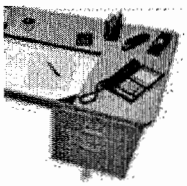

Gale Mitchell/DCA/AO/USCOURTS

10/04/2006 12:50 PM

To
cc
bcc
Subject

06 - CV-003

----- Original Message -----
From: "Jayne Salinger" [jsalinger@sfbar.org]
Sent: 09/06/2006 05:27 PM
To: Peter McCabe
Subject: Rule 30(b)(6)

Good afternoon,

I am the liaison to the Board of directors of The Bar Association of San Francisco (BASF). The Board met today and discussed the report of Rule 30 (b) (6). Please be advised that the Board has voted to approve the 30(b)(6) report, with the exception of pages 4 and 5, as approved by both the BASF board and the Litigation Section of BASF. Pages 4 and 5 will be submitted on behalf of the Litigation Section of BASF.

Thank you.

Regards,

Jayne Salinger

The Bar Association of San Francisco
----- Forwarded by Jennifer Noell/DCA/AO/USCOURTS on 09/07/2006 06:52 AM -----

James Ishida/DCA/AO/USCOURTS

09/07/2006 12:07 AM

To "Jennifer Noell" <Jennifer_Noell@ao.uscourts.gov>
cc
Subject Fw: Bar Association of San Francisco Report on Rule 30(b)(6)

----- Original Message -----
From: James Ishida
Sent: 09/06/2006 10:05 PM
To: James Ishida" <jamesishida@yahoo.com>
Subject: Fw: Bar Association of San Francisco Report on Rule 30(b)(6)

----- Original Message -----
From: "Brosnahan, James J." [JBrosnahan@mofo.com]
Sent: 09/06/2006 06:35 PM
To: Lee Rosenthal
Cc: Peter McCabe
Subject: Bar Association of San Francisco Report on Rule 30(b)(6)

Dear Judge Rosenthal and Judge Campbell,

Some months ago, you wrote to the Bar Association of San Francisco soliciting comments on Federal Rule of Civil Procedure 30(b)(6). I understand your committee is meeting tomorrow, Sept 7. Enclosed is the report from the Bar Association of San Francisco, with a number of comments and a few specific suggestions.

<<BASF 30(b)(6) report.pdf>>
A lot of work went into the report, including a luncheon meeting with discussion. To include everyone, we attach all comments that we received during the months of our work.

We hope that this report will be of assistance.

Very truly yours

James J. Brosnahan
Morrison & Foerster
425 Market Street
San Francisco, CA 94105
Telephone: 415-268-7189
Fax: 415-268-7522

BASF 30(b)(6) report.pdf

---- Forwarded by Jennifer Noell/DCA/AO/USCOURTS on 09/07/2006 06:52 AM -----

James Ishida/DCA/AO/USCOURTS
09/07/2006 12:07 AM

To "Jennifer Noell" <Jennifer_Noell@ao.uscourts.gov>
cc
Subject Fw: Litigation Section of the Bar Association of San Francisco Statement on Rule 30(b)(6)

3 of 3

----- Original Message -----
From: James Ishida
Sent: 09/06/2006 10:06 PM
To: James Ishida" <jamesishida@yahoo.com>
Subject: Fw: Litigation Section of the Bar Association of San Francisco Statement on Rule 30(b)(6)

----- Original Message -----
From: "Brosnahan, James J." [JBrosnahan@mofo.com]
Sent: 09/06/2006 06:35 PM
To: Lee Rosenthal
Cc: Peter McCabe
Subject: Litigation Section of the Bar Association of San Francisco Statement on Rule 30(b)(6)

Dear Judge Rosenthal and Judge Campbell,

The following comments are a result of about six months of work by the Litigation Section of the Bar Association of San Francisco and are sent for your consideration, along with a report authorized by the Bar Association of San Francisco.

<<BASF Litigation Section 30(b)(6) statement.pdf>>

Very truly yours,

James J. Brosnahan
Morrison & Foerster
425 Market Street
San Francisco, CA 94105
Telephone: 415-268-7189
Fax: 415-268-7522

BASF Litigation Section 30(b)(6) statement.pdf

Thank you.

Gale B. Mitchell
Administrative Office of the U.S. Courts
Office of Judges Programs
Rules Committee Support Office
Suite 4-170

The Bar Association of San Francisco Litigation Section Report on Federal Rule of Civil Procedure 30(b)(6)

Submitted by:

Joan Mei Haratani
President, Bar Association of San Francisco

Marcy Bergman
Chairperson of the Litigation Section Executive Committee of
The Bar Association of San Francisco

James J. Brosnahan
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David M. Goldstein
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Richard L. Grossman
Partner, Townsend and Townsend and Crew LLP

September 2006

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THE BAR ASSOCIATION OF SAN FRANCISCO
LITIGATION SECTION REPORT ON
FEDERAL RULE OF CIVIL PROCEDURE 30(B)(6)

PROCEDURES FOLLOWED TO FORMULATE OUR RECOMMENDATIONS:

Approximately 60 practitioners from San Francisco, California were consulted on Federal Rule 30(b)(6). They responded by detailed e-mails and by attendance at a meeting in which they participated and voted on certain possibilities. Ten questions were used for discussion. In addition, these recommendations were reviewed by the Bar Association of San Francisco's Litigation Section and by their Board of Directors. The materials from the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure were reviewed as was an excellent report by the Bar of the City of New York. At the meeting held, the group, composed of approximately 45 practicing lawyers, reviewed the ten questions listed and discussed below. Many 30(b)(6) cases were reviewed.

GENERAL OBSERVATIONS:

Very few of the commentators thought that 30(b)(6) is appropriate in its present formulation. Anecdotal data of abuses was collected. It seemed that most practitioners had some form of grievance. Having said that, no one wants to abolish the rule and it is generally understood that its best purpose is the identification of witnesses who can, at reduced cost, supply real answers to real questions. So there is no doubt from this quarter that 30(b)(6) should be preserved. More interesting questions are reflected in the ten inquiries discussed below. Should there be any amendments to Rule 30(b)(6)?

THE TEN QUESTIONS:

1. Should the notices of deposition be limited in some way? How? Example: A limitation on the number of areas in a case?

   Comments: Although there was some support for limiting the number of areas designated in the subpoena and requiring a showing of good cause for additional areas, this idea could not gain majority support. The issue was broken down further as to whether there would be a limitation of the number of depositions under 30(b)(6) or a limitation on the number of areas designated. Intellectual property cases very often have great complexity as do other commercial cases and the limitation was viewed by some as arbitrary. However, it was reported that very often abusive designated areas in great numbers do occur.

2. How to deal with the problem of the witness not being prepared?

   Comments: It does happen that the witness designated will not be prepared. No amendment to the rule was suggested that would alleviate this problem. It is part of a broader problem of bad faith discovery practices.

3. Should the practice be continued of spoon feeding evidence to an unknowing witness creating synthetic corporate testimony?

   Comments: This was viewed as the strangest aspect of 30(b)(6). Personal knowledge, ensconced in the Federal Rules of Evidence, is the basis for real evidence in a trial. There is considerable support for going back to the rule of personal knowledge and amending the rule to take out the reference to corporate knowledge. We heard strange stories of lawyers spoon feeding witnesses to comply with 30(b)(6) and hoping they remember correctly what they've been told. *U.S. v. J.M. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996) has added additional burdens requiring witnesses to read other people's depositions. The trial lawyers view this rule as a silly business. Time and again the practitioners point out that the best use of 30(b)(6) is to find out where the evidence is. It is true that, when laying a foundation for business records, sometimes a witness will not know, based on personal knowledge, how a document was prepared but would be able to say what the practice and custom of the corporation was. When this spoon feeding is combined with other procedures like binding answers on the corporation, it can breed very strange results.

4. Are there burdens on an answering party sufficient to require amendment of the rule?

   Comments: This question was subsumed in other particular questions and did not receive extensive comment by itself.

5. Are the answers in the deposition binding on the corporation? Can they be disputed by other evidence? Same question, as it relates to summary judgment.

   Comments: Most practitioners thought that the answers by the corporation should be binding but they also felt that there should be a procedure for supplementing the answers. The rationale for binding answers is that discovery should move towards resolution of the case. This is quite different than moving towards an actual trial where truth should win out.

6. Should the deposition be used to determine the parties' contentions?

   Comments: Most practitioners felt that 30(b)(6) depositions should not be used to obtain contention answers and perhaps an amendment should be considered by the committee. Some felt that factual contentions were permissible under 30(b)(6) but no legal contentions should be inquired into. The group also discussed the mix of factual and legal, which often occurs in many kinds of cases.

7. What to do about the mixing of the 30(b)(6) deposition and the witnesses' other testimony.

   Comments: This happens a great deal and some practitioners request the examining party to finish the 30(b)(6) before commencing the regular portion of the deposition. They see this as a matter of tactics and practice rather than the basis for a rule change.

8. Is work product being invaded?

   Comments: This problem is definitely occurring but needs to be handled by tactical instructions at the time of the deposition. It can also be handled by how the information is gathered in the first place. If the lawyer does not give work product to the witness, there is not a problem.

9. Is there a problem with repetitive depositions of the same witness? If so, should the rule be amended?

   Comments: Practitioners were not offended by the idea of repeat depositions with a witness being a 30(b)(6) witness and a regular witness. The sequences that might lead to this make it very difficult to amend the rule in some way to add additional limitations.

10. When, in the process, should 30(b)(6) depositions be taken? Early? Late? Or anytime?

    Comments: Most of the practitioners did not favor specifying when 30(b)(6) depositions could be taken.

Finally, so many agree there are so many pitfalls in this rule for the practitioner that 30(b)(6) notice should not be taken for granted but must be carefully thought through to prevent problems.

We respectfully submit this report and hope that it will be of help.

COMMENTS BY PRACTITIONERS ON
FEDERAL RULE OF CIVIL PROCEDURE 30(B)(6)

The following comments are forwarded for your consideration. They come directly form practitioners and were not edited.

"One problem is that they are frequently used to defeat the 7-hour rule."

"You hit one of my buttons. I find that Rule 30(b)(6), and its state court counterpart, which I think is CCP 2025d, are much abused. Responding parties often designate someone without knowledge or with very limited knowledge, and the witness is not prepared to answer on information available to the corporation. I also occasionally get letters that "no one" is knowledgeable or that the most knowledgeable person has left. For these reasons, I would favor a mandatory sanction to be awarded to the prevailing party in the case of a improper designation, and perhaps an explicit requirement in the rule that the designated witness must be prepared properly on the designated subjects.

I also have seen abuse on the requesting end, where we receive lists of hundreds of subject matters that usually include both broad and highly specific topics. The job or responding becomes difficult or impossible. And then, of course, you get motions in limine later seeking to bar you from calling anyone else to testify on the enumerated subjects. I have often thought that a numerical limit without leave of court might help, but of course that would often just lead to more disputes about how to count."

"The main problems I have with the rule are that some courts still allow a 30(b)(6) deposition to be used to elicit a party's contentions about the ultimate issues in this case. In such a scenario, a lay witness has to understand and regurgitate the positions advanced by the organization's lawyers. That is a tough job in a complex business case. Second, the idea behind rule 30(b)(6) was to permit deposition of a corporate party when counsel is having difficulty figuring out who in the organization should be deposed. In my experience, the rule is rarely used for that purpose but rather to get a second bite at the apple after the relevant corporate witnesses have been deposed.

I'd like to see a rule precluding the use of 30(b)(6) depositions to obtain a party's contentions. I'd also like to see some limitation on the use of a 30(b)(6) when it is just a subterfuge to retake a corporate witness's deposition."

"I like 30(b)(6). It does, in fact, eliminate a lot of game playing. Its hard to imagine any system that limits the total number of depositions, that doesn't also

compel each side to point out the correct deponents.

The biggest problem I have seen (reasonable minds can differ on whether or not its an abuse) is that it is possible to draft a notice, using large numbers of subjects that allow you to literally lay out your entire discovery plan in a single notice. Such a notice can require numerous "persons most knowledgeable" to respond. In turn, this can allow a party to evade limitations on the number of depositions, and can create priority disputes: "I'm not going to produce my witnesses until you have complied with your 30(b)(6) obligations." I'm really not sure how to attack this problem. Simply saying that the notice IS subject to deponent numerical limitations allows the deposed system to game the system by producing unnecessary deponents.

The other area that can be troublesome are questions that are really going after legal contentions. In a patent case, for example, there may not be any person at the plaintiff company truly knowledgeable about infringement contentions. That may be the work of the attorneys, consultants or experts. If you supply a corporate deponent, the company "looks" ignorant. If you supply an attorney witness or a consultant/expert you are giving up rights under other rules or privileges"

"I have practiced in federal courts for just over 30 years and have not encountered meaningful problems with Rule 30(b)(6). I have found it to be a useful tool in obtaining binding deposition testimony from an opposing corporate or agency party, rather than testimony from a variety of individuals at significant expense and possibly limited value. Is elimination or substantive modification of the rule being considered?"

"I have a present problem because of the provision that allows the PMK deposition to be an exception to the one deposition rule.

Where the designated witness is also a party and is identified as the designated witness in advance of the PMK deposition, so that there is a full opportunity to prepare and conduct a full and complete examination at a single session, why should a second deposition be allowed?

The California statute is similar and I have this situation in state court and have moved for a protective order to limit my opponent to one depo. There is no case law and I could cite only general equitable principles to limit expense, inconvenience, etc.

I think there should be some clarification in these circumstances."

"I suggest explicit recognition that when a 30(b)(6) designee has testified fully both to his personal knowledge and his representative knowledge, the witness may not be deposed a second time."

"As a patent litigator, I have found 30(b)(6) depos to be very useful - they are frequently the only realistic way to get information from a corporation. I have also been on the receiving end of these notices and have never been burned. If the notice is too broad, the risk is probably greater to the party giving notice."

"I, and many others who represent plaintiffs in employment discrimination and wage/ hour class actions, feel very strongly that Rule 30 (b)(6) be retained in its current form. Rule 30 (b)(6) is an essential tool for learning about a company's policies and practices. The litigation we do could not be done efficiently and effectively without this rule. I am not personally aware of the rule being abused. To the extent it is, the proper recourse is to seek a protective order.

Of the specific questions raised by the section, I feel very strongly that the answers given in a 30(b)(6) deposition should be binding on the company, and there should not be any opportunity to supplement. Allowing a party to "cleanse" statements it does not like or that are inconvenient for its position is contrary to the search for truth, which is the goal of civil discovery.

Your question 3 is very disturbing. No witness should be spoon fed with information. The company must produce the witness who is most knowledgable about the topic, and who can testify based on personal knowledge. To the extent that the federal rule is not as clear as the Cal PMK depo rule on this point, it should be clarified.

Thank you for your consideration of my views. I request that you include these views, which I believe represent those of the civil rights community generally, when you issue your final report."

Statement of the Litigation Section of the The Bar Association of San Francisco On Federal Rule of Civil Procedure 30(b)(6)

Submitted by:

Marcy J. Bergman
Chairperson of the Litigation Section Executive Committee of
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Senior Partner, Morrison & Foerster LLP

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Shareholder, Heller Ehrman LLP

September 2006

Rule 30(b)(6) Issues

The Executive Committee of the Litigation Section of the Bar Association of San Francisco notes that practitioners, commentators and case decisions have commented that the following issues sometimes arise in connection with Rule 30(b)(6) depositions:

1. The topics for testimony are either too broad or too specific. Some practitioners report that topics are not identified with "reasonable particularity." If a topic is too broad, the organization being deposed may need to designate several individuals to respond to a single topic or take a large amount of time to educate a single witness who does not have personal knowledge. In some cases, the topic may be so broad that the party taking the deposition feels the responding party has not fulfilled its obligation to provide a knowledgeable witness or witnesses. On the other hand, if the topics are too particular, it may require the entity to designate too many witnesses to provide the detailed information sought.

2. Too many topics for testimony are designated. Some practitioners believe that their opponents are foregoing traditional individual depositions in favor of shifting testimony into Rule 30(b)(6) depositions through an over-designation of topics.

3. Organizations respond that there is no knowledgeable witness. Some practitioners report that some organizations do not fulfill the Rule's requirement to educate a witness on topics for which no current employee has knowledge, and instead simply respond that no current employee is knowledgeable about the topic.

4. Witnesses are not prepared. Some practitioners report that after noticing and preparing for a 30(b)(6) deposition, the organization provides a witness who is not prepared on the topic. In some cases this may be inadvertence, but in some cases it appears attorneys ignore the requirement that the witness be prepared to testify on the topics for which he is designated to testify.

5. Witnesses are over-prepared. Some practitioners report that it is very difficult to get binding testimony because witnesses are coached to qualify each response by stating the organization's investigation is still continuing.

6. Parties seek testimony about legal contentions. Some practitioners report that the Rule is sometimes used to go beyond factual information to obtain information about the organization's legal contentions. In some cases, there are mixed fact and law contentions, which require question-by-question parsing.

7. Parties seek repetitive depositions. Some practitioners report that the Rule is sometimes used to get a "second bite at the apple." While there is recognition that at times a second deposition is unavoidable, in some cases attorneys consciously rely on the Rule to take a second deposition of key witnesses after taking individual depositions. Similarly, others complain that 30(b)(6) depositions are used to evade the 7-hour limit on depositions.

8. Attorneys go beyond the topics designated in the notice. Some practitioners stray far from the topics listed in the 30(b)(6) notice. This happens quite often because of the

nature of the give and take in a deposition. Some practitioners believe this is not proper, while others believe it is proper but that testimony that goes beyond the designated topic should be considered the individual's testimony rather than the organization's testimony.

9. The rule requires the organization to educate a witness. Some practitioners report that the Rule is used to force an organization to do the work that the opposing attorney should do. That is, some lawyers use the Rule to shift the work of sifting through documents and testimony to the organization by designating topics that requires the organization to take time to educate a witness based on the documents and testimony in the case. This can be a tremendous burden in preparing 30(b)(6) witnesses to testify.

10. The rule results in admissible statements by someone without personal knowledge. Some practitioners complain that the Rule has a fundamental problem in that it requires an organization to educate a witness without personal knowledge who then testifies as though it is his personal knowledge, resulting in admissible admissions by the organization.

11. The rule does not provide for supplementation of a response. Some practitioners complain that there is no way to supplement 30(b)(6) testimony based on later discovered evidence, even when the designated witness did not have personal knowledge of the issue for which he testified. This can create odd situations. For example, after a 30(b)(6) witness testifies, it is possible that the parties locate a witness with personal knowledge who contradicts the witness who testified in a 30(b)(6) capacity. The Rule does not provide for supplementation of the 30(b)(6) testimony.