OUTSIDE COUNSEL

Deposition of Corporate Witnesses in Commercial Division Cases

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Rule 11-f of the Commercial Division, which took effect in October 2015, changes the manner in which litigants conduct depositions of corporations and other entities in Commercial Division cases. Under the new rule, as with Rule 30(b)(6) of the Federal Rules of Civil Procedure, a party may list in its deposition notice the topics on which it seeks to conduct deposition discovery. The responding entity must then designate and produce for deposition one or more representatives (so-called "organizational witnesses") who are prepared to testify about information known or reasonably available to the entity concerning those topics.

Previously, litigants in the Commercial Division, like all other litigants in the New York state courts, could operate only under CPLR 3106(d). The latter rule gives the entity a choice of whom to tender as a witness, without imposing any affirmative obligation to ensure the witness's knowledgeability on the relevant deposition topics.

While the deposing party is not wholly without recourse to seek additional depositions under Rule 3106(d), Rule 11-f provides a far more efficient and streamlined method for obtaining

relevant testimony and information. The new rule has important implications for the entity that is proffering a deposition witness as well as for the party that has noticed the deposition.

Noticing Entity's Deposition

CPLR 3106(d) provides that a party "desiring to take the deposition of a particular officer, director, member or employee of [an entity] shall include in the notice or subpoena served upon such [entity] the identity, description or title of such individual." In turn, the entity must produce the individual so described unless, no less than 10 days before the scheduled deposition, it notifies the requesting party that another individual will instead be produced and specifies the identity, description or title of such individual.

Under this rule, for example, the plaintiff might serve a notice of deposition on defendant XYZ Corporation either for "Mr. Jones," or alternatively, for the "Chief Financial Officer of XYZ Corporation" (who happens to be Mr. Jones). In either case, the entity may substitute a different witness for Mr. Jones, if it does so on at least 10 days' notice before the deposition. The same option is available to a third party served with a deposition subpoena.

Under CPLR 3107, the deposition notice "need not enumerate the matters upon which the person is to be examined." However, the statute also does not prohibit providing such a list of deposition topics. Thus, even in cases outside the Commercial Division, a party may supply a list of topics in its deposition notice or subpoena. Nonetheless, under CPLR 3106(d) and CPLR 3107, such a list, standing alone, imposes no affirmative obligation on the responding entity to supply a witness fully prepared to address such topics.

Even under Rule 3106(d), however, the party noticing the deposition is not without recourse if the deposition witness designated by the entity is unsatisfactory. The noticing party may seek to obtain further depositions based upon a showing that (1) "the representatives already deposed had insufficient knowledge, or were otherwise inadequate," and (2) "there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case."[1]

This process, however, has three obvious downsides. First, to acquire the relevant information, the party seeking discovery may be shunted from witness to witness, a process commonly known as "bandying."[2] Second, and relatedly, the process of noticing multiple depositions, and /or seeking judicial compulsion of such additional depositions, is time-consuming and costly. Third, the witnesses produced have no affirmative obligation to testify about anything other than their current knowledge or recollection, leaving the entity free to offer other testimony at trial on the very same subject matter. Commercial Rule 11-f, like federal Rule 30(b)(6), seeks to remedy these deficiencies.

Change Under Rule 11-f

Under Rule 11-f, a deposition notice or subpoena "may name as a deponent a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity." Such a notice may "enumerate the matters upon which the person is to be examined," and must describe such matters "with reasonable particularity."

If the notice does not identify a particular officer, director, member or employee of the entity, then not less than 10 days before the scheduled deposition, the entity must: (1) designate one or more officers to

testify on its behalf; (2) furnish the identity, description or title of such individual(s); and (3) if it designates more than one individual, set out the matters on which each individual will testify. Any such subpoena addressed to a nonparty must advise it of its duty to make the above designations.

If the notice does identify a specific individual associated with the entity, while still enumerating the subject matters of the deposition, then once again the entity has the option, pursuant to CPLR 3106(d), to substitute one or more witnesses on 10 days' notice before the scheduled deposition, again identifying the relevant witnesses and their relevant testimonial subject matters. If the notice identifies a specific individual but contains no such list of topics, the entity retains its right under CPLR 3106(d) to substitute another representative for the named deponent on not less than 10 days' notice.

As with federal Rule 30(b)(6), the individual(s) so designated "must testify about information known or reasonably available to the entity." It is the latter rule, as discussed further below, that makes Rule 11-f a powerful discovery device.

Regardless of how many organizational witnesses the entity proffers in response to the notice, all such testimony taken together counts as one "deposition" for purposes of the 10-deposition limit under Commercial Rule 11-d, and are subject to a cumulative seven-hour time limit in the absence of good cause shown.[3] If the entity deposed under Commercial Rule 11-f is a party, the deposition transcript may be used for any purpose by any party who was at the time of deposition, or is at trial, adverse to the entity whose deposition was noticed.[4]

Prepared Witness

To date, no reported decisions have interpreted Rule 11-f's requirement that the organizational witness testify about information known or reasonably available to the entity. However, because the rule is expressly modeled on federal Rule 30(b)(6),[5] it is appropriate to turn to cases interpreting the latter rule for guidance.

Decisional law concerning federal Rule 30(b)(6) imposes two related obligations. First, the entity must prepare its organizational witnesses "in order that they can answer fully, completely, unevasively, the questions posed…as to the relevant subject matters."[6]

Second, the "preparation" requirement goes well beyond merely producing designees to sit in a room and answering questions under oath. Prior to the deposition, any witness proffered by the entity has an "affirmative obligation to educate himself as to the matters regarding the corporation" for which that witness' testimony is offered.[7] Such preparation involves consulting "documents, [present and] past employees, [and] other sources."[8]

Thus, while having personal knowledge concerning the designated topics is not a necessary condition of being qualified to testify as an organizational witness under Rule 30(b)(6), having such personal knowledge is also not a sufficient condition to discharge the entity's obligations. The witness cannot rely solely upon personal knowledge or recollection to the exclusion of other sources of information available to the entity. The failure to consult such other reasonably available sources may render the witness' testimony inadequate and provide grounds for court-ordered re-deposition or, alternatively, deposition of another witness.[9]

In the case of a corporation or like organization, the witness' obligations may extend to consulting documents or employees of subsidiaries and affiliates. The scope of such obligations is likely to depend on whether the entity has "control" over such subsidiaries or affiliates.[10] Applying that standard, in one

leading decision, the federal court in the Southern District of New York ordered the defendant to proffer an organizational witness fully prepared to testify about all knowledge possessed by a television station that was indirectly owned and controlled by the defendant.[11]

Conclusion

An organizational witness deposed under Commercial Division Rule 11-f differs from an ordinary deposition witness in two critical respects. First, an ordinary witness need only testify from personal knowledge or recollection, while an organizational witness also must testify as to information reasonably available to the organization. Second, the ordinary witness has no obligation whatsoever to prepare for the deposition, while the organizational witness has an affirmative obligation to consult documents, personnel and other relevant materials or information in order to respond "fully, completely and unevasively" to questions falling within the scope of the noticed deposition topics.

For these reasons, the most important attribute of an organizational witness is not personal knowledge, but thorough preparation. Conversely, the noticing party must pay careful attention to its list of deposition topics, as it cannot compel testimony from an organizational witness on topics either not enumerated, or not described with reasonable particularity.[12]

Endnotes:

1. *Giordano v. New Rochelle Mun. Hous. Auth.*, 84 A.D.3d 729, 731, 922 N.Y.S.2d 518, 521 (2d Dept. 2011) (internal quotation marks and citations omitted). *Accord Black v. Athale*, 129 A.D.3d 1661, 10 N.Y.S.3d 789 (4th Dept. 2015); *Nunez v. Chase Manhattan Bank*, 71 A.D.3d 967, 896 N.Y.S.2d 472 (1st Dept. 2010).

2. Fed. R. Civ. P. 30(b)(6), Advisory Committee Notes on 1970 Amendment.

3. See Uniform Rule 202.70(g), Commercial Division Rule 11-d(c), (e), (f).

4. See CPLR 3117(a)(2) and Commercial Division Rule 11-f(g).

5. http://www.nycourts.gov/rules/comments/PDF/DepositionsRuleRequest.pdf at 1.

6. *S.E.C. v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y. 1992) (internal quotation marks and citations omitted; ellipsis in original).

7. *Soroof Trading Dev. Co. v. GE Fuel Cell Sys.*, 2013 WL 1286078, at *2 (S.D.N.Y. March 28, 2013) (internal quotation marks and citations omitted).

8. *Soroof Trading*, 2013 WL 1286078, at *2 (internal quotation marks and citations omitted).

9. Cf. *Soroof Trading*, 2013 WL 1286078, at *5 (finding that the witness, Mr. Scovello, had improperly prepared for deposition by failing both to meet with co-employees, to review relevant documents, or to learn about relevant corporate decisions, and ordering the entity to "produce another Rule 30(b)(6) witness or properly prepare Mr. Scovello to testify about these topics").

10. Compare *Bank of Tokyo–Mitsubishi, New York Branch v. Kvaerner*, 175 Misc.2d 408, 411, 671 N.Y.S.2d 902, 905 (Sup. Ct., New York Co. 1998) (holding that parent corporation must produce documents in hands of wholly owned subsidiaries because the parent corporation "has control over the subsidiaries and their documents") with *New GPC v. Kaieteur Newspaper*, 124 A.D.3d 437, 1 N.Y.S.3d

57 (1st Dept. 2015) (holding that a defendant had no obligation to produce an editor from a "sister" newspaper as a witness, despite common ownership, where plaintiff failed to show that the sister newspaper was "under the control of defendant").

11. See *Twentieth Century Fox Film Corp. v. Marvel Enterprises*, 2002 WL 1835439 (S.D.N.Y. Aug. 8, 2002).

12. See, e.g., *Eng-Hatcher v. Sprint Nextel Corp.*, 2008 WL 4104015, at *5 (S.D.N.Y. Aug. 28, 2008) ("the designees deposed were not required to know the answers to questions outside the scope of the matters described in the notice"); *Agniel v. Cent. Park Boathouse*, 2015 WL 463971, at *2 (S.D.N.Y. Jan. 26, 2015) ("the testimony that [movant] characterizes as inadequate came in response to questions that either (1) do not clearly fall within the scope of those Matters as defined in the deposition notice or (2) although within the scope of the Matters, demand a degree of detailed recollection of past arrangements that would be unrealistic without more specific notice").

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