Failure to Prepare Deponent Adequately Leads to Sanctions
By Adam E. Lyons, Litigation News Contributing Editor – March 2, 2016

A recent decision found that counsel failed to prepare fully a witness for a Rule 30(b)(6) deposition, resulting in discovery violations and substantial attorney fees. In OpenGate Capital Group LLC v. Thermo Fisher Scientific Inc., the offending party deliberately limited the scope of preparation. Section leaders analyze the decision and identify practice points to help lawyers avoid sanctions when preparing a Rule30(b)(6) witness.

Thermo’s Litigation Position Leads to an Unprepared Witness
The case involved the sale of a facility in an area “plagued by drug cartel violence.” Cartel activities rose to the level that cartel members had entered the facility and stored materials there, facts the defendants never told the plaintiff. Without this information, the plaintiff purchased the facility. The plaintiff brought a fraud-in-the-inducement case against the defendants.

During discovery, the plaintiff deposed the defendants’ head of security. Afterwards, the plaintiff took a Rule 30(b)(6) deposition on the defendants’ knowledge of criminal activity at the facility. The defendants’ litigation position was that only information known to its “core deal team” was relevant. For that reason, the defendants designated a member of its core deal team as the Rule 30(b)(6) deponent.

Though the head of security was outside the core deal group, the 30(b)(6) deponent relied upon the head of security’s deposition transcript to prepare. The Rule 30(b)(6) deponent never interviewed the security chief or anyone else for more information. Lacking any knowledge about criminal activity, the Rule 30(b)(6) deponent could not answer questions on that topic at his deposition.

The defendants “boxed themselves into a corner” with their position that only “core deal team” knowledge mattered, the court found. “Rule 30(b)(6) requires an inquiry to find ‘reasonably available’ information known to the corporate entity for whom the witness is testifying.” Counsel had deliberately limited the scope of preparation of the Rule 30(b)(6) deponent, consistent with its litigation position that information known to people outside a specific group was not relevant to the case. The Rule 30(b)(6) deponent’s failure to interview anyone with knowledge violated the rule’s preparation requirement.

The U.S. District Court for the District of Delaware determined that the limited preparation the Rule 30(b)(6) deponent conducted was insufficient. The federal court ordered monetary sanctions and the Rule 30(b)(6) deposition to occur again. Specifically, half of the plaintiff’s costs and fees for the first Rule 30(b)(6) deposition, half of fees for the motion to compel, and all fees and costs for the second Rule 30(b)(6) deposition.

Confusion over Preparation for a Rule 30(b)(6) Deposition
"Here, the designee was not a total failure—only a 50 percent failure," opines Cindy C. Abrahm-Cogran, Phoenix, AZ, cochair of the ABA Section of Litigation’s Solo & Small Firm Committee. The “designee could have spoken to multiple other [defendant] employees who had specific knowledge of that criminal activity. [Defendants’] limitation of the designee’s inquiry did not comply with Rule 30(b)(6),” adds Abrahm-Cogran. "The decision is not a surprising one," concludes Stephen J. Siegel, Chicago, IL, cochair of the Section of Litigation’s Commercial & Business Litigation Committee.

While the failure seems clear to experts, there is among practitioners great “confusion about what is required under Rule 30(b)(6),” notes Jeffrey J. Greenbaum, Newark, NJ, cochair of the Section’s Federal Practice Task Force. From a review of decisions by federal courts, the Federal Practice Task Force found “eight or ten areas in which courts have come to different conclusions on what the rule requires,” states Greenbaum.
Section Leaders Disagree on Court Sanctions

Just as the Federal Practice Task Force saw different opinions on the level of preparation required, Section leaders disagree about whether sanctions were appropriate. Because the defendants attempted some level of preparation, Greenbaum finds it "hard to understand" the imposition of sanctions. On the other hand, "Thermo Fisher could have very easily had its designee talk with those who had direct knowledge," opines Albracht-Crogan. A step Thermo Fisher chose not to take.

The court appropriately sanctioned defense counsel, notes Siegel. The defendants knew the witness "had little or no personal knowledge of several key deposition topics," he adds. "[H]is ability to testify for the company depended on adequate investigation and preparation," says Siegel.

The type of sanction the court employed here, meant to correct the problem by "getting plaintiff what it needs," seems appropriate to Greenbaum. On that point, Albracht-Crogan agrees. "Limiting the sanctions to monetary sanctions only was a practical and reasonable thing to do," she adds.

How to Avoid Court Sanctions

As a practical matter, lawyers can engage in a number of practices to avoid similar results. For example, counsel should work in advance to limit the issues for the deposition, suggests Greenbaum. Counsel should also select an appropriate witness and conduct preparation long enough to have an appropriately prepared witness.

Clients must also be aware of the scope of preparation necessary to avoid budgeting issues, Greenbaum notes. Counsel must follow up with the client to ensure that the client's other obligations do not derail a sound plan, adds Siegel.

"This is not a time to be lazy," says Albracht-Crogan. "The designee must be prepared and know what the company can reasonably know by reviewing pertinent documents and talking with those representative who have knowledge about the categories of examination," she concludes.

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