Responding to a Subpoena for Deposition

This Law Review was written by Timothy A. French and edited by Jed Mandel, founding members of Chicago Law Partners LLC. CLP serves as the Association Forum's general counsel.

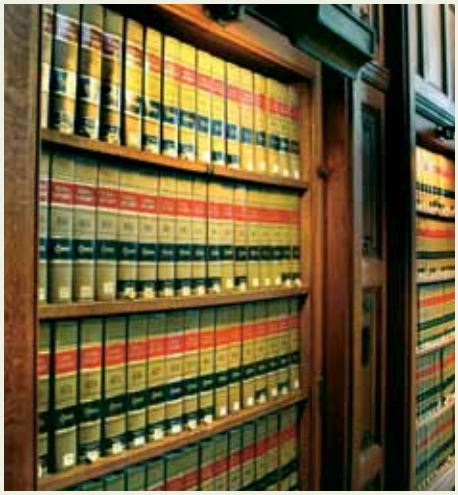
Q: My association has been subpoenaed to give a deposition, but we're not a party to the lawsuit. Do we have to respond?

A: Yes. Even if an association is not a party to a lawsuit, it may be served with a notice or a subpoena to give deposition testimony. Both federal and state rules of civil procedure allow for depositions to be taken of non-parties and of legal entities, such as associations, not just individuals.

However, "entity" depositions impose unique obligations that need to be understood and satisfied. Generally speaking, those obligations are the same under both federal and state court rules. For example, the federal rules specifically state:

> "*Notice or Subpoena Directed to an Organization*. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization."

The foregoing rule is unique in that it requires the party seeking to take an association's deposition to "describe with reasonable particularity" in advance the topics on which deposition testimony is sought. This requirement stems from the fact that the person designated to testify on behalf of the association will be assumed to speak for the association's institutional knowledge on the relevant topics and, as a result, can bind



the association. The admissions made by the designated person will be deemed the admissions of the association. In that context, the association must be given sufficient advance notice of the topics of the deposition for which the designated person can provide binding testimony.

The deposing party's obligation to provide advance notice, in turn, imposes two obligations on the association being deposed: (1) the association must specifically designate one (or more) persons to testify on its behalf regarding the noticed topics; and (2) the association must ensure that the designated person is apprised of all of the information "known or reasonably available to the organization" about the topics on which the person will be testifying.

This second obligation is extremely important and requires that the designated person be properly prepared to testify on behalf of the association. The designated person does not need to be the person with the most knowledge of the particular topic. Rather, it is more important that the person be best suited to gather the relevant information that is "known or reasonably available" to the association. Institutional knowledge, not personal knowledge, is the ultimate litmus test. Accordingly, the designated person not only should have some personal knowledge of the topic, but also should speak to others within the association about what they might know, and should review the association's documents on the subject.

Thorough pre-deposition preparation will ensure that the designated person speaks on behalf of the association as competently as possible and also will avoid the prospect of sanctions, which can be imposed by a court if a designated person turns out to have no meaningful knowledge regarding the noticed deposition topics. Courts have found that when a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through the agent. "If that agent is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all." When that happens courts can and will impose sanctions.

There is another "quid pro quo" for the obligation to provide a thoroughly prepared designee. Specifically, to the extent that a designee is asked questions outside of the scope of the noticed topics, that testimony (assuming proper objections regarding scope are made at the deposition) will not bind the association, but instead will be seen merely as the personal testimony of the designated individual.

As in all matters relating to litigation, an association should consult with its legal counsel promptly if it receives a notice or subpoena for an entity deposition. That said, it is important to recognize that associations can themselves, as entities, be subpoenaed to testify and to know, in advance, the association's general obligations in the context of entity depositions.

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.