questions outside the 30(b)(6) notice are fair game. Yet, if the corporate deponent is unable to answer those questions on topics not noticed, there can be no sanctions and the deponent's lack of knowledge on the topic will not be binding on the company. The lack of preparation in that instance is, as the courts have said, "the examining party's problem."

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