Pitfalls in Defending the Rule 30(b)(6) Witness

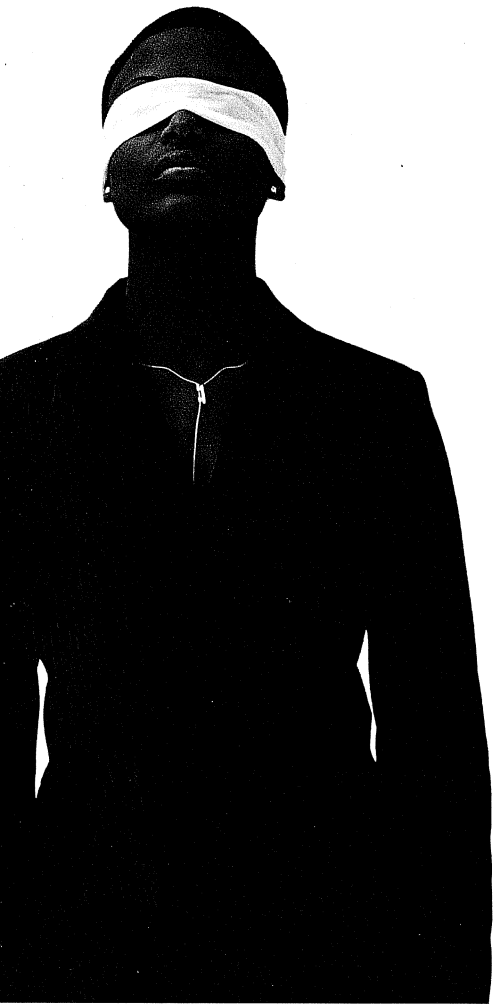
by Christopher W. Arledge

The basic framework is familiar to all federal-court practitioners. Federal Rule of Civil Procedure 30(b)(6) allows a party to notice the deposition of a corporation. The party noticing the deposition is obligated to "describe with reasonable particularity" the subject matters of the deposition. The corporation then has the right to select the person or persons who will speak on its behalf regarding those subject matters. This framework is familiar, and the deposition itself will look no different from any other. But for counsel defending the deposition, Rule 30(b)(6) raises potential problems not present when defending a natural-person witness.

30(b)(6) Testimony Binds the Corporation

Probably the most important difference between 30(b)(6) depositions and other depositions is that the deposition of a 30(b)(6) corporate designee is "binding" on the corporation. What this means, exactly, is still an open question. To some courts, a corporation is bound by its 30(b)(6) testimony the same way any natural-person witness is bound by his or her testimony. That is, the witness' testimony is evidence that, in most cases, can be explained away or modified at trial. But to other courts, answers at a 30(b)(6) deposition actually constitute judicial admissions that the corporation cannot later contradict.

The majority position seems to be the former. As explained in *W.R. Grace & Co. v. Viskase Corp.*, 1991 WL 211647, *2 (N.D. Ill. 1991), "a corporation is 'bound' by its Rule 30(b)(6) testimony, in the same sense that any individual deposed under Rule 30(b)(1) would be 'bound' by his or her testimony. All this means is that the witness has committed to a position at a particular point in time. It does not mean that the witness has made a judicial admission that formally and finally decides an issue." *See also A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 83, 837 (7th Cir. 2001); *Industrial Hard Chrome, LTD.,*



IHC v. Hetran, Inc., 92 F.Supp.2d 786, 791 (N.D. Ill. 2000); *United States v. J.M. Taylor*, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996).

Thus, under this reading of the rule, the corporation may be allowed to contradict positions taken at its 30(b)(6) deposition. Of course, this may be little consolation in many cases. It is obviously never a good thing for your client to take a position in deposition that is antithetical to your client's litigation position. And even under this more lenient reading of Rule 30(b)(6), the corporation may be precluded from contradicting its 30(b)(6) testimony in declarations for the purpose of defeating a summary judgment motion. *See Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) ("The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony."). Nevertheless, the more lenient reading of Rule 30(b)(6) would at least allow a corporation to modify its position for purposes of trial. "Deposition testimony is simply evidence, nothing more. Evidence may be explained or contradicted. Judicial admissions, on the other hand, may not be contradicted. . . . If a . . . trial witness [for the corporation] makes a statement that contradicts a position previously taken in a Rule 30(b)(6) deposition, then [the opposing party] may impeach that witness with the prior inconsistent statement." *W.R. Grace*, 1991 WL 211647 at *2.

But other courts actually preclude the corporation, at trial, from taking any position inconsistent with its 30(b)(6) testimony. "By commissioning the designee as the voice of the corporation, the Rule obligates a corporate party 'to prepare its designee to be able to give binding answers' on its behalf. . . . Unless it 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." *Rainey v. American Forest and Paper Ass'n., Inc.*, 26 F.Supp.2d 82, 94 (D.D.C. 1998); *see also Ierardi v. Lorillard, Inc.*, 1991 WL 158911, *3 (E.D.Penn. 1991) ("Under Rule 30(b)(6), defendant has an obligation to prepare its designee to be able to give binding answers on behalf of [the corporation]. If the designee testifies that [the corporation] does not know the answer to plaintiffs' questions, [the corporation] will not be allowed to change its answer by introducing evidence during trial.").

It is still an open question in most circuits, including the Ninth, whether 30(b)(6) testimony constitutes a judicial admission by the corporation. But under either standard, careless or wrong answers by the corporation's 30(b)(6) designee can do significant damage to the corporation's case. One important lesson, then, is that the corporation's counsel should carefully and thoroughly prepare the corporation's 30(b)(6) designee. Ideally, all of the corporation's agents would be prepared, able and confident witnesses at deposition. But it is the 30(b)(6) designee's testimony that could arguably constitute a judicial admission that binds the corporation.

It is the 30(b)(6) designee's testimony that could preclude the corporation from creating a triable issue of fact at summary judgment. And it is the 30(b)(6) designee's testimony that will be paraded in front of the jury as the corporation's own words. The customary way to parade the corporation's answers in front of the jury is to read the deposition testimony or show video clips of the testimony. Either approach would be appropriate under Federal Rule of Civil Procedure Rule 32(a)(2), which allows a party to use the deposition testimony of the opposing party "for any purpose." But, presumably, in those courts that believe 30(b)(6) testimony is akin to a judicial admission, the opposing party would be entitled to an instruction to the jury to the effect that the matter admitted at the 30(b)(6) deposition is conclusively established as a matter of law. Hence, counsel should take special care in preparing the 30(b)(6) witness.

> ***"The corporation may be bound by a harmful answer to a question that counsel never anticipated from the face of the deposition notice."***

The 30(b)(6) Designee May Have to Testify Even on Subjects Outside the 30(b)(6) Designation

That the lawyer should take care in preparing the 30(b)(6) witness is obvious. Less obvious is the scope of the preparation. The 30(b)(6)

witness is chosen to testify on those topics identified in the deposition notice. But there is a split in the district courts on whether the 30(b)(6) categories define the outer limits of the deposition. One early case held that the questioner in a 30(b)(6) deposition could not stray outside of the 30(b)(6) categories, but the prevailing opinions now seems to be that there are no such limits.

In *Paparelli v. Prudential Ins. Co. of America*, 108 F.R.D. 727 (D.Mass. 1985), one district court held that a party who chooses to take the 30(b)(6) deposition of a corporation "must confine the examination to the matters stated 'with reasonable particularity' . . . in the Notice of Deposition." *Id.* at 730. The court noted that the language of the rule itself does not seem to mandate such a limitation, but that the limitation "is implied by the procedures set forth in the rule. . . ." *Id.* at 729. If the questioner strays outside the 30(b)(6) categories, however, the corporation's attorney cannot merely object and instruct the witness not to answer. Rather, the corporation is obligated to suspend the deposition and seek a protective order. *Id.* at 731.

A string of district courts have rejected *Paparelli*. *See King v. Pratt & Whitney, a Division of United Technologies Corp.*, 161 F.R.D. 475, 476 (S.D.Fla. 1995); *Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 366 (N.D.Cal. 2000); *Overseas Private Inv. Corp. v. Mandelbaum*, 185 F.R.D. 67, 68 (D.D.C. 1999). They conclude that the 30(b)(6) categories delineate that information that the designee *must* be able to answer. If he or she cannot do so, the corporation can be sanctioned. (Or, as discussed above, the corporate designee's answers—however uninformed, incomplete or harmful—may bind the corporation.) But the 30(b)(6) categories do not limit the questioner. Instead, any other topic that falls within the permissible scope of discovery is also fair game.

These courts have generally rejected the *Paparelli* rule because they find it inconsistent with the liberal scope of discovery under the federal rules and creates an unnecessary procedural hurdle. After all, the questioning party could simply re-notice the deposition of the deponent to ask additional questions outside the 30(b)(6) designation. Even so, there is also a danger in this approach. Because 30(b)(6) testimony is binding on the corporation, the corporation has a right to expect that individual testimony (i.e., testimony outside the 30(b)(6) topics) will not be mistaken for 30(b)(6) testimony. The *Detoy* court acknowledges this problem and recommends that counsel avoid it by objecting on the record that the question falls outside the 30(b)(6) categories, allowing the witness to answer the question, and asking for a jury instruction clarifying that the answers are merely the answers of an individual fact witness rather than the corporation itself. *Detoy,* 196 F.R.D. at 367.

Sweat the Details of the 30(b)(6) Categories

The binding nature of 30(b)(6) testimony and the fact that a single deposition could involve questions both inside and outside the 30(b)(6) categories means that the corporation's counsel must pay close attention to the 30(b)(6) categories drafted by opposing counsel. Counsel cannot afford to ignore vague or confusing 30(b)(6) categories. Vague or confusing 30(b)(6) categories will make it difficult to fully prepare the corporate designee, increasing the likelihood that the designee will give harmful answers or will be ill-prepared and potentially subject the corporation to sanctions. Equally troubling, counsel may have difficulty later persuading the court that a particular objectionable questions falls outside the 30(b)(6) categories. The corporation may be bound by a harmful answer to a question that counsel never anticipated from the face of the deposition notice.

Hence, the corporation's counsel should be active in clarifying the scope of the 30(b)(6) categories; meet and confer with opposing counsel; articulate your understanding as to what the categories include and do not include. Note that it is not enough to object, in that objecting will not excuse the duty to comply with the deposition notice. See Federal Rule of Civil Procedure 37(d). If opposing counsel refuses to cooperate with your reasonable requests for a better definition of the 30(b)(6) categories, the corporation's counsel may have no choice but to bring a motion for a protective order under Federal Rule of Civil Procedure 26(c). If court intervention is necessary after the deposition has started, the proper vehicle is Federal Rule of

Civil Procedure 30(d)(4) rather than 26(c).

But this will often prove unnecessary. Opposing counsel will not want to waste time attending a 30(b)(6) deposition that will not give him or her the information sought. Thus, opposing counsel is likely to at least engage in the meet-and-confer process. The corporation's counsel should use this process to get opposing counsel to clarify any vague or uncertain categories (after all, the corporation benefits from clear boundaries), lay the foundation for a motion for a protective order (if truly necessary), and create a paper trail that will help the corporation in pre-trial disputes over the scope of the categories and whether particular answers should be deemed binding on the corporation.

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