Business Torts Section

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Chair's Message
Now is the Time for Business Torts

Elizabeth Ann (Betty) Morgan, Atlanta, Ga.

Soon after I returned from Toronto, I met a fellow ATLA member for lunch. I know her as a products liability and personal injury lawyer. She had spoken previously on these topics at past ATLA conferences. She could not attend the annual convention in Toronto, and we were catching up.

During lunch, she brought up a business case she took defending an executive in a shareholder suit based upon the wrongdoing of another executive. She wound up winning money for her defendant. She enjoyed the case and was looking to do more of that kind of work. Seeing an opportunity for recruiting, I suggested she join the Business Torts Section.

But she was *defending* the executive, she said.

No reason not to join, was my response. Business Torts lawyers represent different sides because in business cases there are usually plenty of torts to go around.

This conversation got me thinking about how we can expand the Business Torts Section. In Toronto, with tort reform casting a pall on products, personal injury, and other traditional torts, I talked to a lot of lawyers interested in business torts.

But few of the lawyers I spoke with are Section members. My challenge to you is to do what I did. Go to lunch with a plaintiff's lawyer you know and convince him or her to spend $45 to join the Business Torts Section. That is not a lot of money for what the Section has to offer. I guarantee you will benefit as well.

The CLE program in Toronto, moderated by former chair Bruce Simon

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Back Issues of Business Torts Section newsletters can be found at www.atla.org/sections/businesstorts.

A Look at the Securities Arbitration Process

By Thomas R. Ajamie, Houston, Texas and Debra G. Speyer, Philadelphia, Penn.

When a customer loses money at a brokerage firm, the customer is required to submit to binding arbitration for resolution of the dispute. The customer's complaint is heard by an arbitrator (or panel of arbitrators) rather than by a judge.

Arbitration is governed by state and federal law, as well as by the rules of the arbitration forum itself. Arbitration in the United States has existed since 1817 for disputes between members of the New York Stock Exchange and since 1872 for disputes between customers and member firms. However, it was not until the Supreme Court made two decisions in the late 1980s that arbitration became the common means by which the securities industry resolved its disputes.[1]

CHOOSING THE ARBITRATION FORUM

Securities arbitration cases are generally administered by two self-regulatory organizations (SROs): the National Association of Securities Dealers (NASD) and the New York Stock

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had a dynamite panel on "The Crystal Ball: Cutting-Edge Business Litigation for the Future." See the report in this newsletter and the papers, which are available on the Web site.

As we learned, shareholder-related claims are on the upswing. Many more business cases are out there waiting to be uncovered. Recruiting some of our traditional tort colleagues will lead to the discovery of new cases of corporate abuse. Better networks lead to more and better cases. Employment lawyers are also likely sources of referrals and make good associations in cases where there is corporate corruption.

My goals for the year are to enlarge the Section's membership and to help transition tort lawyers by teaching them our tools of the trade. To that end, our program at the annual convention in Seattle next summer will be themed "Boot Camp for Business Torts." The program, currently being developed, will cover basics from the ethics rules for contingency fee business representation to case selection strategies and tips for proving elusive lost profits. I hope you'll plan on joining us.

In the meantime, take a non-Section member to lunch and persuade them to join. For each recruit, you and the recruitee will win not only a potential new case, but a camera from ATLA — perfect for taking pictures in Hawaii at the winter meeting.

Elizabeth A. (Betty) Morgan is chair of the Business Torts Section.

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Correction:

In the summer 2005 issue, the following endnotes were inadvertently omitted from the article "Managing and Financing Patent Litigation: Opportunities for Trial Attorneys." The corrected version of the summer 2005 issue is available on the Section's Home Page: www.atla.org/sections/businesstorts. Under "Member Benefits," click on "Newsletter Archives."

Notes

1. *Freedom Wireless, Inc. v. Boston Communications Group, Inc. et al*, special verdicts dated May 20, 2005 (Civil Action No. 00-12234-EFH, D. Mass.), *reported in* Steven Syre, "Talk About Worst-Case," *Boston Globe*, May 24, 2005, at D1, and Peter J. Howe, "A Make-or-Break Court Case," *Boston Globe*, June 7, 2005, at D1.

2. *Eolas Technologies Inc. v. Microsoft Corp*. 399 F.3d 1325 (Fed. Cir. 2005); *see* Reexamination Control No. 90/006, 831.

3. Mark Heinzl, "Blackberry Maker Agrees To Settle Patent Dispute," *Wall Street Journal*, March 17, 2005, at Sec. B; *see NTP Inc. v. Research in Motion Ltd*., 261 F. Supp. 2d 423 (E.D. Va. 2004).

4. Andrew T. Zidel, "Patent Claim Construction in the Trial Courts: A Study Showing the Need for Clear Guidance from the Federal Circuit," 33 Seton Hall L. Rev. 711 (2003); *see also Cybor Corp. v. FAS Technologies, Inc*., 138 F.3d 1448, 1476 (Fed. Cir. 1998) ("This reversal rate, hovering near 50%, is the worst possible. Even a rate that was much higher would provide greater certainty.") (Rader, J., dissenting).

5. *See* 2003 AIPLA Report of Economic Survey, pp. 22, 93-94 (American Intellectual Property Law Association, 2003).

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Exchange (NYSE).[2] In becoming an SRO member, a brokerage firm must agree to be bound by the SRO's rules when a dispute arises.

Thomas R. Ajamie

Both the NASD and NYSE provide specific procedural rules on arbitration, including initial determination of the claim's eligibility, time to answer a statement of claim, selection of the arbitrators and chairperson, discovery, the schedule of fees, the method used to maintain the record of proceedings, and the issuance of awards.

THE ARBITRATION AGREEMENT AND SECURITIES DISPUTES

The Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon* held that agreements to arbitrate in customer agreements with brokerage firms are valid and enforceable in accordance with the Federal Arbitration Act. As a result, the SROs, with the Securities and Exchange Commission's approval, adopted rules regarding arbitration clauses.

The new rules required that (1) an arbitration clause in a customer agreement must be highlighted; (2) the customer agreement must include a statement that it contains an arbitration clause; and (3) a copy of the agreement containing the clause must be given to the customer. Further, the customer agreement may not include any condition that limits the SROs' rules. The rules also established that a customer making a securities claim has a right to be represented by counsel and to hire experts for the preparation and presentation of his case.

COMMENCING SECURITIES ARBITRATION

The arbitration starts with the filing of the customer-claimant's statement of claim with the SRO administering the proceeding. In addition to the statement of claim, the claimant must file a submission agreement and pay the SRO's filing fees. The statement of claim should be addressed to the SRO's director of arbitration. It does not have to be in a particular format or length. However, letter format with bold headings is recommended.

The statement of claim must (1) identify the parties and describe their relationship; (2) clearly and chronologically present the facts of the claim; (3) identify exhibits related to the issues of liability, trading activity, and damages; (4) detail the claimant's request for damages, including an explanation of the customer's efforts to mitigate those damages, and an explanation of how the damages were calculated.

Debra G. Speyer

After filing the statement of claim, the SRO typically serves the complaint and accompanying documents on the respondent by mail, including instructions on the arbitration process. In the event that service is unsuccessful, the SRO may seek assistance from the claimant's counsel to complete service on the respondent.

The respondent's answer must be filed within the SRO's prescribed period. Although the answer does not have to be in a particular form, a letter format is often used. The answer should be written in a chronological, narrative style, setting forth the respondent's defenses and all the facts related to those defenses.

Additionally, the respondent should include exhibits documenting the customer's financial condition. The respondent should explain to the arbitrators how the broker explained the investment to the customer, how the broker concluded that an investment was appropriate, why the final investment decision was in the customer's hands, and how the customer failed to mitigate his damages. The respondent must serve each party, the SRO director of arbitration, and the arbitrators with a copy of its answer and submission agreement.

The NYSE rules provide three different ways to select arbitrators. If both the claimant and respondent agree, the NYSE will provide a list of 10 public arbitrators and five industry arbitrators. The arbitration director serves the parties with a list of the 15 potential arbitrators and their profiles. The parties in turn rank the arbitrators in order of preference. If the NYSE cannot select a panel from the 15 names, a second list of arbitrators is delivered to the parties for consideration. If no acceptable arbitrators are left on the second list, the director of arbitration will appoint arbitrators to serve on the panel.

In another method of panel selection, the NYSE and the parties appoint the arbitrators. Using the second method, the NYSE pre-screens and selects potential arbitrators for conflicts and availability. After the parties exercise limited peremptory challenges and unlimited challenges for cause, they rank the remaining arbitrators in order of preference. The NYSE then appoints the arbitrators according to the mutual preference. The third method is one in which the director of arbitration chooses the three arbitrators and the parties may exercise limited peremptory challenges and unlimited challenges for cause.

Under NASD rules, the parties play a more active role in selecting the arbitrators. Under the list selection method, the parties are provided with

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Security Arbitration, cont. from Page 3

lists from the NASD's pool of public and non-public arbitrators. The lists contain the names and background information of the arbitrators, and the cases in which the arbitrators rendered a decision. The parties use the lists to rank the arbitrators, and strike those arbitrators they do not want.

Once the parties rank the potential arbitrators in order of preference, the lists are combined. The arbitrator with the highest ranking is positioned in first place, and so on. The rankings in the consolidated list form the basis to appoint the arbitrators. An arbitrator may decline to serve under certain circumstances such as unavailability or conflict of interest. The director of arbitration is permitted to appoint one or more arbitrators to complete the panel if the number of arbitrators available under the consolidated list is insufficient.

DISCOVERY AND HEARING RULES

The time and place of the initial hearing is determined after the statement of claim and the answer are filed. If there is an objection to the location, the policy is to conduct the hearing at the place where the customer resides. Arbitration hearings are usually held in conference rooms at the SRO, or at a hotel or other conference facilities.

The SRO rules attempt to balance document production provisions with the aim of resolving disputes promptly. The general rules provide that the parties shall cooperate in the voluntary exchange of documents, making failure to produce documents and information potentially damaging to an otherwise strong case. Accordingly, customers should request account forms, trading confirmations and account statements, prospectuses and research reports, correspondence and telephone records, broker's notes, account analyses, and the broker's employment application to look for prior disciplinary matters relevant to the issues in arbitration.

Pre-hearing conferences with the arbitrators are available during securities arbitration. These conferences assist with resolution of issues relating to the exchange of information, production of documents, identification of witnesses, stipulation of factual matters not in dispute, authenticity of documents, and scheduling of hearings.

The rules of evidence are not strictly applied in arbitration. However, these rules often provide practical guidance on what evidence is probative. Evidence is typically introduced through witness testimony and through documents. After each claimant's witness testifies, the witness is cross-examined by the respondent's counsel. Cross-examination in securities arbitrations is not as limited as it is in court proceedings. Thus, the respondent's counsel may ask the witness questions about areas or topics that were not addressed on direct examination.

Once the witness has been cross-examined, the arbitrators may ask any questions of the witness. After the arbitrators have examined the witness, the claimant's counsel may question the witness again. The arbitrators will only allow questions which were raised by answers on the cross-examination or by the arbitrators' questions. When witnesses are questioned again, re-cross examination begins, limited to the arbitrators' questions.

The examination process is the same for all witnesses, including the respondent. After witness examinations are complete, either or both parties may ask the arbitrators for permission to introduce charts or summaries of the evidence presented.

THE ARBITRATORS' AWARD

An award has the same force and effect as a judgment entered in a judicial proceeding. The award must be in writing and signed by a majority of the arbitrators. It must contain: (1) the names of the parties and their attorneys; (2) the date the claim was filed; (3) the date the award was rendered; (4) a summary of the nature of the dispute; (5) damages and/or other relief awarded and against whom the award is made; (6) a statement of any other matters decided; and (7) the names and signatures of the arbitrators.

After the award is served by mail on the parties, the award is considered final and binding. If a broker or firm fails to honor an award, it shall be subject to disciplinary proceedings. Statutory and judicial grounds to modify or vacate an award are limited.

Notes

1. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 223 (1987); *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 478 (1989).

2. See *www.nasdadr.com* or *www.nyse.com* for more information about the current rules and procedures of the NASD and the NYSE. Other useful web sites related to securities arbitration are *www.sec.gov, www.westgroup.com*, and *www.lexis-nexis.com*, particularly for legal research on laws, litigation releases and decisions, public statements and opinions. For more information on securities, companies and brokerage firms, search *www.CBS.MarketWatch.com*, *www.djinteractive.com* or *www.sia.com*.

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February 18 - 22
Sheraton Waikiki Hotel
Honolulu, HI

2006 Annual Convention
July 15 - 19
Washington State Convention Center, Sheraton Seattle & Westin Seattle
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Fighting Against Discovery Abuse and Winning

Gregory A. Rutchik, San Francisco, Calif.

My experience has taught me that effective law and motion practice, both during and after the discovery period, has determined the success or failure in copyright and trademark actions, especially in the case of the 30(b)(6) deposition. The deposition of an entity, whether it is a public or private corporation, a partnership, association or governmental agency, is your best weapon against stonewalling in written discovery responses, because you can ask the entity-deponent questions directly about the elements of its case. And, as long as the question does not violate the attorney-client or work-product privileges, you are entitled to an answer.

On more than one occasion, when I have requested the bases of claims made against my client, the deponent's response was, "I don't know." Whether that answer was the result of true ignorance or coaching by their counsel, "I don't know" is an unacceptable response. I was not going to accept that answer, and neither should you. When opposing counsel attempts to thwart a 30(b)(6) deposition of an entity deponent by designating an "I don't know" witness, here are a few important strategies to help you win the fight against discovery abuse.

Gregory A. Rutchik

IT ALL STARTS WITH A NOTICE OF DEPOSITION

While the rule itself—Fed. R. Civ. Pro. 30(b)(6)—gives little guidance as to what should go into the Notice of deposition, you have the right to attach a comprehensive list of topics. The 30(b)(6) deposition permits the deposing party to name as a deponent, in either the party notice or in a non-party subpoena, a corporation, partnership, association or governmental agency, and to describe *"with reasonable particularity the matters on which examination is requested."*

Meeting and conferring: More often than not, it is wise to call opposing counsel to determine availability for the deposition. (Some Local District Court Rules may require that you do so). It is advisable to fax or e-mail a tentative Notice of Deposition (e.g. near complete) to opposing counsel with the final date omitted. Suggest a few dates in your cover letter or e-mail, and request a date by which a response should be received. If they fail to respond, serve the deposition notice with a date that is convenient for you.

Often, the location of the deposition is another fight. Save your ammo. We recently argued that a defendant who filed a motion for injunctive relief should be deposed in the district where the motion was filed, and not in the out-of-state principal location of the defendant. Many times, though, it may not be worth the fight. As you may discover below, giving in on the location of the deposition now might provide leverage later, when it comes time to obtain the deposition of a non-complying entity deponent on a motion to compel.

When you serve your Notice of Deposition, attach a list of topics (the matters on which examination is requested). Make sure you list *all* of the matters upon which you wish to examine the deponent. These need only be limited by general rules of relevance, which are pretty broad. (See Fed. R. Civ. Pro. 26(b)(1)[1]). Completeness and clarity will make the difference between getting what you want and being stymied.

Without a comprehensive list, you will be unable to box your entity deponent into an answer. If the examination goes into a topic that is not listed, the deponent is permitted to answer in his or her individual capacity rather than on behalf of the corporation. After all, the deponent, usually an officer, director or manager, speaks for the corporation. If you ask a question that was not on your list of topics, that individual might not be prepared to speak on the corporation's behalf. It seems fair.

The bottom line for the deponent is this: The time to argue about any lack of clarity or relevance in the deposition topics is *before* the deposition. If opposing counsel waits until the deposition to make objections on the record about clarity and whether or not the topics as stated in the notice are clear or proper, such objections are futile. The reason is simple. Unless the case goes to trial, such an objection will not see the light of day. If the case stands or falls on a discovery motion or dispositive motion, you'll have to find another way to win the issue.

So, in order to prevent such questions from being asked of a 30(b)(6) designee and such answers from being made on behalf of the entity, the deponent must seek a protective order.

HERE COMES A MOTION FOR A PROTECTIVE ORDER

Once you serve a 30(b)(6) notice of deposition, smart opposing counsel will immediately send you a meet-and-confer letter requesting that you narrow your list of topics or even change the location of the deposition. If you decline to narrow the list of topics, unless the deponent files a motion for a protective order under Fed. R. Civ. Pro. 26(c) or a motion to limit examination under Fed. R. Civ. Pro. 30(d), the designated witness is required to answer questions on the topics as listed on behalf of the deposed entity.

The motion for the protective order will rise or fall depending on whether

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the moving party can convince the court that there is no "good cause" basis for taking the discovery. Without filing and winning a motion for a protective order, the deponent had better be ready for a thorough examination. Counsel who expect to attend a deposition and object to the topics at that time are asking for a rude awakening at best, and sanctions at worst.

DUTY TO DESIGNATE AND PREPARE THE DEPONENT

Although many try to dispute this obligation, there is no question that when an entity is identified as a deponent, as opposed to a particular individual, the entity must designate one or more individuals as the most knowledgeable. It must also prepare the designee(s) to testify on all topics listed in the notice of deposition.[2] It is not enough that the designee be prepared to testify to the extent of his or her personal knowledge.

According to Fed. R. Civ. Pro. 30(b)(6), upon receipt of a Notice of Deposition, the corporation, agency, or governmental organization is obligated to select and produce officers, directors, or any other person with knowledge to testify with particularity on the matters specified. Once the corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that person.[3]

The designation is an affirmative act, and the deposing party should demand that the designation of witnesses to testify on particular topics be made in writing before the actual deposition. It is difficult to prepare to take a deposition when you do not know who will show up and testify on which topics. Make sure opposing counsel designates the names, titles, and topics of each witness before you begin to prepare for the deposition. Otherwise, you'll be blindsided.

Often, corporations designate someone other than an officer, director, or manager. When they do, you should ask the deponent as part of your opening questions why he or she was designated. This is the time to ask the designee what his or her role is at the company, what he or she did to prepare, and to whom he or she spoke in preparation for deposition. More often than not, you will be met with objections, but keep moving. The objections could be something like "beyond the scope of the notice," or "badgering," but these are not sustainable objections. The designee will also often slip and state that he or she will only testify on all of the topics "to the best of my knowledge."

It may require several questions to get to the basis of the designee's knowledge before and after the designee was asked to serve by the corporation. This may, and often does, establish that the designee had no personal knowledge of a topic, but needed to talk to others to prepare. (Such designees are sometimes referred to as "empty vessel" witnesses).

When you ask questions in this vein, you often uncover that the designee did not ask the right questions to adequately prepare to testify on the topics set forth in the Notice of Deposition. If that is the case, then the corporation has not designated a knowledgeable witness. The result may be a "do-over" of the 30(b)(6) deposition, which could win your case. After all, what corporate entity wants to have its deposition taken twice on the same topics?

This is worth repeating. Not only does the entity have to designate knowledgeable witnesses, but they also have a duty to prepare those witnesses. If the witness is not knowledgeable, he or she must become knowledgeable. Rule 30(b)(6) seeks to "ensure that such witnesses are adequately prepared to testify, that is, that each witness has reviewed all pertinent documents and is familiar with them."[4] Deposing counsel must hold deponents to this duty.

If you are confronted with a witness who does not know the answer to a question taken squarely from the topics contained in the Notice of Deposition, you should stop the deposition and ask the deponent, on the record, to immediately designate a new witness. If the deponent does not, you should know that the designation of a witness who lacks knowledge of the matters specified in the notice entitles the noticing party, in most instances, to seek reimbursement of expenses incurred in taking the deposition, including reasonable attorneys' fees.[5] Perhaps more importantly, it will give the deposing party the right to compel the deponent to designate a new witness and take the 30(b)(6) all over again.

Know the duties incumbent upon the designating entity[6]: First, Rule 30(b)(6) imposes on the deponent the "duty of being knowledgeable on the subject matter identified as the area of inquiry."

Second, the designating party has a duty to "prepare the witness to testify on matters not only known by the deponent, but those that should be reasonably known by the designating party." This is because the purpose of a Rule 30(b)(6) deposition is to get answers on the subject matter described with "reasonable particularity" rather than answers "limited to what the deponent knows."

Third, the deposed party has a duty to substitute an appropriate designee when it becomes apparent that the previous designee is unable to respond to certain relevant areas of inquiry.

If you are aware of these duties and spend some time at the beginning of the deposition determining whether the designee has fulfilled them, you will have obtained pretty good support that may help you win the fight against discovery abuse. The fact remains that most corporations do not understand these duties and their counsel fail to educate them. This may actually work to the deposing party's advantage.

I am surprised how often counsel waits to "work things out" after the deposition has been taken, or even after discovery is completed. Fighting over the relevancy of the topics listed in a Notice of Deposition is often futile. Counsel for the deponent should pick his or her fights carefully. If the deposing party knows of the deponent's duties to designate and prepare witnesses well and successfully questions the deponent as to whether these duties were fulfilled, the deposing party has the opportunity to learn who are the most knowledgeable persons, and on what topics.

If the entity deponent has failed to meet its obligations, you can still use the deposition to get as much informa-

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Editor's Message
Business Torts Lawyers Helping People

Colleen Duffy Smith, San Jose, Calif.

OK folks, these are not your grandpa's business torts! When you think of a business torts representation, you might automatically conjure up the potential representation of some faceless entity client. For those of you trial lawyers whose passion is helping people and making a difference in this world, let me tell you, business torts practice is where it is at!

If you were lucky enough to have attended the ATLA Annual Convention in Toronto in July, and if you were luckier still to have participated in the Business Torts Section presentation, you certainly would have been struck by just how meaningful a business torts practice can be. Kudos to exiting chair, Bruce L. Simon, who assembled a terrific program.

Where else can you get the opportunity to hear and interact in one fell swoop with presenters such as the Hon. Bill Lockyer, California Attorney General; the Hon. Susan Illston, U.S. District Court Judge of Northern District of California; and Michael Shea of the ACORN Housing Corporation?

The panel taught us about a wide variety of practice topics, such as: predatory lending, securities fraud, energy and utility litigation, drug company misconduct, antitrust, fair tax fees, living wage, better schools, affordable housing, community reinvestment, health care, and class action practice in the aftermath of the Class Action Fairness Act of 2005.

What struck me most about the presentations was the common theme running throughout—advocating people over profits and enforcing corporate responsibility. We hope that you not only become active in the Section so that you can enhance your business torts acumen, but also so that you can participate in the excellent opportunities that a business torts practice has to offer.

Colleen Duffy Smith is a co-editor of the Business Torts Section Newsletter.

New Section Members, Welcome!

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tion as you can from the current designee, and then file a motion to compel a further 30(b)(6) deposition. Discovery motions to compel further 30(b)(6) testimony are often worth bringing, especially when there has been blatant discovery abuse elsewhere in the case. Each motion is an opportunity to argue your case and educate the court. When you can show the court that the other side flaunts its discovery obligations and the record supports this, you'll have the court on your side.

Notes

1. Fed. R. Civ. Pro. 26(b)(1) states: "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."
2. *U.S. v. Taylor*, 166 F.R.D. 196, 201 (M.D. NC 1996)
3. *U.S. v. Taylor*, 166 F.R.D. 356, 361 (E.D. N.C. 1996)
4. *Detoy v. San Francisco*, 196 F.R.D. 362, 2000 U.S. Dist. Lexis 13013
5. See Fed. R. Civ. Pro. 26(g) and Schwarzer, Tashima & Wagstaffe, *Federal Civil Procedure Before Trial*. The Rutter Group, ¶11:1414.1.
6. What follows, under the district court's opinion in *Alexander v. Federal Bureau of Investigation*, 186 F.R.D. 137, 141 (D. D.C. 1998), is a list of the several affirmative obligations and duties that have been consistently recognized in every court opinion in connection with a Rule 30(b)(6) deposition notice.

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