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Consider Hearsay Issues Before A Rule 30(b)(6) Deposition

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This article considers the practical implications of hearsay issues within Federal Rule of Civil Procedure 30(b)(6) testimony and examines considerations counsel on both sides should weigh when preparing for Rule 30(b)(6) depositions and their expected use at trial. Although testimony by a party's Rule 30(b)(6) designee based on discussions the designee had with current employees generally will be admissible, testimony based on the designee's discussions with former employees may be deemed hearsay, and a similar issue may arise with nonparty Rule 30(b)(6) testimony. These issues impact the choice of designee on the receiving side of a Rule 30(b)(6) deposition and counsel taking the deposition must establish the basis of Rule 30(b)(6) testimony in order to determine whether important testimony may not be admissible. Consider the following hypothetical.

After Big Company defaults on a sizable loan, lender ABC Bank discovers the collateral that secured the loan was largely non-existent. ABC sues Big's auditor XYZ Accounting, asserting liability based on gross negligence. During discovery, ABC notices XYZ for deposition under Rule 30(b)(6). Donna Designee, XYZ's corporate representative, properly prepares as a Rule 30(b)(6) deponent, including by speaking to employees and former employees. Designee testifies that she learned from a former executive — the audit partner that covered Big — that XYZ never performed certain key tests on the collateral. ABC plans on using Designee's deposition testimony at trial. But XYZ moves in limine, asserting that Designee's testimony regarding the collateral tests should be excluded as hearsay. ABC opposes the motion, asserting the whole point of Rule 30(b)(6) is that a witness may testify to "matters known or reasonably available to the organization." The court rules that Rule 30(b)(6) testimony remains subject to the hearsay rules and the testimony at issue does not qualify as a party admission under Rule 801(d)(2) because Designee was repeating a statement made by a former employee of XYZ. It is too late in the case to identify and call XYZ's former employee and ABC cannot otherwise prove that the collateral tests were not conducted. What could ABC have done differently and what does this scenario suggest for deposition strategy generally?

Case law reflects that the Rule 30(b)(6) witness's duty of preparation goes beyond matters personally known to the designee; if necessary to obtain the facts, the Rule 30(b)(6) designee must interview current and former employees with personal knowledge with respect to the topics for which he or she is designated.[1] But it should not be surprising that testimony not based on a witness's personal knowledge frequently includes testimony that appears to be hearsay. And, depending on the stated topics, the Rule 30(b)(6) witness may need to be able to testify to more than just the facts. The corporation's duty to prepare the witness includes preparing the witness to "state the organization's

position, knowledge, subjective beliefs, and opinions on identified topics."[2] In other words, the Rule 30(b)(6) witness is competent to testify even without personal knowledge.[3]

Courts wrestling with the admissibility of Rule 30(b)(6) testimony at trial must contend with the issues of competence — because the designee testified without personal knowledge — and hearsay. Some courts have developed the concept of the collective knowledge of an organization as a substitute for personal knowledge. Although testimony must be both competent and non-hearsay, many courts simply address whether the testimony is a proper subject for the collective knowledge of an organization. Where the court determines that the testimony is properly grounded in the organization's collective knowledge, some courts implicitly find cured the level of hearsay that occurred when the witness testified based on what he was told by another source. This finding is reasonable so long as the source is a current employee and thus, the statement he makes to the witness is a party admission, which Rule 801(d)(2) deems non-hearsay. But the issue is less certain when the statement is not a party admission, as is the case when the employee that informs the designee is a former employee or when the designee appears on behalf of a nonparty.

Brazos River Authority v. GE Ionics Inc. is an influential Fifth Circuit case that was among the first to develop the concept of corporate knowledge.[4] In Brazos, one of two defendants provided Rule 30(b)(6) testimony, and at trial both defendants objected to certain examination of that Rule 30(b)(6) witness on the ground that he lacked personal knowledge.[5]

The Fifth Circuit held that if a party makes its corporate designee available for trial, that witness could not be excluded from testifying to matters as to which he testified at the deposition simply because he did not have personal knowledge of the issues.[6] The witness should be allowed to testify as to matters "within corporate knowledge" to which he testified in his deposition.[7] The court noted that, under the Rule 30(b)(6) framework, the designee acts as the agent, and testifies "vicariously," for the corporation.[8] As a result, the court held that the designee could testify at trial based on the collective knowledge of the corporation's personnel.[9]

However, the court also held the witness could not go beyond what the court viewed as the realm of a corporation's subjective beliefs. Specifically, the witness could not offer any testimony at trial as to whether the other defendant had made misrepresentations to plaintiff, as such testimony would be hearsay.[10] But the designee witness could be examined at trial as to what the other defendant had told the designee's fellow employees that it had represented to plaintiff, as that would meet the non-hearsay definition of an admission of a party opponent, even if the witness did not have personal knowledge of the discussions.[11]

After Brazos, other courts endorsed the concept of corporate knowledge as a substitute for personal knowledge. For example, in PPM Finance Inc. v. Norandal USA Inc., the Seventh Circuit rejected the argument that the trial court should not have credited the testimony of a witness who lacked personal knowledge because the witness had previously served as a Rule 30(b)(6) witness and "was free to testify to matters outside his personal knowledge as long as they were within the corporate rubric."[12]

Sara Lee Corp. v. Kraft Foods Inc. further analyzed the issue of admitting corporate knowledge at trial.[13] At trial, defendants moved in limine to exclude a nonparty's Rule 30(b)(6) witness's deposition testimony, raising hearsay and lack of personal knowledge arguments.[14] Plaintiff countered that "Rule 30(b)(6) permits testimony within the 'personal' knowledge of the corporation, rather than the individual."[15] The court acknowledged that this was true at the deposition stage, but pointed out that the issue becomes more complex when it comes to using the testimony at trial.[16] Citing Brazos, the

court stated: “[C]ourts have attempted to square Rule 30(b)(6) with the personal knowledge requirement by explaining that a Rule 30(b)(6) witness ‘testifies “vicariously,” for the corporation, as to its knowledge and perceptions.’”[17] Unwilling to allow the testimony on that basis without further analysis, the court continued:

When it comes to using Rule 30(b)(6) depositions at trial, strictly imposing the personal knowledge requirement would only recreate the problems that Rule 30(b)(6) was created to solve. For example, a party might force a corporation to “take a position” on multiple issues through a Rule 30(b)(6) deposition, only to be left with the daunting task of identifying which individual employees and former employees will have to be called at trial to establish the same facts. ...

Given that some of [the witness’s] testimony may be admitted based on the corporate knowledge of [the nonparty], the next question is how far the concept of “corporate knowledge” can be stretched. Few courts have addressed this issue, but the purposes underlying Rule 30(b)(6) must be balanced against the real dangers of admitting testimony based on hearsay. For instance, the Court doubts that a Rule 30(b)(6) witness should be allowed to testify about the details of a car accident in lieu of the corporation’s truck driver who actually witnessed the event. If he could, Rule 30(b)(6) would severely undercut the requirement, fundamental to our adversary system, that fact witnesses have personal knowledge of the matters upon which they testify.[18]

Thus, a court should consider where the offered testimony stands on a spectrum of corporate knowledge, ranging from core knowledge such as a corporation’s beliefs on one end to factual events on the other end. The Sara Lee court further observed that the tension between the purposes underlying Rule 30(b)(6) and the personal knowledge requirement increases where the Rule 30(b)(6) deponent is a nonparty.[19] When a party’s own corporate representative testifies at a deposition, there is no concern that there has been a lack of a meaningful opportunity to cross-examine.[20] Regarding nonparty corporate designees, the court concluded:

Thus, at least where the Rule 30(b)(6) witness is a nonparty, the admission of testimony based on corporate knowledge should be limited to topics that are particularly suitable for Rule 30(b)(6) testimony. Such topics include matters about which the corporation’s official position is relevant, such as corporate policies and procedures, or the corporation’s opinion about whether a business partner complied with the terms of a contract. Nonparty Rule 30(b)(6) testimony is less appropriate for proving how the parties acted in a given instance.[21]

So what should ABC have done differently in the hypothetical? Given the lack of a personal knowledge requirement for Rule 30(b)(6) witnesses, it is important to determine how the adverse party’s designee obtained her key information. And this importance rises as the topic moves from one end of the spectrum of corporate knowledge to the other, from the subjective beliefs of that corporation toward specific facts such as how an entity acted in a given instance. If the party designee’s source of the corporate knowledge is a current employee, such that it is safe to assume that the testimony will be a party admission, counsel probably need do no more. But if the source of that testimony is a former employee, such that the testimony is likely hearsay, examining counsel needs to identify who that former employee is, and depose her as well in order to ensure the testimony is admissible.

In Rule 30(b)(6) depositions, it is wise to seek the basis for any important testimony, so that an individual who was the source for the testimony can be deposed or named for trial as needed. A predicate to admissible evidence is having the right witness in the box — one with personal knowledge

so he or she is competent to testify. Alternatively, counsel could seek to have the designee adopt the desired testimony at deposition — that is, counsel could ask if the helpful statements that come from another source is the position or belief of the corporation. If counsel is able to obtain a successful adoption, courts would likely allow it as part of the entity's "corporate knowledge." Similarly, counsel could seek to confirm the information in an interrogatory. But, if feasible, deposing the witness with personal knowledge is an even safer course of action.[22]

Where the Rule 30(b)(6) deposition is of a nonparty, the testimony typically will not be admissible as a party admission, and it is very possible that any testimony of the nonparty's designee not based on that witness's personal knowledge will be deemed hearsay. In addition, the nonparty's adoption of that hearsay testimony may carry less weight because, as Sara Lee noted, opposing counsel has not had an opportunity to cross-examine the source of that testimony. Thus, when conducting a Rule 30(b)(6) deposition of a nonparty, it is particularly important to have the witness identify the declarant, so as to evaluate whether it is necessary to subpoena that source.[23]

When defending a Rule 30(b)(6) deposition, there is no need to wait and see if opposing counsel seeks the source of certain testimony if it is clear that testimony would be hearsay because, for example, the information was obtained from a former employee or nonparty. The witness should be prepared to provide the source of that information along with the information itself. That is, if the witness is asked, were the tests on the collateral done, she may testify: no, I heard from Joe, the former audit partner, that the tests were never done. This practice puts it out in the open that there is hearsay testimony, and a court is less likely to simply admit this testimony, along with other testimony, under the heading of "corporate knowledge."[24] Then, defending counsel should be prepared to argue against the admission of the testimony, whether by motion in limine or by objecting to the witness testifying live at trial on the same topics for which she provided hearsay testimony at her Rule 30(b)(6) deposition.

As the case law discussed above suggests, all counsel need to be focused in advance on knowledge and hearsay issues that may arise at Rule 30(b)(6) depositions. While hearsay issues are less apt to arise when a party designee testifies based on internal corporate sources, counsel should still focus on where the testimony falls on the knowledge spectrum to assess whether it will be deemed "corporate knowledge." Both knowledge and hearsay rules are implicated when former employees are the source of testimony and when nonparties are being deposed.

Situation Strategy

Using a Rule 30(b)(6) deposition to obtain relevant facts without calling all relevant witnesses.	Counsel must establish basis of testimony to determine if important testimony may not be deemed admissible.
When a Rule 30(b)(6) witness testifies that she learned important testimony from a former employee.	Counsel should either depose (or bring to trial) that former employee or at least seek to have the Rule 30(b)(6) designee adopt that testimony.
When defending a Rule 30(b)(6) deposition and counsel is aware that the	Counsel should prepare the witness to testify that the testimony is based on discussions with a former employee,

basis for certain unhelpful testimony is a former employee.	thus establishing the hearsay nature of that testimony.[25]
When conducting a Rule 30(b)(6) deposition of a nonparty.	Counsel must obtain the basis for any important testimony and should conduct an additional deposition or bring that witness to trial where necessary (unless parties stipulate to admissibility).
When a nonparty is served with a Rule 30(b)(6) notice of deposition.	A nonparty should designate a person with knowledge on the important issue to avoid the likelihood of multiple depositions.

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[1] See, e.g., Wultz v. Bank of China Ltd., 11 CIV. 1266 SAS, 2014 WL 572527, at *5 (S.D.N.Y. Feb. 13, 2014).

[2] In re Neurontin Antitrust Litig., MDL No. 1479, 2011 WL 253434, at *7 (D.N.J. Jan. 25, 2011) aff'd, 2011 WL 2357793 (D.N.J. June 9, 2011).

[3] See, e.g., Ierardi v. Lorillard, Inc., No. CIV. A. 90-7049, 1991 WL 158911 (E.D. Pa. Aug. 13, 1991) ("Moreover, an individual employee's lack of personal knowledge is irrelevant: the organization must provide a witness to 'testify as to matters known or reasonably available to the organization.'" (quoting Fed. R. Civ. P. 30(b)(6))).

[4] 469 F.3d 416 (5th Cir. 2006).

[5] Id. at 432.

[6] Id. at 434.

[7] Id.

[8] Id.

[9] Id. at 435.

[10] Id.

[11] Id. Lurking behind the admissibility of a corporation's subjective beliefs is the recognition that such testimony is often not offered for the truth of the matter asserted but rather to prove what the organization believed or understood to be the case. See, e.g., General Mills Operations v. Five Star Custom Foods, Ltd., 703 F.3d 1104, 1110 (8th Cir. 2013) (defendant's corporate designee competent to testify regarding defendant's understanding of a government recall, even if not competent to testify regarding the actual reasons for the recall).

[12] 392 F.3d 889, 894-95 (7th Cir. 2004); see also, e.g., ISG Insolvency Grp., Inc. v. Meritage Homes Corp., No. 11-1364, 2013 WL 3043681, at *4 (D. Nev. June 17, 2013).

[13] 276 F.R.D. 500 (N.D. Ill. 2011).

[14] Id.

[15] Id.

[16] Id. at 503.

[17] Id. (quoting Brazos, 469 F.3d at 434).

[18] Id. at 503 (citation omitted).

[19] Id. The court's example suggested it would not extend the concept of corporate knowledge as far as the Brazos court did.

[20] Id. (pointing out that party admissions may address much such testimony).

[21] Id. (citation omitted). However, some courts see the nonparty issue as more relevant to the availability of a witness.

[22] The possible need to call and depose witnesses that provided information to the designee may militate in favor of serving one's opponent with a Rule 30(b)(6) notice earlier in discovery.

[23] Parties may avoid the need to depose the source of a non-party designee's testimony by proposing that the parties stipulate to the admission of the Rule 30(b0(6) witness's testimony. Knowing the name of the source creates a credible risk of an additional deposition and renders a stipulation more likely.

[24] Identifying the external source of the testimony (e.g., former employees) also avoids any claim of surprise that an adversary did not know the source was a nonparty. There is no advantage to having a Rule 30(b)(6) witness volunteer her source when the source comes from within the company (e.g., current employees).

[25] Of course, the former employee will then be deposed if he or she is within reach of a subpoena.
