IADC COMMITTEE NEWSLETTER

TRIAL TECHNIQUES AND TACTICS

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This article analyzes case law regarding questions posed to a Rule 30(b)(6) witness that are beyond the scope of the Rule 30(b)(6) notice. It also provides practical tips regarding witness preparation and appropriate objections to address the inevitable beyond-the-scope question. At the end of the article, follow the trial trip and learn to achieve homeostasis in your trial preparation.

Questions Outside the Scope in a Rule 30(b)(6) Deposition

ABOUT THE AUTHOR

Jim King is a partner with the law firm of Porter, Wright, Morris & Arthur LLP in Columbus, Ohio. Jim's practice centers on commercial and business litigation in courts throughout Ohio and the Midwest. He can be reached at jking@porterwright.com.

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The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice. Learn more about the Committee at www.iadclaw.org.

To contribute a newsletter article, contact:

Bryant J. Spann
Vice Chair of Publications
Thomas Combs & Spann, PLLC
bspann@tcspllc.com

Rule 30(b)(6) of the Federal Rules of Civil Procedure permits a party to depose a corporation, government agency, or other entity on discrete subject matters described with particularity in a deposition notice. The named entity must then designate one or more persons (such as officers or directors) to testify on behalf of the entity on the listed subjects. A problem that often surfaces in a Rule 30(b)(6) deposition is questioning on matters that fall outside the subjects identified in the deposition notice. If a witness is asked about something that is not within the scope of the subject matters for which the witness has been designated, must the witness answer the question or is the questioning limited to the subjects in the notice? And what is proper for the defending lawyer to do when her witness is asked a question outside the scope? This article discusses how courts have resolved this problem.

One of the first decisions to address this question was *Paparelli v. Prudential Insurance Company of America*, 108 F.R.D. 727 (D. Mass. 1985). In *Paparelli*, the court strictly construed the scope of a Rule 30(b)(6) deposition:

> Accordingly, I rule that if a party opts to employ the procedures of Rule 30(b)(6), F.R.Civ.P., to depose the representative of a corporation, that party must confine the examination to the matters stated "with reasonable particularity" which are contained in the Notice of Deposition.

Id. at 730. Although the *Paparelli* court limited the examination to the subject matter of the designation in the notice, the court held that a defending party should not instruct the witness not to answer, but instead should adjourn the deposition immediately and seek a protective order. *Id*. at 731.

Since *Paparelli*, however, every court that has considered the issue has refused to limit Rule 30(b)(6) questioning to the designated subject matters. *See, e.g., Philbrick v. eNom, Inc.*, 593 F.Supp.2d 352 (D.N.H. 2009); *Cabot Corp. v. Yamulla Enters., Inc.,* 194 F.R.D. 499 (M.D. Pa. 2000); *Overseas Private Inv. Corp. v. Mandelbaum*, 185 F.R.D. 67 (D.D.C. 1999); *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995). For example, in *Detoy v. City & County of San Francisco*, 196 F.R.D. 362 (N.D. Ca. 2000), the court criticized *Paparelli* for "ignor[ing] the liberal discovery requirements" of the then-existing Rule 26(b)(1). "Limiting the scope of a 30(b)(6) deposition to what is noticed in the deposition subpoena frustrates the objectives of Rule 26(b)(1) whenever a deposition party seeks information relevant to the subject matter of the pending litigation that was not specified." *Id*. at 366. The court, therefore, concluded that "*Paparelli* forecloses the deposing party from two of the most significant benefits of the deposition as a tool in the discovery process: (1) the ability to explore previously undisclosed areas of a case that are revealed by a deponent during deposition questioning; and (2) the ability to observe a deponent's response to an unexpected question." *Id*. Even though the scope of discovery under Rule 26(b)(1) has narrowed since the *Detoy* ruling, recent decisions have continued to reject the *Paparelli's* limitations on Rule 30(b)(6) depositions. *See Kuennen v. Wright Med. Tech., Inc.*, No. C14-2045, 2015 U.S. Dist. LEXIS 23485, at *8-9 n.6 (D. Iowa Feb. 25, 2015).

Other than the general scope of discovery in Rule 26(b)(1), the only limitation on the scope of a Rule 30(b)(6) deposition is the rule's "reasonable particularity" requirement. As one court explained, the responding party's obligation to designate a witness to testify "extends only so far as the party issuing the deposition has honored its own obligation to 'describe with reasonable particularity the matters for the examination.'" *Philbrick*, 593 F.Supp.2d at 363. A party producing a witness about information known or knowable to the entity "does not vouch for his or her ability to speak to other matters." *Id*. "[I]f the deponent does not know the answer to the questions outside the scope of the matters described in the notice, then that is the examining party's problem." *King*, 161 F.R.D. at 476.

In short, Rule 30(b)(6) cannot be used to limit what is asked of the designated witness. If the witness is able to answer on the subjects described with "reasonable particularity," the witness has satisfied the rule's minimum standards. From there, the deposition's scope is determined solely by the standards of relevance under Rule 26.

So what should counsel do in preparing and defending a corporate representative on the scope of questioning? First, of course, the witness needs to be prepared to testify on the listed subject matters. Failure may subject the responding party to sanctions. *King*, 161 F.R.D. at 476. Second, the witness should be prepared to testify as an individual on those subjects he or she is competent to testify. Then, at the deposition itself, if the witness is asked a question outside the scope of the subjects in the notice, "counsel shall state the objection on the record and the witness shall answer the question, to the best of the witness's ability." *Detoy*, 196 F.R.D. at 367. Counsel will need to be attentive and vigilant to ensure the objection is made to a question outside the scope. But, in the absence of a need to preserve privilege, enforce a limitation on discovery imposed by the court, or to present a motion for protective order for reasons other than the question's scope, counsel should refrain from instructing the witness not to answer. *Id*.

TRIAL TIP: HOMEOSTASIS

BY: MARGARET FONSHELL WARD

We generally believe that the best way to go into trial is to think about the necessary preparation. Instead of merely getting ready, though, think of your preparation as a plan to reach the condition of **homeostasis**. A product of the Greek *homoios* (similar) and *stasis* (stillness), the typical modern definition is "a relatively stable state of equilibrium or a tendency toward such a state between different but interdependent elements."

A trial is nothing if not an amalgam of "different but interdependent elements." All at once, the trial lawyer must be meeting the needs and directives of the client, the witnesses, the law, the judge, the schedule, and the adversary, to reach the single intended result of a favorable verdict. Lose sight or control of one of these and the cracks appear and gradually become larger, or cause crisis, chaos and stress as the attorney attempts to correct course.

The physiologist, Walter Cannon, addressing homeostasis in the body, wrote: "Constancy in an open system, such as our bodies represent, requires mechanisms that act to maintain this constancy. Homeostasis does not occur by chance, but is the result of organized self-government." Similarly, homeostasis in trial does not happen by chance, but only by the self-imposed rigor of organization and preparation. Each component of that preparation should take account of and incorporate the needs of each of the interdependent element.

In practice this means, for instance, examining the relationship you have had with adversary counsel and making specific decisions about how you will approach her during the trial. Then go further by telling the client the decision, explaining the approach to each witness you will call, making a decision about specifically how you will communicate the relationship to the court, and creating a list of each legal, evidentiary, and scheduling issue that will need to be coordinated with the counsel and the plan for doing so.

Next is to apply the same method on the judge. Research what you need to know. Tell the client and witnesses everything you learn. Discuss what you know about the judge with adversary counsel to reach agreement about joint advances where beneficial to the administration of the case. Put all exhibits, legal issues, and logistics into the form the court expects.

Move to the exhibits. Examine each in full for its necessity and intended use. Create a note for each exhibit that identifies how you would explain its importance to the client and the witness through whom it will be entered. Note the anticipated questions or objections from the court and counsel and set forth the responses. Attach the exhibit specifically to the issue it supports or negates.

Now the witnesses, both yours and the adversary's. Introduce each to the client, literally or figuratively. Does the client know and understand exactly what each will do? To the extent possible without crossing ethical boundaries, introduce them to one another. Make a note that identifies each witness's relationship to the evidence, the legal point to be made, and the goal of the case. Note the legal and evidentiary objections that may arise. Consider and make decisions on handling the likely reaction of the court, jury, and counsel to the personality, appearance, and substance of the witness.

Create a logistics diagram. What equipment and supplies will you need? How will it all get there? What is the anticipated schedule for trial, not just overall but each day and portion of the day? What kind of courtroom does the judge run? What will be the role of the courtroom clerks? Who will be on call to address unanticipated changes or demands? Once the diagram is created, discuss any joint concerns with counsel, show the diagram to your client, and notify witnesses of that relevant to them.

Now the legal issues, now the facts, now the opening and closing arguments. You get the picture – every element of the case and trial must incorporate every other element and constituency. This is, without question, an extraordinary amount of work. It takes time and manpower. The benefit, though, is the homeostasis that makes for the most successful trial possible – one that unfolds with "a relatively stable state of equilibrium." It cannot guarantee you will win the case but it can guarantee that you and all concerned know that you had it under control and were able to adapt as necessary without chaos or disaster.

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