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PRACTICE TIP

The Attorney-Client Privilege And Former Employees

By Andrew K. Solow, Jennifer L. Taiwo and David A. Kerschner

Undoubtedly, the attorney-client privilege is integral to every attorney's practice, regardless of whether that attorney's practice focuses on litigation, regulatory or transactional work. Yet, despite the ubiquitous nature of the attorney-client privilege, attorneys generally understand far less about the nuances of the invocation of the attorney-client privilege than they should, particularly in the context of interacting with former employees of a corporate client. In the face of seemingly endless regulatory and compliance investigations, along with protracted product liability, antitrust, securities and other corporate litigations, the need to communicate with and prepare former employees for any kind of testimony is ever-increasing. As this need increases, so, too, does the practicing attorney's need for a solid and accurate understanding of when and precisely how the attorney-client privilege applies in the context of interactions with former employees.

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How to Defend Rule 30(b)(6) Product Liability Depositions Successfully

By Eric L. Probst

Federal Rule 30(b)(6) requires 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).

The Rule has 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. *Id.* at 30(b)(6) advisory commn. to 1970 amendments.

The Federal Practice Rules Committee's comments and case law are clear that Rule 30(b)(6) depositions should be "viewed as an added facility for discovery" whose scope can be as broad, within some limitations to effect the liberal discovery goals of the Federal Rules of Civil Procedure. *King v. Pratt &*

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Whitney, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (quoting Fed. R.Civ.P. 30(b)(6) and advisory committee's notes). Like any other discovery device, Rule 30(b)(6) deposition testimony can be used adversely against the corporation or for impeachment purposes. *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001); *Brazo River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 434 N. 20 (5th Cir. 2006). 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. It is preparation, probably above all else, that ensures a successful Rule 30(b)(6) deposition.

This article addresses one of the most important aspects of the 30(b)(6) deposition — preparation.

Preparation

"Before anything else, preparation is key." — Alexander Graham Bell

Preparing for the Rule 30(b)(6) deposition is key. There are two people you must prepare — yourself and the witness.

Educating Yourself

Before counsel can adequately defend the witness — indeed, before counsel can competently and diligently represent his/her client pursuant to Rules of Professional Conduct 1.1 and 1.3 — counsel must understand how the product was manufactured, designed, works, and allegedly caused the plaintiff's injury, as well as the warnings accompanying the product. Without this knowledge base, the lawyer defending the witness will not be able to communicate effectively with the witness at the deposition preparation session or properly prepare the witness for the deposition.

It is critical that counsel understand the product. While site visits to manufacturing facilities are excellent opportunities for counsel to learn how the product was designed and manufactured, they are not always feasible. When not practical, counsel needs to discuss the manufacturing, design, and warning processes, applicable regulatory framework, and distributor relationships with "business people" before sitting down with the witness for a preparation session (and before answering the complaint, and, certainly, before serving discovery). Counsel also needs to become educated on the product's accident, recall, and litigation history in order to prepare the witness for questions on these topics. In essence, one has to "talk the talk" with the witness.

Educating the Witness

Corporations have an obligation to educate the witness so that he or she becomes knowledgeable through preparation about the topics contained in the deposition notice. *King*, 161 F.R.D. at 476. Corporations have the obligation to produce a knowledgeable witness because they control whom they designate. *Id*. This obligation stems from one of the purposes of the Rule — to assist parties uncertain of who in the organization has the relevant knowledge. Fed.R.Civ.P. 30(b)(6) advisory commn. to 1970 amendments. This extends to all the topics contained in the notice. *Poole ex rel. Elliot v. Textron, Inc.*, 192 F.R.D. 494, 504 (D. Md. 2000) ("Upon notification of a deposition, the corporation has an obligation to investigate and identify and if necessary prepare a designee for each listed subject area and produce that designee as noticed.").

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What has to be understood at the outset is that the witness must be prepared to testify not only on subjects about which he or she has personal knowledge, but also on subjects about which he or she may have *no* personal knowledge. This is the essence of a Rule 30(b)(6) deposition. *Buycks-Roberson v. Citibank Fed. Savings Bank*, 162 F.R.D. 338, 343 (N.D. Ill. 1995). In product liability cases, many Rule 30(b)(6) witnesses must be taught or educated about the manufacture, design and warning of the product because it is likely that no single company employee has been involved in every aspect of the manufacture and design of the product.

1. Start with the relevant facts: The next question is: What do I have to educate the witness about? Start with the most relevant facts in the case — the accident or injury. Make sure the witness understands how the accident occurred, even if the witness will not be questioned about the accident. Context for the witness is important, *i.e.*, "How does my testimony fit within the case?" Next, discuss details about the company's investigation of the accident with the witness, when the product was sold, involvement of distributors, and contracts with distributors. From there, probe the facts of how the product was manufactured and designed, and how warnings were selected. For certain types of product cases, other facts are highly relevant. For example, in workplace injury cases, the company's knowledge of the product's resale and retrofitting are important. In others, especially in pharmaceutical and medical device cases, the witness might need to be educated on the company's relationship with overseas subsidiaries or affiliates, new drug applications, and warning labels contained in the Physician Desk Reference. While you can start with the deposition notice when educating the witness, do not stop there.

2. The witness with knowledge: One trap to avoid is thinking that you do not need to educate and prepare the witness who has knowledge of the product's manufacture and design as much as the witness "without knowledge," who must be educated about the deposition topics. While the former may not require as much preparation as the witness who lacks personal knowledge, he still must be prepared and cautioned about the importance of the deposition. It is not uncommon for these witnesses to discredit the need for a time-consuming preparation session because they believe that they will be able to anticipate every question plaintiff's counsel will ask. This is dangerous. During the preparation session, school these witnesses on the hazards associated with predicting or anticipating questions and answers, and have them stick to the rules of depositions — listen to the question and give an answer to that question only.

*3. Document*s: It must be decided if documents will be shown to the witness during deposition preparation sessions. If so, will the witness be shown documents produced in discovery, or documents that have not been produced, or documents you have created for purposes of the deposition ("cheat sheets")? Each case, witness, and deposition is different, so the attorney must make the call, knowing that documents shown to the witness during preparation are discoverable.

It almost goes without saying that privileged documents should not be shown to the witness during preparation sessions. Further, counsel should be very selective when considering what documents to show the witness. The document may contain information about which plaintiff's counsel is not aware, or contain privileged communications embedded in an attachment. In such cases, explaining the document to the witness may better serve the client's interests and its defense strategy. However, if documents exist that will likely be used at trial, show them to the witness to ensure that they will be able to be used at trial.

A "cheat sheet" is a document that contains certain facts about the case — dates, times, events, plaintiff's injuries, manufacturing and design aspects of the product, etc. It is a tool that can facilitate the deposition preparation session, but, like employee interviews (see below), comes with its own dangers. At times, "cheat sheets" are unavoidable because of the complexity of the facts, the breadth of the deposition topics, or the need for the witness to convey certain testimony. Because "cheat sheets" are discoverable, the sheet must include only facts, and should not contain any defense strategies. The reason cheat sheets are used is that the goal of the Rule 30(b)(6) deposition is to preserve testimony for use at trial (or arbitration). Getting good deposition testimony is imperative, and, if "cheat sheets" or other document aids are needed to accomplish this goal, then use them but with the appropriate amount of caution.

4. Interviews with current or former employees: A way around having to show the witness documents is to have the witness speak to current or former knowledgeable employees. This preparation method is not without its potential pitfalls. First, there is a significant question whether the witness' conversation with another employee is privileged (not likely). Therefore, counsel should be present during these conversations, even if by phone. Second, unlike documents, counsel cannot control what the company employee will reveal to the witness — such as information that even counsel might not know. It is important that the information the witness learns is funneled through the attorney.

5. Former employees: The obligation Rule 30(b)(6) imposes on corporations, requires them to

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produce, under certain circumstances, former employees as Rule 30(b)(6) witnesses, or have current employees speak to former employees in order to testify about the information the former employee possesses. Former employees are often the most logical choice for the corporate designee, especially if legacy documents are involved, or the product was manufactured and designed years before the accident occurred. This is very common in workplace injury cases where, for example, a press may have been resold multiple times, and the accident occurs years after distribution. The unavailability of a product liability statute of repose in many states places manufactures at risk for these types of suits. However, a company cannot plead "lack of knowledge" or "unavailability of information" if the deponent can educate himself by talking with former employees. *In re Air Cargo Shipping Services Antitrust Litig.*, 2011 U.S. Dist. LEXIS 154428, at *61 (E.D.N.Y March 27, 2011); *see Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006).

The court in *In re Air Cargo* recognized that a corporation's Rule 30(b)(6) "duty requires the responding party to educate its designees 'to the extent matters are reasonably available, whether from documents, *past employees*, or other sources.'" *Id.* (quoting *Fleurimond v. New York University*, No. 09-cv-3739, 2011 U.S. Dist. LEXIS 83288, at *2-3 (E.D.N.Y. July 29, 2011)) (emphasis supplied). The court, upon application, ordered deposition witnesses to speak or attempt to speak to former employees who had participated in the meetings or drafted e-mail communications that allegedly led to the price fixing scheme because the testifying witnesses did not participate in the meetings or draft the e-mails that led to the alleged price-fixing scheme. *Id.* at *64.

6. Affiliate corporations: The Rule 30(b)(6) obligation does not end with the company being sued. Employees working for affiliated entities also must be consulted and the witness prepared on their knowledge. *Sanofi-Aventis v. Sandoz, Inc.*, 272 F.R.D. 391 (D.N.J. 2011). In this patent infringement matter involving the manufacture of a generic drug by defendant Sandoz to Sanofi-Aventis' Ambien CR®, Sanofi-Aventis sought Rule 30(b)(6) deposition testimony on activities performed by Sandoz's Slovenian pharmaceutical affiliate, Lek Pharmaceuticals (Lek), in the manufacture and drug application process for the generic drug. *Id.* at 392-393. After analyzing the significant involvement Lek had in the drug application, the court turned its attention to whether the information possessed by Lek was

Third Circuit courts have relied on the "control" standard set forth in Rule 34(a) for the production of documents ...

"reasonably available" to Sandoz under Rule 30(b)(6). *Id.* at 394. Important for product manufacturers, the court focused its analysis on whether the information Lek possessed was "reasonably available" to Sandoz, the corporation named in a Rule 30(b)(6) notice. *Id.*

Third Circuit courts have relied on the "control" standard set forth in Rule 34(a) for the production of documents to hold that corporations must have Rule 30(b)(6) witnesses obtain information from related entities that they have "the legal right, authority or ability to obtain documents upon demand." *Id.* at 394 (citation omitted). Similarly, Third Circuit cases have required corporations to educate their witnesses about a related entity when the corporation obtains documents from the related entity for business needs (the case in the Sanofi-Aventis matter). *Id.* Other circuit courts have required the responding party to educate its witnesses on information from related entities with "eight degrees of ownership separation." *S.C. Johnson & Son, Inc. v. Dial Corp.*, No. 08-CV-4696, 2008 U.S. Dist. LEXIS 76320, at *2 (N.D. Ill. Sept. 10, 2008). In the circuits that have addressed the issue, the courts have compelled the litigating corporation to educate its witness(es) on the conduct of its related entity when it "had either the legal or practical ability to obtain information from its corporate affiliate." *Sanofi-Aventis*, 272 F.R.D. at 395 (citations omitted). In the more traditional product liability lawsuit, manufacturers will likely be compelled to educate their witnesses on the conduct of related entities if the related entity played a role in the manufacture, design, or warning of the product, or any of its components. However, the rule is not absolute as "[t]he availability of information in possession of a related company turns on the facts of each case, in particular as they relate (sic) the 'control' standard of Rule 34(a)." *Id.*

7. Mock deposition: No matter the size of the case, counsel should conduct a mock deposition. If counsel believes there are certain questions plaintiff's counsel will ask, ask them. If there are key, potentially damaging questions that will be asked, ask them. Counsel needs to know ahead of time how the witness will respond to the critical questions that will be asked. If counsel does not like the response, tell the witness what is wrong with how the answer is phrased, what a better strategy is to approach to question and provide a response, how important it is to control one's emotions during a depositions, or, if needed, designate another witness (thus, the timing issue). Moreover, you need to prepare your witness for questions beyond the scope of the deposition topics; therefore, it

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is important to educate the witness on issue beyond the manufacture and design of the product, and, more generally, about "the case." Even if the deposition is limited in scope, some form of mock deposition should be conducted to place the witness at ease.

Deposition Issues: They Always Come Up

Counsel must be aware of the fine line between proper objections under the Federal Rules of Civil Procedure and improperly instructing the witness not to answer plaintiff's counsel's questions. Rule 30(c)(2) states that "[a] person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." If counsel anticipates a contentious deposition (and counsel will likely know well ahead of time that the deposition will be contentious), counsel should seriously consider seeking a protective order to limit the deposition topics. *See Baker*, 670 F.3d at 119 (deposition was limited to topics the First Circuit outlined in a remand order). As discussed above, if the deposition topics are too broad or vague, seek the magistrate's involvement before the deposition and after conferring with the adversary.

Courts will impose sanctions on counsel who terminate a deposition or instruct their corporate designee not to answer questions unless consistently done within the parameters of Rule 30(c)(2). Harassment and an adversary's bad-faith conduct do not justify repeated objections instructing the witness not to answer. *American General Life Ins. Co. v. Billard*, C10-1012, 2010 U.S.Dist. LEXIS 114961(N.D. IA. Oct. 28, 2010). In *Billard*, the Rule 30(b)(6) deposition of plaintiff-insurance company's designee was especially contentious, with defense-counter-claimant's counsel asking harassing, argumentative, irrelevant questions, often well beyond the scope of the notice, that were met with repeated instructions by plaintiff's counsel not to answer the question, and finally, termination of the deposition. *Id*. at *3-8.

While the court did not necessarily disagree that defense counsel acted in bad faith at times, and his questioning exceeded the scope of the notice, the court was most troubled by plaintiff's counsel's failure to seek the court's assistance under Rule 30(d)(3), instead instructing the witness not to answer the questions. *Id*. at *20-22 (citing *Smith v. Logansport Comm. School*, 139 F.R.D. 637, 643 (N.D. Ind. 1991) (counsel should have stated objections on the record, halted the deposition, and immediately filed a protective order). The court, in awarding sanctions, held that plaintiff's counsel should have sought its "immediate assistance" pursuant to Rule 30(d)(3), through a simple phone call, rather than terminating the deposition. *Id*. at *21, 24.

The most common deposition issue is whether proper objections can be made to questions "believed" to be beyond the scope of the deposition notice.

The most common deposition issue is whether proper objections can be made to questions "believed" to be beyond the scope of the deposition notice. Counsel should not mistakenly believe that the deposition notice confines the examination, and you should not confine your preparation to the deposition notice topics. *King*, 161 F.R.D. at 476. The *King* court, followed by many federal circuits, reasoned that Rule 30(b)(6) "is best read"…

> 3) If the examining party asks questions outside the scope of the matters described in the notice, the general deposition rules govern (i.e. Fed.R.Civ.P. 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).

Id. at 476. Stated another way, the Rule 30(b)(6) deposition notice does not limit the deposition topics. However, that is not to say that defense counsel cannot object to the scope of the questions. *See TV Interactive*, 2012 U.S. Dist. LEXIS, at *8-12 (contention interrogatories were a more appropriate discovery tool than a Rule 30(b)(6) deposition to obtain information about the defendant's legal defenses); *Newman v. Borders, Inc.*, 2009 WL 931545 (D.D.C. April 6, 2009) (the court relied upon Fed.R.Civ.P. 1 to limit plaintiff's request for an additional 30(b)(6) witness, instead ordering the defendant to submit an affidavit addressing the company's e-mail policies and system). A more appropriate defense strategy is to confer first with the client and then with opposing counsel to determine whether another corporate designee should appear on the topics about which plaintiff's counsel is asking. And, if necessary, contact the court.

Conclusion

Rule 30(b)(6) depositions are important events in product 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 Rule 30(b)(6) deposition — meaning, the case has not been torpedoed — starts with preparation — yours and the witness'. If the witness is properly prepared, the deposition's outcome should be satisfactory, which, in most, cases, is all you can ask for.

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