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Putting the Horse Before the Cart: the Power of 30(b)(6) Depositions as an Early Discovery Tool

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Through force of habit, plaintiffs' attorneys often begin the discovery process with written interrogatories, requests for admission, and requests for production of documents. In cases involving large corporate defendants, this approach can lead to frustrating results when opposing counsel responds with boilerplate objections, partial answers, and incomplete document production. Plaintiffs then notice depositions, only to find out that different fact witnesses are more appropriate for certain topics, or that key documents are missing. It doesn't have to be this way. In some cases, it makes more sense to begin discovery with a Rule 30(b)(6) deposition of defendant's corporate representative, combined with a series of requests under Rules 30(b)(2) and 34. This so-called "document deposition" forces defendants to put all their cards on the table early in discovery, and avoids time-consuming disputes over the completeness of document production.

Most attorneys are familiar with the basics of Rule 30(b)(6). The party being deposed must "designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf." The deponent does not testify based on his or her personal views and opinions. Instead, he or she speaks on behalf of the entire organization. Thus, the 30(b)(6) deposition is a powerful tool to obtain answers that are binding on the corporation. Yet, by itself, 30(b)(6) does not offer enough firepower to ensure adequate document production. To ensure completeness, a plaintiff's attorney must combine 30(b)(6) with a few more tools. One approach is to use Rule 30(b)(2) in the deposition notice to request a list of "documents and tangible things" to be produced at the deposition, typically with a subpoena. This may be accomplished along with a Rule 34 request for production of documents, such as internal emails, reports to regulatory agencies, safety guidelines, and employee files.

A plaintiff's attorney utilizing the document deposition approach may feel uneasy at first. Without the benefit of any documents to review beforehand, it may seem difficult to form a list of questions to ask the corporate representative. But this is not the purpose of putting the horse before the cart. The goal, instead, is to ensure the completeness of the documents that exist, and to learn which individuals are best suited for fact witness depositions later in the case. Hence, a list of designated matters for the deposition might include the following subjects: the existence of the documents requested pursuant to Fed. R. Civ. P. 34; the creation, duplication, and/or storage of the documents requested; document retention and destruction policies; the location and organization of the documents; and the method of search for the documents. This is followed by a detailed list of particular documents and information to be produced under Rule 34.

Using a document deposition to begin discovery may be uncommon, but it is not unprecedented. One veteran practitioner, Mark Kosieradzki, calls this approach the "Death Star Deposition" because it reveals the full universe of information possessed by an adversary.[1] When done correctly, both parties benefit from the technique. Toward the end of a recent document deposition in a product liability case, opposing counsel remarked that most plaintiffs' attorneys use 30(b)(6) depositions just before trial to obtain final admissions on key topics. She noted that I was using the rule to learn about the case itself, *before* the start of written discovery. This comparison strikes at the heart of the reason why the document deposition works. With a corporate representative of an organization testifying under oath, a plaintiff's attorney has a chance to drill into defense objections on the grounds that a request is vague or burdensome, or not relevant to the litigation. For example, the attorney may ask how long it took to find a certain set of emails in a computer — usually just a few minutes — or how many years the company keeps records of injury reports. It is the designee's duty under 30(b)(6) to be prepared for these questions. If the deponent cannot testify adequately, he or she may be asked for the names of people who do have the information.

Like any litigation technique, there are pitfalls to be considered with the document deposition. First, in a case with small damages and a large corporate defendant, traveling to the defendant's faraway headquarters may be expensive, especially where multiple representatives are designated. Second, expect to receive objections ahead of the document deposition about the scope of the requested documents and topics. Third, it may take more time to secure a document deposition than it would to obtain written discovery responses. Finally, opposing counsel may be unfamiliar with the combination of Rules 30(b)(6,) 30(b)(2) and 34 in the context of a deposition.

These and other hurdles can be overcome with thorough preparation, negotiation between the parties, and reliance on the rules themselves along with supporting case law.[2] Perhaps the most important element of a successful document deposition is the process of exhaustion. The examiner must be satisfied that the documents offered are complete. Did the examinee search file cabinets only, or also computer systems? Are any documents stored in archives in other locations? Did anyone else assist in the search? Is there any reason the documents could not be produced? Every nook and cranny pertaining to document completeness must be explored in order to leverage the combined power of the three rules. When this is done correctly, the doors are thrown open for written discovery, whether the defendant is a municipal government, a trucking company, or a pharmaceutical manufacturer.

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[1] Kosieradzki, of Kosieradzki Smith Law Firm, LLC, based in Minneapolis, Minn., offers CLE programs on advanced deposition techniques including the "Death Star" approach.

[2] *See, e.g.*, Fed. Jud. Ctr., Manual for Complex Litigation (Fourth) § 11.12 and § 11.464.