BACK STORY

THE 30(b)(6) DESIGNATION: A DISTINCTION WITH A DIFFERENCE

BY FRANK FLANSBURG, ESQ.

In civil commercial practice, parties often need the deposition testimony of an organization, whether it be a private corporation, limited liability company or trust.[1] Although some practitioners have resorted to PMK Deposition Notices, such depositions do not bind the corporation. To ensure that testimony is binding on the corporation, practitioners must resort to Rule 30(b)(6) of the Nevada Rules of Civil Procedure and designate topics on which corporations must provide a designated representative with knowledge, but not necessarily personal knowledge. The previous "have knowledge" or personal knowledge requirement was eliminated for consistency with the federal rule.[2]

While Nevada precedent has not articulated the distinctions between a PMK Deposition and a Rule 30(b)(6) Deposition, our United States District Court for the District of Nevada has collected national precedent on the issue and provides ample authority concerning the use of Rule 30(b)(6) Depositions. Since "[f]ederal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts,"[3] commercial practitioners should turn to the federal interpretation of Rule 30(b)(6) for guidance.

The Distinction

The testimony of a Rule 30(b)(6) designee "represents the knowledge of the corporation, not the individual deponents."[4] Even though they may have no *personal* knowledge, Rule 30(b)(6) designees must represent the corporation's position and testify to the corporation's knowledge on the notice topics.[5] When a corporation receives a Rule 30(b)(6) Deposition Notice, the corporation has the duty and obligation to provide a knowledgeable witness who will testify to "binding answers on behalf of the corporation."[6] Thus, unlike the traditional PMK Deposition that neither provides binding nor knowledgeable testimony, Rule 30(b)(6) Depositions bind a corporation to its knowledge.

The Scope of Knowledge

Although a Rule 30(b)(6) Deposition is not a memory test,[7] the corporation has a duty to "make a conscientious, good faith effort to designate knowledgeable persons for 30(b)(6) depositions and prepare them to fully and unevasively answer questions about the designated subject matter."[8] The fact that a person with knowledge on the designated topics is no longer associated with the corporation does not relieve it of the duty to prepare a Rule 30(b)(6) designee; the corporation must educate the designee with information from documents, past employees or other sources.[9] If necessary, the corporation must also designate more than one designee to address the relevant areas of inquiry included within the Rule 30(b)(6) Notice.[10]

The Balanced Interests

Rule 30(b)(6) is intended to streamline the discovery process.[11] Serving a unique function by allowing a specialized deposition, Rule 30(b)(6) empowers the corporation with the ability to select and prepare witnesses who will provide binding testimony for the corporation.[12] For the examining party, Rule 30(b)(6) serves as a discovery device to curb any temptation that a corporation may have to strategically present deponents who disclaim knowledge of facts clearly known to someone in the organization.[13] While preparing for a Rule 30(b)(6) deposition can be a burdensome process, courts have recognized that the burden is a fair exchange for the privilege of using the corporate form to conduct business.[14]

Conclusion

Of course, there are a whole host of pitfalls, challenges and nuances related to Rule 30(b)(6) Depositions that cannot be covered in the limited space here. That said, any civil commercial practitioner must be aware of the distinction between the historical PMK Deposition and the Rule 30(b)(6) Depositions, paying close attention to the burdens and obligations on both the corporation and examining party. ■

1. For simplicity, this article refers to organizations collectively and generically as "corporation."
2. *See* Editor's Note to NRCP 30(b)(6).
3. *Executive Mgmt. Ltd. v. Ticor Title Insur. Co.*, 118 Nev. 46, 38 P.3d 872 (2002).
4. *Great American Insur. Co. of New York v. Vegas Construction Co., Inc.*, 251 F.R.D. 534, 538 (D. Nev. 2008) (quoting *United States v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996)).
5. *Id.; United States v. Massachusetts Industry Finance Agency*, 162 F.R.D. 410, 412 (D. Mass. 1995); *Sprint Communications Co. v. Theglobe.com, Inc.*, 236 F.R.D. 524, 526 (D. Kan. 2006).
6. *Starlight Int'l. Inc. v. Herlihy*, 186 F.R.D. 626, 638 (D. Kan. 1999).
7. *Bank of New York v. Meridian BIAO Bank Tarzania, Ltd.*, 171 F.R.D. 135,150 (S.D.N.Y. 1997).
8. *Great American Insur. Co.*, 251 F.R.D. at 539; *Starlight*, 186 F.R.D. at 639.
9. *Taylor*, 166 F.R.D. at 361.
10. *Id.; Barron v. Caterpillar Inc.*, 168 F.R.D. 175, 176 (E.D. Pa. 1996); I*n Re: Vitamins Antitrust Litigation*, 216 F.R.D. 168, 172 (D.D.C. 2003).
11. *Resolution Trust Corp. v. Southern Union Co. Inc.*, 985 F.2d 196, 197 (5th Cir. 1993).
12. *Sprint*, 236 F.R.D. 524; *Taylor*, 166 F.R.D. at 360.
13. *Federal Deposit Insur. Co. v. Butcher*, 116 F.R.D. 196, 199 (E.D. Tenn. 1986).
14. *Taylor*, 166 F.R.D. at 361; *see also Great American Insur. Co.*, 251 F.R.D. at 531.

FRANK M. FLANSBURG III, is a shareholder of Marquis Aurbach Coffing. Flansburg focuses his practice on commercial litigation, representing businesses and entrepreneurs both in and out of court. Flansburg has tried numerous cases and has expertise in defending guarantors, business disputes and construction law. He can be reached at (702) 382-0711 or fmf@maclaw.com.