

EMPLOYMENT LAW

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IN THIS ISSUE

Larry Smith provides useful guidance for responding to Rule 30(b)(6) deposition notices received in employment cases.

Responding to 30(b)(6) Deposition Notices in Employment Cases



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Attorneys defending employers frequently sigh deeply when they receive a 30(b)(6) deposition notice. The Notice often contains a list of thirty (30) or more topics on which the Plaintiff requests Defendant to testify. Frequently, many of the topics are vague, overbroad, irrelevant or just plain silly. The event becomes even more sigh-worthy when this notice is served after depositions have already been taken seeking information from the Defendant about which Defendant's employees have already testified.

Rule 30(b)(6) is a powerful tool for employees. Plaintiffs utilize the process not only to obtain information regarding the underlying employment dispute, but also as a sword because of the requirement for the employer to locate, prepare and present a witness that will bind the Company on facts that may have occurred more than five (5) or ten (10) years previously.

One strategy for an employer to lessen the impact of the 30(b)(6) deposition is to narrow the requested topics to something manageable. This article focuses on responding to the 30(b)(6) deposition notice and highlights some recent examples of how Courts have narrowed an employer's responsibilities for responding to a Rule 30(b)(6) notice.

Fed. R. Civ. P. 30(b)(6)

Rule 30(b)(6) of the Federal Rules of Civil Procedure provides:

(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 in 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.

The testimony of a Rule 30(b)(6) witness represents the collective knowledge of the corporation, not of the specific individual deponents.¹ A 30(b)(6) witness must testify beyond matters personally known to the individual or matters in which the

¹ *Tolston v. Charles Drew Health Center, Inc.*, 2017 WL 2838134, at * 4 (D. Neb. June 30, 2017).

designated witness was personally involved.² The corporation has a duty to prepare such individual for the deposition and such duty includes not only reviewing documents, but interviewing other individuals or even former employees to prepare for deposition.³

1) Use of Pretrial Process.

Rules 16 & 26 of the Federal Rules of Civil Procedure provide for pretrial processes to establish guidelines for discovery. Aggressive use of the process to try to force Plaintiff to identify corporate representative deposition topics early in the process can benefit the employer. Plaintiff's designation at that time might not be as thorough or complete as it might be at a later time during the litigation. Courts have limited corporate representative deposition topics based on communications on discovery made to the Court.⁴

2) Over Breadth Objections.

Over breadth objections to discovery are very familiar to employer's counsel. However, regarding Rule 30(b)(6) depositions, these objections take particular

importance because overly broad Rule 30(b)(6) deposition topics subject the noticed party to impossible tasks because, where it is not possible to identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible.⁵

One familiar over breadth objection concerns geographic scope. Courts have narrowed Rule 30(b)(6) deposition topics where the geographic scope of a requested deposition topic exceeded that which was pertinent to the case. This usually occurs in situations where the employee seeks information from beyond the geographic scope for which employment decisions were made. For example, in *Parrottino v. Bankers Life & Cas. Co.*,⁶ the Court narrowed the scope of the 30(b)(6) deposition topics from a company-wide request to Michigan because Plaintiff only sought to represent Michigan employees.

Courts will review the temporal scope of a notice when evaluating the over breadth of a 30(b)(6) topic. Courts have narrowed a 30(b)(6) topic when the temporal scope is either too broad or unstated. For example, in *Parrottino*, plaintiff sought deposition testimony on various topics for a period of

² *Id.*

³ *Peshlakai v. Ruiz*, 2014 WL 459650, at *65-71 (D.N.M. Jan. 9, 2014).

⁴ *Doe v. City of San Diego*, 2013 WL 6577065, at *25 (S.D. Cal., Dec. 13, 2013). (Court refused to compel 30(b)(6) deposition on topics which Plaintiff had not requested in hearing).

⁵ *Eng-Hatcher v. Sprint Nextel Corp.*, 2008 WL 4104015, at * 4 (S.D.N.Y. August 28, 2008).

⁶ 2014 WL 1516195, at *9, *18 (E.D. Mich., April 17, 2014). See also *McPadden v. Wal-Mart Stores East, L.P.* 2015 U.S. Dist. Lexis 179144, at *10-12 (D.N.H., Oct. 16, 2015) (Request for 30(b)(6) deposition seeking nationwide information narrowed to regional location involved); *Monohon v. BNSF Ry. Co.*, 2015 U.S. Dist. Lexis 183709, at *25-27 (S.D. Iowa, Oct. 9, 2015) (Limiting deposition topic to Nebraska division where plaintiff worked rather than nationwide scope requested).

seven years but the Court limited the request to four years.⁷

Additionally, Courts have narrowed 30(b)(6) topics where they are overbroad in subject matter. This frequently occurs when the deposition topics seek information regarding individuals not similarly situated to the plaintiff, either as to employment position or legal claims. For example, in *Breiterman v. United States Capitol Police*,⁸ the Court determined a deposition topic which sought testimony regarding all complaints of discrimination, misconduct, retaliation and violations of free speech was overbroad. The Court noted that, in order to be proper comparator evidence, prior complaints must involve misconduct similar to or of comparable seriousness to the plaintiff's alleged misconduct.⁹

3) Reasonable Particularity.

Rule 30(b)(6) specifically requires that the plaintiff identify with "reasonable particularity" the topics on which the corporate representative will be deposed. One court has suggested that, if the plaintiff wants a prepared corporate witness, it is their duty to make sure that the topic is narrowly defined.¹⁰ The notion of reasonable particularity is linked to over

breadth and Courts frequently view these matters interchangeably. In *McArthur v. Rock Woodfired Pizza & Spirits*,¹¹ the Court evaluated a 30(b)(6) topic seeking testimony on the "nature and scope of your business and holdings from 2006 through the present." The Court noted that this request was not particular enough in nature such that a witness could adequately prepare to answer such a topic and accordingly granted a protective order related to that topic.¹²

4) Attorney Client Privilege.

Just like any other discovery process, Rule 30(b)(6) topics can be objectionable if they relate to matters protected by the attorney-client privilege, attorney work-product doctrine or litigation anticipation privilege. In *McArthur*, the plaintiff had requested a corporate representative to testify on "the facts supporting your denial of the claims asserted by plaintiff in this lawsuit" and "the facts that you rely upon to deny each of Plaintiff's claims." In addition to finding the topics lacked particularity, the Court observed that the topics arguably encompassed attorney-client privileged information and granted a protective order on these two topics.¹³ In *Moore v. Dan Holdings, Inc.*,¹⁴ the Court refused to permit a Rule 30(b)(6) deposition related to

⁷ *Parrottino v. Bankers Life & Cas. Co.*, 2014 WL 1516195, at *9-10.

⁸ 2018 WL 443495, at *17-19 (D.D.C., Jan. 16, 2014).

⁹ *Id.* at *17. See also, *Parrottino v. Banker's Life and Cas. Co.*, 2014 WL 1516195, at *9-10, (Rule 30(b)(6) topic overbroad where it sought testimony on all legal proceedings of an employment nature nationwide.)

¹⁰ See *Peshlakai v. Ruiz*, 2014 WL 459650, at *75-76 (D.N.M. Jan. 9, 2014).

¹¹ 318 F.R.D. 136 (W.D. Wash. 2016).

¹² *Id.* at 143.

¹³ *Id.* at 143.

¹⁴ 2013 WL 1833557 (M.D.N.C. April, 30, 2013).

counsel's investigation of claims of harassment sought to obtain legal advice. The Court also refused to compel a deposition on any investigation after a EEOC complaint was filed. The Court ruled that these topics were protected under the attorney-client privilege and the work product doctrine, respectively, and denied the request to compel the production of a witness on these topics.¹⁵

5) Burdensomeness.

Courts also recognize burdensomeness objections leveled at Rule 30(b)(6) deposition topics. For example, in *EEOC v. Tepro, Inc.*,¹⁶ the plaintiff noticed a corporate deposition seeking testimony on 26 topics only two weeks before the conclusion of the discovery deadline when the parties had already scheduled depositions on dates leading up to the deadline. The Court ruled that it would be burdensome to prepare a 30(b)(6) witnesses to testify regarding the 26 topics within the timeframe provided.¹⁷ Burdensomeness also occurs where the amount of

information sought has no correlation to the issues in the lawsuit.¹⁸

6) Proportionality.

Rule 26(b) of the Federal Rules of Civil Procedure specifically requires that discovery being sought must be proportional to the needs of the case. Courts have utilized the proportionality requirement to restrict the scope of Rule 30(b)(6) deposition topics.¹⁹

7) Relevancy.

Relevancy objections can also be utilized to object to Rule 30(b)(6) topics.²⁰

8) Other Parts of the Federal Rules of Civil Procedure.

The general rules related to discovery contained in the Federal Rules of Civil Procedure also apply to Rule 30(b)(6) depositions.²¹ For example, Rule 30(a)(2)(A)(i) presumptively limits the number of depositions to 10 per side. Rule

¹⁵ *Id.* at *7-24, 48.

¹⁶ 2014 U.S. Dist. Lexis 190543 (E.D. Tenn. Aug. 29, 2014).

¹⁷ *Id.* at *41-44.

¹⁸ See *Monohon v. BNSF Ry. Co.*, 2015 U.S. Dist. Lexis 183709 at *26-27. (Requiring preparation of witnesses to testify on issues on a company-wide basis outside of the safety rules at issue in the case would cause undue burden and expense outweighing any benefit).

¹⁹ See *McArthur, supra* at 142. (Court granted protective order on 30(b)(6) deposition topics seeking extensive financial information where such were not proportional to needs of case involving

allegations of personal work environment at one location.)

²⁰ See *McArthur, supra* at 143 (Court granting protective order as to deposition topic in part because topic was irrelevant in light of other information sought).

²¹ *Monohon v. BNSF Ry. Co.*, 2015 U.S. Dist. Lexis 183709, at *18 ("All discovery is subject to certain limitations"); *City of New York v. FedEx Ground Package Sys.*, 2016 WL 1718261, at *5 (S.D.N.Y., Apr. 27, 2016) ("A Rule 30(b)(6) notice, like other forms of discovery, is subject to the limitations under Rule 26 of the Federal Rules of Civil Procedure.")

26(b)(2)(c) allows a Court to limit discovery where, among other things, the discovery sought is unreasonably cumulative, the parties have had ample opportunity to obtain the information in discovery or the discovery burden outweighs its likely benefit. Any objection that might be raised under the Federal Rules to discovery generally can also be utilized in objecting to a Rule 30(b)(6) topic.

Overbroad and inappropriate Rule 30(b)(6) deposition topic requests can put an employer's defense at jeopardy. The first steps in assuring employers are not put in such a position is to ensure that the 30(b)(6) topics are appropriate and sufficiently narrow such that the employer can properly identify and prepare a representative to testify completely and thoroughly. The above-types of objections can help achieve this narrowing.

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