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Preparing And Protecting The Company And Its Witnesses At Deposition And Trial

Marilyn Heffley, Sunoco, Inc.
Tom Ringe, Duane Morris LLP
Sharon Caffrey, Duane Morris LLP

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Procedure: Deposition Notice for Corporate Representative

- Adverse party seeks person most knowledgeable (“PMK”), person to bind the corporation under Rule 30(b)(6) or fact witness;
- Options:
 - Motion for Protective Order
 - Identify a Witness
 - Train a Witness

Selecting the Company Witness

- Rule 30(b)(6)
- Person most knowledgeable
 - What do you do when there is no one with personal knowledge?
- Fact witness
 - Whom might opposing counsel identify?

Control over Employee Witnesses

- Current Employees
 - Ex parte communications with current employees are fraught with danger, but some jurisdictions allow them;
 - Depends upon whether or not the employee is considered to be “represented”;
 - Highly dependent upon jurisdiction, but Model Rule of Professional Conduct 4.2 provides some guidance

Current Employees

- Comment to Model Rule 4.2 prohibits contact with anyone who “supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization....”;
- No bright line in most jurisdictions as to who does/does not fall within the scope.

Current Employees

- Many courts use the “managing-speaking agent” test :
 - Managerial employees;
 - Anyone whose acts or omissions in connection with the matter at issue may be imputed to the corporation for liability;
 - Anyone whose statement would constitutes an admission by the corporation.

See Bussell v. Minix, 926 F. Supp. 809 (N.D. Ind. 1996)

Control over Employee Witnesses

- Former Employees
 - Ability to contact is highly dependent on jurisdiction;
 - Former managerial employees usually not fair game to opposing counsel where they were privy to confidential information, but many jurisdictions allow contact if counsel stays away from confidential information.

What do you do when.....

- Current or former employee is cooperating with opposing counsel?
- Co-defendant's former employees have information you need?

Fed. R. Civ. P. 30(b)(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.

Pa. R. Civ. P. 4007.1(e)

- A party may in the notice and in a subpoena, if issued, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters to be inquired into and the materials to be produced. In that event, the organization so named shall serve a designation of one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated the matters on which each person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person or persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (e) does not preclude taking a deposition by any other procedure authorized in these rules.

Preparing the Rule 30(b)(6) or PMK Witness

- Binding the corporation—deponent is the personification of the corporation
 - If witness is non-responsive the company may be precluded from presenting evidence on that issue;
 - May be precluded from offering evidence contrary to its 306(b)(6) witness' testimony;
 - Noticing party must define the scope with reasonable particularity (consider Motion for Protective Order to establish subject matter and temporal limitations).
- Prepare early and often
- Have witness personally investigate facts and issues
- Track every step taken by witness

Preparing the Rule 30(b)(6) or PMK Witness

- **PIT FALL:** If the testimony of the witness relies on privileged documents or discussions, the privilege may be compromised.

How to prepare the corporate witness

- Risks and benefits of videotaped preparation and mock cross-examinations;
- Train tone and demeanor—niceness can overcome some weaknesses in testimony;
- Appear forthcoming;
- Invest in grooming repeat 30(b)(6) or PMK witnesses—experience helps (usually).

Basic Rules for Witness Prep

- Always tell the truth;
- Never guess or speculate;
- Be a careful, not careless listener;
- Repeat the question;
- Prep early and often;
- Be confident and interested, not arrogant or disinterested;
- Control emotions.

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