

How Binding Is That 30(B)(6) Testimony?

By **Steven Kramer** (July 6, 2018, 11:51 AM EDT)

Under the Federal Rules of Civil Procedure, a Rule 30(b)(6) witness gives testimony on behalf of the company and the general rule is a company cannot present facts that conflict with the testimony of its designee.[1] But as the U.S. Court of Appeals for the Tenth Circuit recently held in *Snapp v. United Transportation Union*, “this general proposition should not be overstated.”[2]



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That “gotcha” sound bite/line of testimony may not be written in stone after all. Testimony by a Rule 30(b)(6) witness is an evidentiary admission by the witness, and the witness — not the company — is bound by the deposition testimony like any Rule 30 witness. The Second Circuit in *Keepers Inc. v. City of Milford*[3] explained “[R]ule 30(b)(6) testimony is not ‘binding’ in the sense that it precludes the deponent from correcting, explaining or supplementing its statements. Nothing in the text of the Rule or in the Advisory Committee notes indicates that the Rule is meant to bind a corporate party irrevocably to whatever its designee happens to recollect during her testimony. Of course, a party whose testimony ‘evolves’ risks its credibility, but that does not mean that it has violated the Federal Rules of Civil Procedure.”[4]

In *Snapp*, the binding nature of 30(b)(6) deposition testimony at trial was examined. The plaintiff claimed his former employer and union failed to make an accommodation under the Americans with Disabilities Act. The plaintiff lost at trial. On appeal, the plaintiff argued the defendant’s 30(b)(6) witness made binding admissions at deposition and the district court should have granted the plaintiff’s motion for judgment as a matter of law. The Tenth Circuit disagreed and affirmed the jury’s verdict.

At deposition, the plaintiff’s counsel questioned defendant BNSF Railway Co.’s designee witness about select sentences from lengthy letters the plaintiff sent to BNSF (i.e., counsel “cherry picked”). The letters primarily concerned the termination of the plaintiff’s disability insurance benefits, but the letters contained the phrase “reasonable accommodation.” As the appellate court put it, BNSF’s designee’s testimony suggested the plaintiff had in fact requested an ADA accommodation and BNSF failed to engage in an evaluation process. At trial, BNSF’s 30(b)(6) witness testified and so did the actual BNSF employee who communicated with the plaintiff. Unlike the designee, the employee testified she thought the letters were an attempt to reinstate the plaintiff’s disability benefits and the phrase “reasonable accommodation” referred to provisions of an insurance policy that was attached to the letters.

On appeal, the plaintiff argued BNSF was bound by its designee’s testimony and the jury should not have been allowed to hear other evidence. The Tenth Circuit noted that the letters plaintiff’s counsel used at deposition were “long and dense,” and

Snapp essentially seeks to take Freshour's deposition answers to leading questions examining isolated sentences from dense letters and use those answers as legal or judicial admissions as to whether Snapp requested an accommodation and whether BNSF engaged in the interactive process. His proposed limitations cut severely against the jury's truth-seeking function. The jury was entitled to, and did, hear the full evidence, see the full letters, see completely what Snapp communicated to BNSF, and see what BNSF said in response. The district court did not err in letting the jury hear evidence to explore and explain the full communications between the parties.[5]

Designee testimony was not fatal to the plaintiff in *North Alabama Fabricating Co. Inc. v. Bedeschi Mid-West Conveyor Co. LLC*. [6] The plaintiff's designee was asked at deposition to identify all acts of misrepresentation committed by the defendants and the designee identified five acts. In their summary judgment motion, the defendants argued none of the five acts could survive. The plaintiff's opposition papers never even addressed the five acts. Instead, the plaintiffs argued the defendants' motion failed to address other misrepresentations specifically identified in the pretrial order. The defendants argued in reply that the plaintiffs' claims were limited to the acts identified by the plaintiff's 30(b)(6) designee. The court disagreed, reasoning "[t]he court refuses to treat Mr. Parrish's Rule 30(b)(6) testimony as a judicial admission confining [the plaintiff's claims] to the five alleged misrepresentations and omissions he identified in his Rule 30(b)(6) deposition." [7] Although the court's reasoning was purely legal, it cannot be overlooked the court's recitation of the facts included that the defendant's own project manager estimated the defendant might owe the plaintiff between \$1,388,815.22 and \$1,712,815.22, but the defendant paid the plaintiff only \$944,376.80. [8]

Conclusion

A company has an obligation to prepare its Rule 30(b)(6) witness to be knowledgeable about designated subject matters. A witness is not an oracle of the company, [9] but repeatedly answering "I don't know" to designated topics without adequate explanation is not proper. Sanctions will likely be issued and the company may be stuck with an "I don't know" position. Snapp and Northern Alabama teach that litigation is a truth-seeking process and where a designee really gets it wrong, a court may exercise its inherent power to allow the true facts to come out. Each case will be fact-specific, and relief from 30(b)(6) testimony should be considered an exception. Snapp and Northern Alabama underscore the importance of how much time should be spent on deposition preparation.

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[1] 7 James Wm. Moore, *Moore's Federal Practice* § 30.25[3] (3d ed. 2016).

[2] 2018 WL 2168653 (10th Cir. May 11, 2018) at *11.

[3] 807 F. 3d 24, 34-35 (2d Cir. 2015).

[4] See also *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F. 3d 630 (7th Cir. 2001); *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control, Inc.*, 731 F. 3d 799 (8th Cir. 2013); *Vehicle Mkt. Research, Inc. v. Mitchell Int'l Inc.*, 839 F. 3d 1251 (10th Cir. 2016).

[5] Snapp at *12.

[6] North Alabama Fabricating Co. Inc. v. Bedeschi Mid-West Conveyor Co. LLC, 2018 WL 2198638 (D.Kan. May 14, 2018) at *16.

[7] Id. at *16.

[8] Id. at *9.

[9] Kramer, Corporate Designee Practice Under NY V. Federal Rules, Law 360 (April 25, 2018), found at <https://www.law360.com/articles/1037095/corporate-designee-practice-under-ny-v-federal-rules>.