

How Can 30 Be 6, Anyway, and Other Representative Witness Conundrums[1]

by Pete Haskel

Federal Rule of Civil Procedure 30(b)(6)[2] authorizes a party to compel any entity (party or non-party) to designate representative deposition witnesses to testify on behalf of the entity about designated topics. We need to take a second look at our assumptions about Rule 30(b)(6) practice before proceeding under the rule, because the scope of the rule differs among different circuits, among courts within the same circuit, and among state courts working under rules identical to or similar to Rule 30(b)(6).

The majority rule is that permissible questions to Rule 30(b)(6) witnesses are NOT limited to the topics designated in the notice.[3] Therefore, if taking a 30(b)(6) deposition and your presiding judge is not hostile to the practice,[4] exercise your right to suspend the deposition after the first few refusals to answer questions on grounds that the questions are beyond the scope of designated topics, to get a court directive for the witness to answer.

If you are defending a Rule 30(b)(6) deposition, object to questions beyond the scope of designated topics if your jurisdiction's case law supports that position, if your law is silent, or if you can support a good faith argument for changing the law.[5] In any event, carefully prepare your witness. If the questions are outside the designated topics and the witness lacks personal knowledge, the answers should make this uncertainty and lack of personal knowledge explicit. Maybe the defending attorney's assertions of these points on the deposition record will receive some weight at later summary judgment litigation or trial, but I believe that the deponent's testimony, and any additional evidence adduced when admissibility is litigated, rather that the lawyer's argument, should determine admissibility.

Although hearsay objections generally do not lie at depositions, making it clear that deposition answers are hearsay will make it easier to exclude these answers in summary judgment motions or at trial. To avoid a trial ruling that the hearsay answers are admissible as the admissions of a party, even as hearsay, the witness should be carefully prepared to describe the specific narrow scope of the witness's authority to act for the employer and, if true, to deny having the power to make admissions binding on the entity. This deponent can be cross-examined to bring out those facts during the deposition (my preferred procedure for properly prepared witnesses), or the evidence can be introduced later. If the opposing counsel's leading questions induce your unprepared deponent to agree that the deponent has the powers that a court will see as giving the deponent the authority to make admissions binding on your client, the answers likely will be deemed to be binding admissions.

Entities are NOT always bound by the deposition testimony of their designated witnesses in the same way as by judicial admissions.[6] Rather, Rule 30(b)(6) testimony is treated like any other testimony that can be contradicted or impeached. In the Third and Eight Circuits, representative testimony of facts will bind the entity, but not testimony as to law.[7] Other courts, following treatises,[8] hold that Rule 30(b)(6) testimony, even about facts within the scope of designated topics, can be contradicted, like any other deposition testimony.[9]

The moral? Knowest thee thy jurisdiction's rules.

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Notes

1. "Contrary to what one might think, 'conundrum' is not a Latin word, and is described in my dictionary as 'Ety. dub.' If it was Latin it would be conundra. But it ain't, so it isn't." R Tanner, St Monans, Scotland. . . . 'The plural of conundrums need detain us no longer. Just say 'puzzles', you pedants.' Mike Bird, Maryport, Cumbria." What is the correct plural of conundrum? *Notes and Queries*, THE GUARDIAN, guardian.co.uk, http://www.guardian.co.uk/notesandqueries/query/0,5753,-5253,00.html (last visited Jan. 21, 2011) (the web page on this topic also presents the contrary viewpoint, that the correct plural should be 'conundra,' which not deserve deference because expressed less wittily).
2. FED. R. Civ. P. 30(b)(6) ("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. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.").
3. *See* Order, Am. Gen. Life Ins. Co. v. Billard, No. C10-1012, ECF No. 68, 2010 U.S. Dist LEXIS 114961 [Pull

up on PACER] (N.D. Iowa Oct. 28, 2010) (not officially published; collecting cases & analyzing majority and minority rules); Karen L. Stevenson, *Magistrate Judge Examines Broad Scope of Rule 30(b)(6) Depositions,* LITIGATION NEWS, ABA Section of Litigation (Dec. 29, 2011), http://www.abanet.org/litigation/litigationnews/top_stories/122910-civil-procedure-rule-30-(b)-(6)-depositions.html (last visited Jan. 22, 2011) (summarizing & analyzing *American General*). "The proper scope of the questioning of a Rule 30(b)(6) witness is not defined by the notice of deposition, but by Rule 26(b)(1) of the Federal Rules of Civil Procedure, unless a court otherwise directs. Employers Ins. Co. of Wausau v. Nationwide Mut. Fire Ins. Co., No. CV 2005-620(JFB)(MDD), 2006 WL 1120632, at *1 (E.D.N.Y. Apr. 26, 2006) (Go, Mag. J.). "In fact, a notice of deposition ... constitutes the minimum, not the maximum, about which a deponent must be prepared to speak.' *Id.* (quoting *Detoy v. City and County of San Francisco,* 196 F.R.D. 362, 366 (N.D. Ca. 2000)) (internal quotation marks and brackets omitted)." Crawford v. Franklin Credit Mgmt. Corp., 261 F.R.D. 34, 38 (S.D.N.Y. 2009).

4. While the Rules give parties the right to recess depositions to get a court order against deposition conduct that "unreasonably annoys, embarrasses, or oppresses," FED. R. CIV. P. 30(d)(3)(A), some judges, even magistrate judges, just hate to have their dockets interrupted for this purpose. If the deposition is in a district other than the one where the trial is pending, be careful about which judge is consulted. You want the judge presiding at trial, or at least a magistrate judge in that district. *See id.*

5. The *American General Order*, *supra* note 3, sanctioned the deposition defender for continually instructing the witness not to answer, instead of halting the deposition to get court protection!

6. *See, e.g.,* Indus. Hard Chrome, Ltd. v. Hetran, Inc., 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000) (Rule 30(b)(6) testimony not a judicial admission; it is evidence that can be contradicted and used for impeachment).

7. *See* AstenJohnson, Inc. v. Columbia Cas. Co., 562 F.3d 213, 229 n.9 (3d Cir. 2009) (citing with approval, *R & B Appliance Parts, Inc., v. Amana Co.,* 258 F.3d 783, 787 (8th Cir. 2001)).

8. *See, e.g.,* 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, FEDERAL PRACTICE AND PROCEDURE § 2103 (Westlaw, FPP § 2103, as of Jan. 23, 2011).

9. *See* A.I. Credit Corp. v. Legion Ins. Co., 265 F.3d 630, 637 (7th Cir. 2001); Lindquist v. City of Pasadena, Tex., 656 F. Supp. 2d 662, 698 (S.D. Tex. 2009). **M**

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