The Organizational Deposition of an Insurance Company

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Rule 30(b)(6) of the Federal Rules of Civil Procedure and the corollary state procedural rules are often used to obtain information from organizations, including insurance companies. Although—in many ways—the deposition of an insurance company is similar to that of any other organization, the structure and culture of some insurer clients can present unique challenges. This article discusses some practice pointers counsel can employ when faced with defending an insurance company's 30(b)(6) deposition, including how to avoid potential pitfalls.

Designating a Noticed Organization's Deponent

Rule 30(b)(6) requires that designated representative(s) of a noticed organization testify with respect to designated matters "known or reasonably available to the organization." When a 30(b)(6) designee speaks, she speaks not for herself, but for the noticed entity. The deponent has an affirmative obligation to educate herself about the matters identified on the notice.

As we all know, few people want to be the subject of a deposition. Finding someone to be a noticed organization's deponent may be difficult. In an insurance company, this process may be complicated by the compartmentalization of the company. For example, your contact may not know anyone with knowledge of environmental underwriting in the 1960s. Personnel turnover may mean that employees who worked for the organization 50 years ago are probably fishing in Wisconsin today. Remember, too, that the final designation of the organization's deponent has to occur before you can schedule your prep time with that person, and the prep meeting must occur before the deposition date. With this in mind, you may want to talk with your client about the possible topics of an organizational deposition and encourage the client to consider designating a deponent well before the notice is received.

Working with an insurer client presents a special challenge: the person you report to may not know who is authorized to designate a company deponent. If, from your prior experience with the client, *you* know who the right person to receive the notice is, consider suggesting to your contact that she authorize you to send the deposition notice directly to the decision maker. Also, don't be afraid to follow up with your contact. No one is helped by waiting until the week before the deposition date to find out that the notice waits on your contact's (amazingly long) to-do list. Help your contact understand that *this* issue requires immediate attention.

With respect to choosing the right person, remember that the corporate entity has an obligation to identify someone. You may hear repeatedly that no one currently at the company has any personal knowledge of the deposition notice's subject. (They all are fishing in Wisconsin!) That is fine. The deponent is not required to have personal knowledge; she must have the organization's knowledge of the matters designated. If no one has that knowledge personally, someone must be *made* knowledgeable. Importantly, the federal rule does not require that the deponent be a current or even a former employee of the company. However, a "never has been" employee is likely to be worth pursing only in rare cases; it is a big job to make your deponent sufficiently knowledgeable if she has not been associated with the company and its practices. Remember, too, that one deponent need not have information on every matter designated in the notice; multiple deponents can be identified.

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Preparing the Designated Deponent

To comply with the requirement that the deponent testify about information "known or reasonably available to the organization" on the designated matters, counsel often has to prepare the Rule 30(b)(6) deponent through the review of reasonably available sources of organizational information such as documents, past and current employees, prior witness deposition testimony, and deposition exhibits. If your deponent is a working claims person, she may be handling hundreds of matters and dealing with dozens of files on a daily basis. It is unlikely the employee will get help with work responsibilities to free up time for either the document review or any in-person prep time. Indeed, a working claims person may not be the best designee because that employee has so little time available to spend on matters beyond claim files. Help the company see that the appropriate deponent must have sufficient time to devote to becoming knowledgeable about the subjects of the deposition and about the process itself.

To speed preparation—and make your deponent more at ease—consider making a notebook of relevant documents and providing it to the deponent as early as possible. Be mindful that documents used to prepare the witness may have to be produced to the other side. The case law on this issue is varied across jurisdictions. Some courts recognize work-product protections for documents used to prepare witnesses, while other courts have held that Federal Rule of Evidence 612 requires production of documents used to refresh the testifying witness's memory.

Consider, however, that reviewing readily available written material is not likely to fully comply with the deponent's duty to become knowledgeable about the designated matters. The organization has the duty to search for documents and persons with information and provide that information to the deponent. The questioning attorney will ask the deponent what she did to become knowledgeable. Make sure you know what was done and what information the deponent received.

Objections to Deposition Topics

If problems exist with the scope of the deposition topics (such as too broad, not clear, not reasonably calculated to lead to admissible evidence) or the notice fails to provide "reasonable particularity" concerning the noticed topics, immediately inform the propounding attorney and try to work through your objections well before the deposition. As a practical matter, your letter identifying the problem areas puts the onus on the propounding attorney to refine the deposition topics to resolve the issues. If that attorney has no opportunity to address your objections until the deposition, a court may find that it is too late to raise those objections. In that case, Rule 37 may be used to sanction your client for not answering questions that fall under one of the noticed topics. If you are unable to resolve a dispute over the noticed topics, you should seek a protective order under Rule 26.

What should you do if the deposing counsel goes beyond the scope of the deposition topics? Courts are split on whether the witness must answer questions beyond the scope of the deposition notice. One approach is to object to the question and suspend the deposition to seek a protective order. Another approach is to allow the witness to answer, if she can, based on her personal knowledge. Then make an objection on the record that the witness's answer should not be considered binding on the organization because the question went beyond the scope of the 30(b)(6) notice.

As with all depositions, preparation is key. Help your client choose the right deponent and make sure that person has been given the insurance company's knowledge of the matters identified in the notice. Solid preparation will help your client avoid being on the wrong end of a motion to compel or a motion for sanctions.

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