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Let Company Witnesses Work from a Script

The person designated to give a deposition for an organization can't possibly know all the answers.

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"With all due respect" almost never is. We invariably use the phrase as an introduction to an insult. But just this once, I mean it.

With all due respect, many judges continue to get it wrong about Rule 30(b)(6), the rule that allows a party to depose an organization through a witness designated by the organization. Not all judges get it wrong, but too many. I respect these judges, I do, and for the most part their error is harmless, but they are wrong. They can be forgiven, because their error has been repeated in legions of reported cases. But they are wrong.

A 30(b)(6) witness must be prepared to convey knowledge but need not have knowledge. Two opinions, each issued a few weeks ago out of the same Southern District of New York, illustrate the right and wrong. Judge Katherine Forrest got it right. Discussing the requirement that a Rule 30(b)(6) deponent must be prepared to testify to the corporation's collective knowledge, she correctly added, "To be clear, a 30(b)(6) witness need not have personal knowledge of a topic so long as he is prepared to speak to it."

But her colleague, Judge Frank Maas, got it, with all due respect, wrong, stating that the organization "must make a conscientious good-faith endeavor to designate the persons having knowledge."

Both judges agree that the witness has to be knowledgeable and has to show up prepared to answer questions about the corporation's knowledge. Where they disagree is whether the witness must have or simply be prepared to convey the entity's knowledge.

Maas can be forgiven, if for no other reason than that his view appears to be more universally espoused. In my unscientific and certainly not academically disciplined research, I found six other reported cases in the past several months that wrote on the subject, and five of those agreed with Maas, saying such things as that the entity "should produce the witness with the most knowledge." Only one case correctly observed that "a corporation has an affirmative duty to provide a witness who is able to provide binding answers on behalf

of the corporation but such witness need not have personal knowledge of the designated subject matter."

MAILMAN AS POINT MAN?

Let's actually look at Rule 30(b)(6). The rule requires an entity to "designate one or more … persons who consent to testify on its behalf. … The persons designated must testify about information known or reasonably available to the organization." The rule nowhere requires that the designated persons be possessed of any personal knowledge.

They do not even have to be employees of the entity. The entity can designate anyone—its chief executive officer, or its lawyer or its mailman. It can hire an actor. OK, I know judges whose eyebrows would arch into weapons at mailmen and actors, but the rule doesn't preclude them. It simply requires a being with a pulse prepared to answer questions.

And the best way for someone without knowledge to convey knowledge is to work from a script. A script? Yes, think about it. You represent Mega Corporation in bet-your-company litigation and get a 30(b)(6) notice with 100 distinct topics that cover five years of history, 50,000 relevant e-mails and 300 individual actors. No single human being could possess the company's collective knowledge, nor could any individual memorize it. Hell, no single platoon of people could. What do you do? Designate 100 individuals? Each for seven hours? Or designate one or two persons who know something about some of the topics, with the inevitable complaint and motion practice that the designated persons were not prepared to answer?

Think "other side." You represent the plaintiff, itching to get Mega's answers and get on to trial. Do you really want 100 seven-hour depositions? Motion practice? No, you want efficiency, you simply want binding answers. Whichever side you are on, both sides should want a script so you give and get answers, not "I don't knows."

And once you get over the wrong-headed notion that the witness ought to possess knowledge rather than be prepared to convey knowledge of others, a script makes perfect sense.

But "script" actually may be the wrong word; maybe "summary" or "outline" or "talking points" would be a better term. Whatever the term, the document becomes the key to an efficient deposition for both sides.

Ah, but we live in an adversarial world. Both sides may win, but don't expect your opponent to necessarily see that. If you say "good morning" he says, "Oh yeah? Prove it." So can you have your witness use a script over opposing counsel's objection?

There is scant little authority on the propriety of using scripts. One court had no problem with a corporate representative using a 22-page summary and multiple documents during her testimony: "A well-prepared deposition notebook has the potential to enhance the accuracy and depth of a designee's testimony."

But another court came to an entirely different conclusion: "The use of an outline created entirely by litigation counsel contradicts the purpose of Rule 30(b)(6)."

So, here's my vote. (I don't get a vote. But I live in Chicago where you need not even be alive to vote). I think scripts make sense. I see nothing in Rule 30(b)(6) that precludes their use. A script is simply a document used to refresh the entity's recollection for testimony, so it should be allowed as contemplated by Fed. R. Evid. 612. You should be prepared to give your opponent the script—hopefully well in advance—and you should be prepared to let the witness be asked about the creation of the script without letting a gag-reflex to assert privilege kick in.

But with all due respect, you should get on script.

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