

Federal Rule of Civil Procedure 30(b)(6) Part II – Even More Puzzlement About Representative Witness Testimony

by Pete Haskel

In the March/April 2011 issue of MUNICIPAL LAWYER, I noted that, under Federal Rule of Civil Procedure 30(b)(6),[1] deposition topics are not limited to the topics listed in the deposition notice, and that representative testimony is not necessarily binding on the organization for which the deponent testifies. Here are second looks at more Rule 30(b)(6) questions:

How do you serve a subpoena on a non-party corporation or other non-party organization? Rule 45 is silent about how to serve organizations, so courts often look to the rules for service of summons and complaint under Rule 4 (which includes permitting service as permitted by state law. FED. R. CIV. P. 4(e)(1)). *See Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, 262 F.R.D. 293, 305-06 (S.D.N.Y. 2009). I do not think that we would go wrong in doing this. Nevertheless, when in doubt, seek advance court approval as to the method of service upon a corporation, or obtain agreement from the non-party corporation to accept service. Of course, we can always serve a named corporate officer with a subpoena, but the individual served can sometimes assert that facts or documents sought are not within the individual's knowledge (as to fact), or custody or control (as to documents). I have no on-point cases, but I do not believe that subpoenas are "other process" within the meaning of Fed. R. Civ. P. 4.1 (Service of Other Process).[2]

What happens when an organization leaves its designated witness ignorant and then, at trial, "finds" new information? Even courts that do not bind organizations to the representative witness's deposition testimony should not allow organizations to "game" the 30(b)(6) process by proffering unprepared representative deposition witnesses and then surprising the opposing party at trial. A party that fails to designate knowledgeable witnesses, or to prepare witnesses adequately on the topics designated for deposition under Rule 30(b)(6), has essentially violated the Rule and can be sanctioned. *See Resolution Trust Corp. v. S. Union Co.*, 985 F.2d 196, 197-98 (5th Cir. 1993). The courts have often dealt with, and sanctioned, parties for failing to designate knowledgeable deposition witnesses or who failed to educate designated witnesses.

What if the organization that failed to educate its deposition witness, or did not designate a knowledgeable witness, is not a party? If we discovered this in time, we could move to compel compliance with Rule 30(b)(6) and seek contempt sanctions if the organization disobeyed the compulsion order. However, what if we only discovered the Rule 30(b)(6) violations at trial (and further assume that we could not prove that our adverse party connived in the violation)? Could we move for mistrial or continuance, and seek leave to reopen discovery? I have never seen that attempted in the Rule 30(b)(6) context. At the least, I speculate that, to prevail on such attempt, we would have to demonstrate that we could not have discovered the Rule 30(b)(6) violation with due diligence, and that the adverse party was not prejudiced (or that any prejudice to the adverse party was outweighed by prejudice to our client). Would our client have an independent cause of action against the Rule 30(b)(6) violator? Even assuming that to be the case, proving damages would likely be difficult. Swearing out a criminal complaint against the organization (and, perhaps, against the individual witness, depending on the facts) for tampering with evidence by concealing it might at least provide some satisfaction.

Rule 30(b)(6) only applies at depositions. How do you question a representative witness at hearings and trial? In *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 434 (5th Cir. 2006), the court permitted questioning, at trial, of a Rule 30(b)(6) designee of a party on all issues addressed in the witness's deposition:

> Although there is no rule requiring that the corporate designee testify "vicariously" at trial, as distinguished from at the Rule 30(b)(6) deposition, if the corporation makes the witness available at trial he should not be able to refuse to testify to matters as to which he testified at the deposition on grounds that he had only corporate knowledge of the issues, not personal knowledge. This conclusion rests on the consideration that though Federal Rule of Civil Procedure 32(a)(2) "permits a party to introduce the deposition of an adversary as part of his substantive proof regardless of the adversary's availability to testify at trial," *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 308 (5th Cir.1978), district courts are reluctant to allow the reading into evidence of the Rule 30(b)(6) deposition if the witness is available to testify at trial, and such exclusion is usually deemed harmless error. Thus, if a Rule 30(b)(6) witness is made available at trial, he should be allowed to testify as to matters within corporate knowledge to which he testified in deposition. (Footnotes omitted.)

In addition, the court likely would deem the adverse party's witness's deposition testimony as statements against interest by a party, even if not binding admissions.

But, again, what if the organization is not a party? The rule against hearsay would normally preclude the testimony of

continued on page 36

Ordinances

cont'd from page 29

solicitors" also failed on overbreadth grounds. Based on *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002), it broadly restricted speech and failed to strike a balance "between the speech affected and the governmental interests" asserted by the City. The only interest that Ocean City advanced in support of the registration requirement was the need to protect children from potential inappropriate conduct by costumed street performers, and the registration requirement was "vastly overinclusive with respect to the City's stated concerns." The case is *Chase v. Town of Ocean City*, No. ELH-11-1771, 2011 U.S. Dist. LEXIS 102162 (D. Md. Sept. 09, 2011). ML

Code Enforcement

cont'd from page 31

because the individual was subject to increased penalties without being afforded a hearing to contest the validity of the violation. As a result, I changed our ordinance's penalty provision. Now, it provides for a set minimum fine, and allows an individual to pay a reduced amount if he or she chooses to admit the violation and pay within a short time after the violation date. An individual wishing to contest a violation merely faces the established minimum fine. Since the provision does not automatically increase the fine amount without a hearing, the provision should pass constitutional muster.

Municipalities always struggle to balance the needs of their businesses with the need for parking regulations—namely, how strict should enforcement be if the municipality wants to encourage customers to come downtown and patronize local businesses? Municipalities may address that balance in different ways, but rest assured that, as long as parking regulations exist, *Parking Wars* will continue. Perhaps your best bet is to make violators an offer they can't refuse. ML

Second Look

cont'd from page 30

facts not within the testifying individual witness' own knowledge.

I believe that we should use the 30(b)(6) deposition to discover the names of those persons employed by, or contracting with, the organization that *do* have personal knowledge of the relevant facts, and then either depose them, or (if within subpoena distance and also within our client's risk tolerance) call them as trial witnesses. Time and rules permitting, one could also use the Rule 30(b)(6) testimony as the basis for requests for admission, and ask that the opposing party be required to pay the expenses of proving any denied facts.

Notes

1. (6) **Notice or Subpoena Directed to an Organization.** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

2. Based on the Advisory Committee notes and the only four decisions under Rule 4.1, I think that the "other process" contemplated by the Rule means court orders for contempt, civil committal or the like. However, nothing in Rule 4.1 excludes using it for serving subpoenas, and one could argue that a "subpoena" is one example of "process." Indeed, prior to the 1993 amendments, Rule 4 referred to "process other than a subpoena ... ":

> In support of the contention that the word "process" in [ERISA] section 502(e)(2) includes a trial subpoena, plaintiff cites to the portion of [former] Rule 4 that states:
>
> > *Process, other than a subpoena or a summons and complaint*, shall be served by a United States marshal or deputy United States marshal, or by a person specially appointed for that purpose.
>
> [Former] FRCP 4(c)(1) (emphasis added) [now recodified in Rule 4.1, without reference to "subpoena"].
>
> As the passage cited by plaintiff indicates, "process" certainly can include a subpoena. It need not be construed so broadly though, as:
>
> > The word "process" ... as now commonly understood, refers to a summons, or, summons and complaint, and, less commonly, to a writ.
>
> Black's Law Dictionary at 1085 (West 5th ed 1979). The court accordingly does not find the broad use of the word "process" in Federal Rule of Civil Procedure 4 conclusive on the question of the meaning of "process" in section 502(e)(2) of ERISA.

Martin v. Cont'l Cas. Co., 807 F. Supp. 1359, 1360 (N.D. Ill. 1992).

In any event, we would find out very quickly if the Rule applies to serving subpoenas if we try to use it for that purpose—the Rule requires service by the U.S. Marshals Service or a person specially appointed by the court. I suspect that at least until a court otherwise orders, the Marshals Service will take the position that Rule 4.1 does not apply to subpoenas. A district court probably would grant a motion to appoint a person to make personal service of a subpoena upon a corporation, but not necessarily relying on Rule 4.1. If we sought such order, we should try to include specific instructions on how the organization is to be served. ML

Zoning Decision Immunity

cont'd from page 17

Chicago Joe's

In the *Chicago Joe's* case, Chicago Joe's submitted an application for a special use permit to operate an adult use facility in the Village of Broadview, Illinois. The District Court for the Northern District of Illinois reviewed whether the Village Trustees were immune from liability for their denial of the permit.[24] In accordance with the Village's zoning ordinance, the Planning and Zoning Commission held a public hearing on the application, and recommended to the Village's corporate authorities, the Village Board of Trustees, that the requested permit be denied. The Board of Trustees