How To Select A Corporate Respresentative For A *Rule* 30(b)(6) AND *Rule* 4:14-2 Depositions In Products Liability Actions

*Eric Probst, Esq.**

Federal Rule of Civil Procedure 30(b)(6) and New Jersey Court Rule 4:14-2 require a corporation to designate a witness in response to a deposition notice that describes with "reasonable particularity" the topics upon which the witness will testify. More specifically, *Rule* 30(b)(6) provides:

> In its notice or subpoena, a party may name as a deponent a public or private corporation, . . . 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 . . .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.

Fed. R. Civ. P. 30(b)(6).

Rule 4:14-2 provides that an organization "so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth for each person designated the matters on which testimony will be given. The persons so designated shall testify as to matters known or reasonably available to the organization." *R.* 4:14-2(c).

The Rules have three purposes: (1) to reduce the difficulty a deposing lawyer encounters in determining, before the deposition, who should be deposed; (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. *See Fed.R.Civ.P.* 30(b)(6) advisory commn. to 1970 amendments. Further, corporate representative depositions "serve[ ] the convenience of both parties by assuring that the noticing party deposes an authorized person with appropriate knowledge and by avoiding, in the interests of the noticed organization, the attendance at depositions by officers and directors who may have no relevant knowledge." Pressler & Verniero, Current N.J. Court Rules, Comment R. 4:14-2.

The potential trial implications of a corporate witness' testimony require counsel to understand his client's product, carefully examine the deposition notice topics, help to identify the proper corporate designee(s) to testify, and thoroughly prepare the designee to testify on the notice topics, among others. This article will address the first two topics of the corporate representative deposition process.

The Deposition Notice

The starting point is the deposition notice. *Rule* 30(b)(6) and *R.* 4:14-2 deposition notices are different than fact-witness deposition notices, and must be treated that way. The deposition notice must be carefully examined to determine whether the client can even produce a witness with knowledge to testify on the listed topics. Counsel must not misinterpret the threshold question. The question is not whether counsel understands the scope of the deposition topics, but rather whether the client's designee understands what he or she will testify about. Descriptions that are vague, ambiguous, and overly broad must be objected to, in writing, and well in advance of the deposition. Vagueness is always a concern. When objecting, advise plaintiff's counsel that your client will produce a witness to testify based on *its understanding* of the deposition topics.

Timing is key. Once the notice lands on your desk, immediately consult with your client to determine whether it has a witness (or witnesses) who can testify on the topics. In product cases, it often takes counsel and the client considerable time to identify the correct corporate designee(s) who will testify. There is often a long delay between receipt of the notice and identification of the witness, who has to be shown the notice to ensure that he or she has the knowledge to testify. Do not wait until two weeks before the deposition to locate a witness because that leaves very little time to either object to the notice and to prepare the witness. Likewise, you cannot assume your client will be able to produce any witness or only one witness on each of the topics. Multiple witnesses may be involved, including former employees, which may take your client even longer to identify.

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If you are going to object to the scope of the topics (and there are few occasions when you do not), you should object soon after receiving the notice to allow you and your adversary significant time to discuss your objections. If you cannot resolve your differences, plaintiff's counsel may file a motion to compel, or defense counsel may be forced to file a motion for a protective order. Certain topics may be so overly broad or vague that the scope will have to be refined for your client to properly identify a witness to testify. Court intervention may be required.

One of the keys to successfully limiting the scope of corporate representative deposition topics is to negotiate them in good faith and in advance with your adversary. Magistrates' scheduling orders typically require counsel to meet and confer before raising any discovery dispute. Though there are cases when it is nearly impossible to establish a good working relationship with your adversary, when you and your adversary get along, try to resolve scope and vagueness issues in the notice before the deposition begins. This should ensure that the deposition proceeds more smoothly for your witness.

Knowing and understanding the scope of the deposition notice is vital to determining who to select as the deposition witness.

WITNESS SELECTION

Choosing the correct corporate witness designee to testify is important because the witness is the face of the corporation and the deposition testimony (which is often videotaped) will bind the corporation at trial. Counsel wants to be sure that the witness designated to testify has knowledge of the deposition topics that not only satisfies the corporation's obligation under the *Rule*, but who also will make an excellent deposition and, in turn, trial witness. Therefore, several issues must be examined before selecting the corporate designee.

(1) *Prior testimonial experience*: The first question to ask is: "has the witness testified before?" If the answer is yes, the next question is: "is that a good or bad thing?" The answer to that question depends on the witness. Some corporate designees are skilled deposition witnesses. They do not require significant hand-holding or preparation, and can represent themselves and the corporation even against the most skilled questioner. However, numerous deposition transcripts will exist for the serial deponent, giving plaintiff's attorney ample cross-examination material—so read them first before designating the witness. On the other hand, the first-time witness requires more preparation time, which means more costs, a significant issue in today's world.

(2) *Jury appeal*: Even though most cases settle, defending counsel should always consider the deponent's potential jury appeal. The analysis is no different than when deciding whether to call a witness at trial. If plaintiff is alleging warning defect claims, evaluate whether the company's warning witness will be able to effectively communicate the reasons why the company chose to design the warning the way they did. Similarly, will the company's design engineer in a design defect case involving complex engineering issues be able to explain to a jury how the product was designed, what risks were considered, rejected, accepted, and how feasibility and alternative-design studies were conducted? If these witnesses are skilled communicators who can teach the jury about the product, designate them as corporate witnesses. However, if not, work with in-house counsel to identify the witness who can serve the role.

(3) *Temperament*: Similarly, the witness' temperament, appearance, and likeability should be evaluated. There are certain employees who you would never put on the witness stand for a variety of reasons—they are generally unlikeable, do not have jury appeal, are not good communicators etc. Therefore, they should not be designated as corporate representatives witnesses. If plaintiff's counsel is aggressive, consider whether the witness' personality will handle or succumb to his tactics, always remembering that the witness is potentially testifying before the jury. The last thing you want is for the witness to lose his cool and come across poorly during the deposition, especially if the depositions is videotaped.

(4) *Person with the most knowledge v. prepared knowledge*: In a products liability action, the knee-jerk reaction when deciding who to choose as the *Rule* 30(b)(6) witness is to select the engineer involved in the manufacture, design, or warning of the product. While a natural reaction, counsel should first re-read the deposition notice. Make sure that the plaintiff is actually seeking deposition testimony about the manufacture, design, and warning of the product that this witness can provide. It is important to note that the Rules allows the corporate defendant to designate more than one witness to testify on the noticed topics. *Rule* 30(b)(6) ("then designate one or more officers"); *R*. 4:14-2(c) ("The organization so named shall designate *one or more* officers[.]" (emphasis supplied)). It might be advisable to choose multiple witnesses to testify on the product's manufacturing or design history. Next, will the witness with the most knowledge—the engineer—make the most effective witness (see (2) and (3) above)? If the witness with the most knowledge (no matter their position) will not be an

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effective witness, then educate another corporate employee to testify, or have the engineer testify only on limited topics, thereby limiting the damage they might do because of their inability to effectively communicate what they know.

(5) *Witness involvement with the product*: Another compelling consideration is the witness' involvement, even if remote, with the product. Before selecting the witness, a thorough review of the relevant documents should be conducted to determine whether the witness authored any of the "bad company documents." The answer to this question may influence your witness selection decision. The author-turned-witness may be in a better position to explain the document than a non-author witness. However, the non-author witness may be better able to answer questions about the correspondence because they did not draft it and might feel less defensive about the contents of the correspondence, allowing the witness to testify more comfortably about it.

Warning defect cases are especially difficult. The potential witness with the most knowledge is the engineer who designed the warning. Before producing this witness, every document, including electronically stored information, should be located and reviewed to determine whether the witness can be cross-examined with damaging documents. Does the engineer have notes, diagrams, etc. that did not make it into the project file? Are they damaging? Remember, the client will have to produce them if it relies upon them to prepare for the deposition (assuming they are not already responsive to a plaintiff document request).

Similarly, does the potential witness have "product pride?" All corporate witnesses will have a certain pride in the product, and believe that the company "did no wrong," and that the plaintiff misused (and maybe even recklessly used) the product in a non-foreseeable manner and disregarded the product's warnings. This "pride" issue can become problematic when a witness fights with opposing counsel during the deposition. Always admonish the witness during preparation that the goal of the deposition is not to win the case, just to get in the car at the end of the day without having torpedoed the case. Because you do not want the witness' pride getting in the way of a successful deposition, do not hesitate to be firm with the witness during deposition preparation.

(6) *Current or former employee*: The witness, at times, may be a former employee if the information the former employee possesses is "reasonably available" to the corporation and no current employees possess the former employee's knowledge base or can be sufficiently educated to testify. Certain issues are associated with designating a former employee to testify—compensation, costs, expenses, relationship with former employer, and "pride in the product," are just some. These issues must be addressed before the former employee can be selected to testify.

(7) *Other factors:* Consider several factors before deciding which witness to select. Today, deposition preparation legal fees and expenses are significant concerns for in-house counsel. Selecting the witness with the "most knowledge" typically results in less preparation time, and therefore, less cost because the witness does not have be educated about the product. On the other hand, selecting a witness who will testify based on "prepared knowledge" will require more deposition preparation sessions and result in more legal fees. Time, or a witness' schedule, is another factor, as well as other resources that affect deposition preparation sessions—location of the witness, location of the product, location of the accident scene (do you want to prepare the witness at a location so the witness can inspect the accident scene), etc. All of these have to be balanced, however, against whether the witness will be an effective witness. This factor is the most important of all.

Conclusion

Rule 30(b)(6) and *R.* 4:14-2 depositions are important events in products liability cases. The uncertainty of whether the correct corporate witness has been selected, the witness has been sufficiently prepared, and the conduct of the deposition itself can lead to sleepless nights. A successful corporate representative deposition in federal and state court cases—meaning, the case has not been torpedoed—starts with a careful examination of the deposition notice, raising appropriate objections when necessary, and continues with a careful examination and identification of who will be the voice of the corporation.

*** Eric L. Probst is a Principal at Porzio, Bromberg & Newman, P.C., and a member of its Litigation Practice Group. He focuses his practices on commercial products liability, transportation, and construction defect litigation. He is a member of DRI and NJDA, and is the Central Region Vice President of NJDA and immediate past chair of NJDA's Products Liability Subcommittee. Eric also serves as Acting General Counsel of Anthony & Sylvan Pools Corp.**