Reasonable Particularity

The Starting Point for Effective Rule 30(b)(6) Depositions

By William A. Yoder, Amy M. Crouch, and Melissa M. Plunkett

Rule 30(b)(6) depositions are not designed to be an exercise in "gotcha" tactics; nor are they designed to be a fishing expedition.

Effectively representing an organization in the face of discovery targeting the company and its corporate representatives mandates that an attorney learn to navigate the complexities of Federal Rule of Civil Procedure 30(b)(6).

Rule 30(b)(6) allows a party to depose a corporation, partnership, association, governmental agency, or other entity without identifying a specific individual for the deposition. Fed. R. Civ. P. 30(b)(6). The rule allows the party seeking a deposition—by naming the organization that it intends to depose and describing the topics that it intends to cover—to shift the burden to the organization to designate the right person to appear at the deposition. *See id.*

The rule places a significant burden on the organization being deposed. *See Murphy v. Kmart Corp.*, 255 F.R.D. 497, 504 (D.S.D. 2009). Not only must the organization designate an appropriate witness or witnesses to testify on its behalf, it must also prepare its witnesses to answer any questions within the topics described in the notice or subpoena. *Alliance for Global Justice v. District of Columbia*, 437 F. Supp. 2d 32, 37 (D.D.C. 2006) ("By its very nature, a Rule 30(b)(6) deposition notice requires the responding party to prepare a designated representative so that he or she can testify on matters not only within his or her personal knowledge, but also on matters reasonably known by the responding entity."). And if the organization fails to designate an appropriate witness, or to prepare that witness adequately, it could face sanctions. *Murphy*, 255 F.R.D. at 506.

Drafters of Federal Rule 30(b)(6) sought to address multiple concerns that arose when parties attempted to depose representatives from an organization under traditional methods, among other ways, by helping the party taking the deposition find the "right" deponents and helping the organization by reducing the number of depositions. Fed. R. Civ. P. 30(b)(6) advisory committee's notes. Whether the



■ William A. Yoder and Amy M. Crouch are partners and Melissa M. Plunkett is an associate of Shook, Hardy & Bacon LLP. From the firm's Washington, D.C. office, Mr. Yoder practices in the Global Product Liability Group, focusing on complex individual and class action litigation, risk assessment and risk avoidance counseling. From the Kansas City, Missouri office, Ms. Crouch's practice focuses on complex U.S. litigation as well as international regulatory counseling. Also in Kansas City, Ms. Plunkett's practice focuses on complex individual and class action litigation. Ms. Crouch and Ms. Plunkett are members of DRI and its Commercial Litigation Committee.

rule effectively addresses the concerns that the measures sought to address, however, depends on "the parties' reciprocal obligations" under the rule. *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000). The key obligation for the party seeking the deposition arises in its duty to "describe with reasonable particularity the matters for examination" in the notice or subpoena. Fed. R. Civ. P. 30(b)(6). Only when the requesting party has "reasonably particularized" the subjects that it wants to ask about can the responding party produce someone who is prepared to respond to questioning within the scope of the notice. *Lipari v. U.S. Bancorp, N.A.*, No. 07-2146-CM-DJW, 2008 WL 4642618, at *5 (D. Kan. Oct. 16, 2008).

"Reasonable Particularity": Why Does It Matter?

Preparing someone to speak on behalf of an organization is no small task. The time involved depends on the scope of the notice because the notice defines the organization's obligations to designate and to prepare its witnesses. But Federal Rule 30(b)(6) notice has significance beyond defining an organization's obligations—it can also limit the testimony that binds the organization in later motions or at trial. *See, e.g., Falchenberg v. N.Y. State Dep't of Educ.*, 642 F. Supp. 2d 156, 164 (S.D.N.Y. 2008) ("Question and answers exceeding the scope of the 30(b)(6) notice will not bind the corporation, but are merely treated as the answers of the individual deponent."); *Detoy v. City & Cnty. of San Francisco*, 196 F.R.D. 362, 367 (N.D. Cal. 2000) ("Counsel may note on the record that answers to questions beyond the scope of the Rule 30(b)(6) designation are not intended as the answers of the designating party and do not bind the designating party."). While courts have typically found that parties are free to ask questions beyond the scope of the Federal Rule 30(b)(6) notice, some courts have held that the answers to those questions do not bind the organization. *See Falchenberg*, 642 F. Supp. 2d at 164; *Am. General Life Ins. Co. v. Billard*, No. C10-1012, 2010 WL 4367052, at **3–4 (N.D. Iowa Oct. 28, 2010) (adopting "the majority view and find[ing] that the questioning of a Rule 30(b)(6) deponent is not limited to those subjects identified in the Rule 30(b)(6) notice"). Other courts may find answers to questions that step beyond the notice parameters binding but do not expect the deponent to know information outside of the scope of the notice. *F.C.C. v. Mizuho Medy Co. Ltd.*, 257 F.R.D. 679, 683 (S.D. Cal. 2009); *King v. Pratt & Whitney*, 161 F.R.D. 475, (S.D. Fla. 1995) (explaining that the party may ask questions outside of the notice, but "if the deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party's problem"), *aff'd*, 213 F.3d 646 (11th Cir. 2000). One court has held that the topics listed in a Rule 30(b)(6) notice form the outer bounds of questions allowed during the deposition. *Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 729–30 (D. Mass. 1985) (explaining that the deposition is limited to matters listed in the Rule 30(b)(6) notice). Not surprisingly, issues surrounding the reasonable particularity requirement are often litigated. *See* Lisa C. Wood & Matthew E. Miller, *Serving as the Company's Voice—The 30(b)(6) Deposition*, 24 Antitrust 92 (Spring 2010). Thus, paying close attention to this requirement from the outset could protect the usefulness of the deposition testimony, define how much preparation is required, save time and money spent to resolve disputes, and keep discovery disputes from reaching a court.

Determining Whether Notice Meets the "Reasonable Particularity" Requirement

Neither the Federal Rules of Civil Procedure nor its Advisory Committee notes define "reasonable particularity." Citing the reciprocal obligations of the parties under Federal Rule 30(b)(6), some courts require the party seeking a deposition "to designate, with painstaking specificity, the particular subject areas that are intended to be questions, and that are relevant to the issues in dispute." *Prokosch*, 193 F.R.D. at 638. *See also, e.g., CitiMortgage, Inc. v. Sanders*, No. 11-CV-2540-EFM-GLR, 2012 WL 6024641, at *3 (D. Kan. Dec. 4, 2012). Courts explain that without "painstaking specificity" an overly broad notice would "subject[] the noticed party to an impossible task" of preparing a witness to answer questions during the deposition without knowing the outer limit of the topics that the witness will face. *See Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000). Other courts, however, have rejected the "painstaking specificity" requirement. *Murphy v. Kmart Corp.*, for example, found that "painstaking particularity" is a heightened standard that creates a burden for the deposing party beyond what the plain language of the rule requires: reasonable particularity. 255 F.R.D. at 505–06. Nevertheless, *Murphy*, just as courts using the "painstaking specificity" standard, recognized that the effectiveness of the rule turns on a party's adherence to the requirement that it "reasonably particularize" the intended subjects of a deposition. *Id.* at 504. The deposing party in *Murphy* sought information about the defendant's role in the corporate hierarchy of various corporate entities that were not parties to the lawsuit. *Id.* at 506. The notice described the topics as "(1) the corporate history of four corporate entities, (2) the corporate relationship between these entities, and (3) the bankruptcy of 2001." *Id.* The court noted that the requested information could include topics completely irrelevant to any claim. *Id.* The court thus found that the notice failed to meet the Federal Rule 30(b)(6) requirements because it did not allow the party being deposed to designate and to prepare a witness without independently interpreting what the request sought, a burden that the court would not place on the party being deposed. *Id.*

Courts generally focus on whether a notice provides the party being deposed with the ability to designate an appropriate witness or witnesses and to prepare them to answer all questions that would fall within the noticed subject matter.

But see ABA Civil Discovery Standards §19(d), available at http://www.americanbar.org/content/dam/aba/administrative/litigation/litigation-aba-2004-civil-discovery-standards.authcheckdam.pdf (explaining that "in preparing and responding to a notice or subpoena to an entity, association or other organization, a party or witness is expected to interpret the designated area(s) of inquiry in a reasonable manner consistent with the entity's business and operations").

If you are on the receiving end of a Rule 30(b)(6) notice, do not take it at face value; examine it closely.

Whatever definition courts use to define reasonable particularity, courts generally focus on whether a notice provides the party being deposed with the ability to designate an appropriate witness or witnesses and to prepare them to answer all questions that would fall within the noticed subject matter. *See, e.g.*, *Murphy*, 255 F.R.D. 497, 505–06 (D.S.D. 2009); *Prokosch*, 193 F.R.D. at 638; *Mitsui & Co. (U.S.A.) v. P.R. Water Res. Auth.*, 93 F.R.D. 62, 66 (D.P.R. 1981) (explaining that the Rule 30(b)(6) notices complied with the reasonable particularity requirements because they were sufficient to inform the party being deposed of the matters of inquiry such that the party could identify the proper witnesses to provide adequate responses for any potential questions).

By examining cases using this focus, a number of trends emerge that illuminate a notice's sufficiency. First, to the extent possible, a notice should limit the deposition topics to specific claims, matters, actions, individuals, time periods, and geographic locations. *See, e.g.*, *New Jersey v. Sprint Corp.*, No. 03-2071-JWL, 2010 WL 610671, at *2 (D. Kan. Feb. 9, 2010) (explaining that the court found the topics "not so overly broad as to fall outside the 'reasonable particularity' standard" because the topics were "reasonably limited (*i.e.*, to the extent possible) to the specific subject matters, actions, individuals, and time periods relevant to this case."); *Young v. United Parcel Serv. of Am., Inc.*, No. DKC-08-2586, 2010 WL 1346423, at *9 (D. Md. Mar. 30, 2010) (explaining that the topics for "the 30(b)(6) deposition must not be overbroad and must be limited to a relevant time period, geographic scope, an related to claims"); *Hartford Fire Insurance Co v. P & H Cattle Co.*, No. 05-2001-DJW, 2009 WL 2951120, at *10 (D. Kan. Sept. 10, 2009) (finding that the Rule 30(b)(6) notice seeking to inquire about all financial information that the plaintiff ever received from the defendants was insufficient). *But see Lykins v. Certainteed Corp.*, No. 11-2133-JTM, 2012 WL 3542016, at *9 (D. Kan. Aug. 16, 2012) (explaining that the notice is not necessarily overly broad simply because it is unlimited in time or scope). Second, a notice should do more than merely describe the topics as anything concerning the complaint, answer, or affirmative defenses. *See, e.g., Catt v. Affirmative Ins. Co.*, No. 2:08-CV-243-JVB-PRC, 2009 WL 1228605, *6–7 (N.D. Ind. Apr. 30, 2009) (explaining that topics listed as allegations in the complaint, answers, affirmative defenses did "not identify the subject matter to be covered with 'reasonable particularity'"); *Alexander v. FBI*, 188 F.R.D. 111, 121 (D.D.C 1998) (finding that the notice stating deposition topics as any matters that are relevant to the case or would lead to relevant evidence is too broad); *Lipari*, 2008 WL 4642618, at *6 (finding that a notice is overly broad when it simply states that it seeks information on all paragraphs contained in the petition). *But see Omega Patents, LLC v. Fortin Auto Radio, Inc.*, 6:05CV1113 ORL 22DAB, 2006 WL 2038534 (M.D. Fla. July 19, 2006) (noting that the court ordered the defendant in a patent case to produce a witness to answer questions on "(1) The factual basis for [defendant's] defenses or denials of the allegations raised in Plaintiff's Complaint; (2) The factual basis for [defendant's] counterclaims; (3) [Defendant's] claims of invalidity; and (4) [Defendants] claims of non-infringement"). Third, a notice should not include phrasing such as "including but not limited to" when describing the deposition topics because that description does nothing to limit the scope of the deposition. *See, e.g., Reed*, 193 F.R.D. at 692 ("Although plaintiff has specifically listed the areas of inquiry for which a 30(b)(6) designation is sought, she has indicated that the listed areas are not exclusive. Plaintiff broadens the scope of the designated topics by indicating that the areas of inquiry will 'includ[e], but not [be] limited to' the areas specifically enumerated. An overbroad Rule 30(b)(6) notice subjects the noticed party to an impossible task.").

Tips for Practitioners

If you are on the receiving end of a Rule 30(b)(6) notice, do not take it at face value; examine it closely. Does it tell you precisely what the examiner wants to ask about? Is it narrowly tailored to the specific issues in the case? Does it tell you precisely what you need to do to prepare your witness adequately? If the answer to any of these questions is "no," challenge the notice—first with the opposing counsel, and then with the court if necessary.

The party responding to a Rule 30(b)(6) notice is expected to interpret the request reasonably. *See* ABA Civil Discovery Standards §19(d). But the counsel for a responding party should work with the opposing counsel to resolve any ambiguities and to narrow any excessively broad topics, and if that fails, seek a protective order from the court. *See Espy v. Mformation Techs., Inc.*, 08-2211-EFM-DWB, 2010 WL 1488555, at *3 (D. Kan. Apr. 13, 2010). Counsel should also note that areas of inquiry are constrained, not only by the reasonable particularity requirement of Federal Rule 30(b)(6), but also by the general limits of discovery described in Federal Rule 26(b). Objections alone are insufficient to protect a responding party from a deficient notice. *Id.* And failing to designate a witness, or allowing a witness to attend the deposition unprepared to answer all questions, could lead to sanctions. *See Prokosch*, 193 F.R.D. at 639. Furthermore, failing to take prompt action could lead also to sanctions against a responding party. *See Landsport Corp.*, 2006 WL 4692567, at *3 (noting that the court would consider sanctions against the party facing the deposition for its failure to file a protective order until the night before the deposition). Finally, be aware of the dangers of a witness saying "I don't know" because he or she was not prepared to answer certain questions. This may be tempting to do when dealing with an excessively broad notice for which preparing for every question or reviewing every document is impossible.

Rule 30(b)(6), continued on page 87

Rule30(b)(6), from page 50
It may be harmless in most other contexts. But in the context of a Rule 30(b)(6) deposition, when a witness says "I don't know," the witness has said that the company does not know, and it may limit your ability to use those facts or that evidence affirmatively at trial. Narrowing a notice to what is fair and reasonable can help avoid this pitfall.

There is rarely a downside to challenging an excessively broad notice, and courts will often grant relief. One court, for example, has held that a party may not ask questions outside of the scope of the Rule 30(b)(6) notice. *Paparelli*, 108 F.R.D. at 729–30. Other courts allow questions but state that the deposing party bears the risk that the deponent may not know the answer to such questions and will not risk sanctions for failure to answer those questions. *King*, 161 F.R.D. 475. Courts have also held that any answers to questions beyond the scope of the notice constitute the testimony of the individual witness as opposed to the testimony of the corporation. *See, e.g.*, *Falchenberg*, 642 F. Supp. 2d at 164; *Detoy*, 196 F.R.D. at 367. A number of courts have also required advance disclosure of specific documents that the examining party wants to ask about. *See, e.g., Order on Mots, In re: Engle Progeny Cases Tobacco Litig.*, No. 2008-CA-15000, at *1 (Fla. 4th DCA May 3, 2011) (under parallel Florida Rule 1.310(b)(6), requiring parties to provide documents to be used in the deposition 30 days before the deposition). So it is good practice to ask for relief in the motion for protective order. Courts want to avoid disputes over scope and adequate preparation, and this goes a long way toward avoiding these battles.

Conclusion

Rule 30(b)(6) depositions are not designed to be an exercise in "gotcha" tactics; nor are they designed to be a fishing expedition. They are an opportunity to examine what an organization knows about the specific issues in a particular case. A witness cannot be prepared to give meaningful testimony if the witness does not know the specific issues that the examiner will ask the witness about. It is the deposing party's obligation to identify those issues fairly so that there are no surprises. FD