

Corporate Reps at Deposition Must Be Knowledgeable

by Thomas G. Bell Jr.

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A recent decision by Magistrate Judge Michael F. Urbanski of the U.S. District Court—Western District of Virginia provides useful guidance and warning for corporations or other entities required to provide a knowledgeable corporate representative for a discovery deposition.

Rule 30(b)(6) of the Federal Rules of Civil Procedure allows and requires a corporation or other business or government entity to be deposed. Under the familiar procedure, the party that requests the deposition “must describe with reasonable particularity the matters for examination.” In turn, the entity must name a person or persons to testify on its behalf, by designating a specific individual for each matter on which examination is requested. The rule requires that the “persons designated must testify about information known or reasonably available to the organization,” so there is an obvious requirement that the designated person be able to speak for the entity and not just as an individual. Rule 4:5(B) of the Virginia Rules of Court closely tracks Rule 30(b)(6) and establishes a similar procedural framework for cases in Virginia circuit courts.

Nearly all trial lawyers at some point have faced the frustration of deposing a corporate representative who is designated for the deposition, but when questioned lacks sufficient information to provide adequate discovery of the company’s evidence or lacks understanding of his responsibility in the case.

Lawyers who represent business entities often have difficulty getting their clients to understand and take seriously their obligations under the rule. The designation as a deponent for a company is obviously not one that an employee gen-

erally welcomes. Often the designated corporate representative is unhappy about his or her designation and is faced with a difficult and time-consuming obligation outside of normal job duties. There is an understandable desire to get the deposition done with a minimum of effort so the employee can get back to his or her real job. Litigation is often seen as an annoyance and a distraction, particularly when there is insurance coverage for any loss and the company’s assets are not at risk.

The facts in *Spicer v. Universal Forest Products* (2008 U.S. Dist LEXIS 77232, W.D. Va., decided October 1, 2008) reveal a particularly flagrant corporate failure to comply with the requirements of the rule and the severe consequences of that failure. Judge Urbanski’s decision in that case should be required reading for any business representative designated in a Virginia case—state or federal. It should impress on any designee the importance of the assignment.

Spicer alleged that he was fired by Universal from his job at its Pearisburg plant in violation of federal laws prohibiting age and disability discrimination and in retaliation for filing a workers’ compensation claim. Universal’s defense was that his termination was for poor job performance and a result of a decline in the business at its Pearisburg plant.

The plaintiff’s counsel issued a notice under Rule 30(b)(6) designating at least sixteen separate topics for inquiry, including the basis of the business downturn defense and the company’s response to the workers’ compensation claim. He was required to travel from Roanoke to Grand Rapids, Michigan, to take the deposition. Before the deposition was scheduled, Universal had filed two motions for protective order to narrow the scope of the topics to be addressed at the deposition, so it certainly had knowledge of what the deposition was to cover.

When the corporate representative was deposed, he stated in response to questions on all or nearly all the topics that he had no knowledge on which to respond for the company. He

revealed that his only preparation was a conference with the company's counsel, that he had not reviewed any documents except with counsel, that the documents he reviewed did not relate to the topic, and that otherwise he had done no preparation. Counsel refused to let him answer any questions about the nature of their pre-deposition discussions or the documents they had reviewed, so the representative was unable to provide any responsive information. As Urbanski noted, "It is clear from review of the transcript that Hendricks was simply unaware of his role as 30(b)(6) corporate designee."

After the deposition, plaintiff's counsel filed for sanctions pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure. That rule authorizes sanctions against an offending party that include waiver of defenses, rendering a default judgment, contempt, and payment of attorney's fees and expenses.

The designated representative testified that he had no information about business conditions at the Pearisburg plant or any financial reports of the company, but admitted that he could have obtained that information if he had done any investigation. He gave a similar response on questions about the workers' compensation claim.

Urbanski held that a "corporation must make a good-faith effort to designate people with knowledge of the matter sought by an opposing party and to adequately prepare its representatives so that they may give complete, knowledgeable, and non-evasive answers in deposition." Citing the case of *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996), the opinion stated:

The testimony elicited at the *Rule 30(b)(6)* deposition represents the knowledge of the corporation, not of the individual deponents. . . . If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation. Thus, the duty to present and prepare a *Rule 30(b)(6)* designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved.

Rule 30(b)(6) explicitly requires [a corporation] to have persons testify on its behalf as to all matters known or reasonably available to it and, therefore, implicitly requires such

persons to review all matters known or reasonably available to it in preparation for the *Rule 30(b)(6)* deposition.

Urbanski noted that preparing for corporate depositions could be burdensome, but that did not relieve the corporation of its responsibility to prepare. The burden of preparation is simply an obligation imposed on the corporation in return for its ability to take advantage of the legal protections available to a corporation.

Universal argued that the information sought was otherwise attainable and had been provided to the plaintiff through other witnesses, so that the lack of knowledge of the corporate representative did not prejudice the plaintiff. While Judge Urbanski gave Universal some leeway where that information had been obtained from other witnesses, he noted that on some of the topics, especially the financial condition of Universal's Pearisburg plant, there was no information elsewhere. He further found that, "The fact that four Universal employees were deposed does not relieve Universal of its obligations under *Rule 30(b)(6)*. Providing plaintiff with discoverable information through non-30(b)(6) depositions and document production does not excuse Universal's failure to prepare its corporate designee for the 30(b)(6) deposition. . . . The mere fact that a corporation produces all of its documents relating to an allegation does not relieve it of its responsibility to produce competent witnesses."

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Faced with the flagrant lack of preparation, Urbanski concluded, "Whether by design or oversight, it is clear that Universal completely disregarded its obligations under *Rule 30(b)(6)*. Spicer has been prejudiced in terms of the expenses incurred in preparing for and attending a 30(b)(6) deposition in a distant city that was utterly futile and in its inability to obtain discoverable information on the company's alleged financial downturn."

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Because the trial date was near, Urbanski declined to reschedule the corporate deposition since that “would only serve to punish plaintiff’s counsel by requiring them to retrace their steps instead of preparing for the impending trial.” He imposed sanctions, beginning with ordering Universal to pay the attorney’s fees and costs incurred by the plaintiff in preparing for, traveling to, and conducting the deposition, as well as those incurred in pursuing the motion for sanctions.

As previously noted, Universal designated a 30(b)(6) witness who could provide no evidence regarding its claim of a financial downturn at its Pearisburg plant. To compound its problems, two weeks after the 30(b)(6) deposition Universal filed an affidavit outlining the financial problems of the Pearisburg plant and moved for summary

judgment based on the affidavit, despite stonewalling plaintiff’s efforts to inquire about the issue at the 30(b)(6) deposition.

In discussing the summary judgment affidavit, Urbanski noted that the court had narrowed the scope of the financial inquiry condition to that of the Pearisburg plant but the witness failed to provide any supporting information. The court concluded, “It is incongruous that Universal can contend, based on this affidavit, that there is no dispute of fact as to the financial condition of its Pearisburg plant when counsel for the plaintiff was given no opportunity at the 30(b)(6) deposition to probe this defense, as the corporate deponent was utterly unprepared to testify on this subject.” ■