June 2015 Vol. 13, No. 4

ILLINOIS STATE BAR ASSOCIATION

FEDERAL CIVIL PRACTICE

The newsletter of the Illinois State Bar Association's Section on Federal Civil Practice

A modest proposal for a better rule 30(b)(6) deposition

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I am sure that this has never happened to you, but, perhaps, maybe "a friend" has participated in the following scenario.

- "Your friend" is involved in litigation akin to the Thunderdome of the Mad Max variety.
- "Your friend" receives a notice of a deposition pursuant to Federal Rule of Civil Procedure 30(b)(6).[1]
- The notice contains a laundry list of categories spanning every conceivable aspect of all the claims and affirmative defenses at issue – and then some. For example, the notice seeks "all facts" supporting each affirmative defense and the legal bases for those defenses.
- "Your friend" begrudgingly contacts her client to explain the requirements of producing a Rule 30(b)(6) witness (or witnesses).[2] The client is unpleased, but understands.
- "Your friend" uses her best efforts to prepare the Rule 30(b)(6) witness for the deposition, including providing the witness with information the witness previously did not know so as to comply with the notice.[3]
- "Your friend" and her Rule 30(b)(6) witness appear at the designated time and location for the deposition.
- A few hours (although it seems like years) into the deposition, the opposing counsel begins to ask questions outside the scope of the Rule 30(b)(6) deposition, some of which are clearly attempts to impeach the witness by showing, among other things, bias. (The opponent's ability and desire to seek information beyond the scope of the notice may have seemed impossible based upon the broad scope of the notice, but as we all know, litigation is full of surprises.) Moreover, the opponent begins to also ask questions that appear to seek legal conclusions.
- "Your friend" frantically tries to recall a seminar she attended years before that explained the few instances in which it is proper to instruct a witness not to answer.[4]
- "Your friend" is confident that the questions seeking legal conclusions are improper.[5]
- "Your friend" seems to recall that there *may be* a split of authority on whether she can instruct a Rule 30(b)(6) witness not to answer questions that are beyond the scope of notice or seek legal conclusions.[6] Although she certainly feels sandbagged because she prepared her witness on the topics of the notice, not on other issues, she is unsure what the proper response should be.[7]
- Frustrated by the nature of the questions, the length of the deposition and the acrimonious litigation history, "your friend" instructs the witness not to answer those types of questions. Her opponent balks and demands that the witness answer the questions.
- The deposition comes to a screeching halt, and "your friend" files a motion for a protective order. Her opponent files a motion for sanctions.
- The motions are heard before a cranky judge, who is unhappy with both attorneys and who enters a ruling that displeases both sides.

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The next time "your friend" encounters this type of distasteful circumstance, think of all the opportunities that exist to avoid or prevent the downward spiral of problems.

First, try to avoid death matches.[8] Without doubt, there are lawyers who stink. (You know who you are; so knock it off). During a career that may last four decades, "your friend" is bound to litigate against a couple of them. But she should try to be the bigger person and the better attorney. A good judge and court staff will recognize that effort. And if "your friend" does not believe that, tell her to be like Earl and have faith in karma.

Second, upon receipt of a laundry list Rule 30(b)(6) notice, instead of trying to create an omniscient witness, "your friend" should try the following.[9] Initially, "your friend" should write a polite and thorough letter (not an e-mail) that contains at a minimum the following: (a) an explanation of her concerns about the notice; (b) an acknowledgment that she takes her duty of presenting a properly prepared and knowledgeably witness seriously and that the notice is preventing her from fulfilling that duty; and (c) a date and time when she will call opposing counsel to personally discuss these issues. (If opposing counsel responds with an e-mail, "your friend" should simply reply by stating she will call him to discuss the issues).

Third, "your friend" should call the opposing counsel at the identified time and have a proper Rule 37 conference, addressing the concerns.

Fourth, if "your friend" and the opposing counsel reach an agreement on limiting or at least clarifying the scope of the notice, "your friend" should follow up with a letter confirming those limits or clarifications. During

the Rule 37 conference, "your friend" should let her opponent know that she will be sending a confirmatory letter and that if she has misconstrued any understanding, then he should let her know. She should honestly explain that the purpose is to allow her to present a witness that can provide the information sought. By letting opposing counsel know that this type of letter will be forthcoming, he will, hopefully, be less inclined to think that the letter is simply part of a game.

Alternatively, if "your friend" and the opposing counsel are unable to reach an agreement, "your friend" should move for a protective order from the court.[10] "Your friend" should explain in the motion that the notice does not "describe with reasonable particularity the matters for examination," that the information sought is not "known or reasonably available" to her client and that the types of "information" sought are, in fact, legal conclusions. The motion should explain all the efforts "your friend" has attempted to avoid seeking court intervention. It is apparently a little known secret that courts prefer to prevent problems rather than fix them. By seeking a protective order before the deposition, "your friend" is giving the court the opportunity to address the problem and fashion an appropriate remedy *before* a larger problem occurs. In the motion for a protective order, "your friend" can also argue that written discovery, in particular serving contention interrogatories, would be more appropriate than the Rule 30(b)(6) deposition.[11] If "your friend" is unfamiliar with contention interrogatories, simply refer her to an excellent article on the subject.[12]

Fifth, if the opposing counsel is more of a stinker than originally thought, and, despite the written agreement clarifying and limiting the scope of the notice, he asks questions beyond the agreement, "your friend" has only a few options. Initially, "your friend" can ask opposing counsel for a brief recess so that they can call the magistrate judge to address the issue.[13] Moreover, she can halt the deposition and seek a protective order from the court.[14] Further, "your friend" can object during the lines of questioning that exceed the agreement, noting that the witness is answering only in a personal capacity and not as a designated representative.[15] Additionally, without objecting, "your friend" can simply let the witness answer the questions. The same options exist if the opponent seeks to obtain legal conclusions or impeachment information from the witness.[16] "Your friend" *cannot* instruct the witness not to answer the questions, unless the instruction is made so that she can obtain a protective order.[17] In fact, instructing Rule 30(b)(6) witnesses not to answer questions that are beyond the scope or seek legal conclusions can result in sanctions.[18] As one court has noted, "[t]here simply is no more aggravating action than a lawyer improperly instructing a deponent not to answer a question."[19] The theory for allowing a witness to answer over the objection is that an answer to a question outside the scope of the Rule 30(b)(6) notice does not bind the party. Similarly, a questioning party that asks a question outside the scope of the notice cannot be heard to complain if the witness does not know the answer.[20] Moreover, although a Rule 30(b)(6) witness' testimony "binds" the entity in a way, the answers do not constitute judicial admissions that can never go unchallenged.[21]

* * *

A Rule 30(b)(6) deposition can be an effective discovery tool, if parties use it properly and in good faith.[22] The court in *Peshlakai v. Ruiz*, 2014 U.S. Dist. LEXIS 14278, *75-76 (D. N.M. 2014) explained the good faith required by both sides:

> A good Rule 30(b)(6) deposition – from both parties' standpoints – requires cooperation. There is little room for hiding the ball at this stage. The rules of engagement are relatively demanding. The corporation must produce fully prepared and knowledgeable witnesses on the topics designated, but the questioning party must be specific in what it wants to know – before the deposition day. If the questioning party wants a prepared witness, the questioning party must help the witness prepare. This assistance may come close to scripting out questions, there is no need or privilege that protects such work product when one is about to take a 30(b)(6) deposition. If the corporation wants more specificity, it is entitled to it. In the end, however, the questioner is entitled to answers to his or her questions. The corporation is not free to reframe or limit the scope of questioning. Accordingly, the parties must try, in good faith, to agree on what topics fit into which category...

At first blush, this may seem like asking a lot from the parties and their attorneys. But if the parties and their attorneys want to avoid the situation "your friend" found herself in, they should follow this sage advice. ■

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1. Fed. R. Civ. P. 30(b)(6) ("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 on its behalf... The persons designated must testify about information known or reasonably available to the organization.").

2. *Peshlakai v. Ruiz*, 2014 U.S. Dist. LEXIS 14278, *66 (D. N.M. 2014) ("the corporate deponent has an affirmative duty to make available 'such number of persons as will' be able 'to give complete, knowledgeable and binding answers' on its behalf").

3. *Id.* at *68-71 (duty to prepare witness includes duty to educate the witness even if the information is voluminous and to collect information, review documents and interview employees, even former employees, with personal knowledge).

4. Fed. R. Civ. P. 30(c)(2) ("A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).").

5. *See Cat Iron, Inc. v. Bodine Environmental Services, Inc.*, 2011 U.S. Dist. LEXIS 63162, *19-27 (C.D. Ill. 2011); *First Internet Bank of Indiana v. Lawyers Title Ins. Co.*, 2009 U.S. Dist. LEXIS 59673 (S.D. Ind. 2009).

6. *See Boyer v. Reed Smith LLC*, 2013 U.S. Dist. LEXIS 151133, *8-10 (W.D. Wash. 2013); *Dagdagan v. City of Vallejo*, 263 F.R.D. 632 (E.D. Cal. 2010) (seeming to allow defending party to instruct deponent not to answer questions beyond the scope of the notice); *Paparelli v. Prudential Ins. Co.*, 108 F.R.D. 727, 730 (D. Mass. 1985) (Rule 30(b)(6) deposition limited to scope of notice).

7. *See Paparelli*, 108 F.R.D. at 730-31 (although Rule 30(b)(6) deposition limited to scope of notice, instruction not to answer questions beyond scope is improper).

8. *See generally* Standards for Professional Conduct within the Seventh Federal Judicial Circuit.

9. Fed. R. Civ. P. 26(c)(1) ("The motion [for protective order] must include a certification that the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action.").

10. *See Ingersoll v. Farmland Foods, Inc.*, 2011 U.S. Dist. LEXIS 31872, *10-16 (W.D. Mo. 2011) (granting motion for protective order, in part, because scope of notice was too broad); *Murray v. Tyson Foods, Inc.*, 2010 U.S. Dist. LEXIS 16556, *63 (C.D. Ill. 2010) (granting motion for protective order limiting scope of notice).

11. *Exxon Res. & Eng'g Co. v. U.S.*, 44 Fed. Cl. 597,

601 (Fed. Cl. 1999); *U.S. v. Taylor*, 166 F.R.D. 356, 363 n. 7 (M.D.N.C. 1996).

12. *See* Johnston & Johnston, *Contention Interrogatories in Federal Court*, 148 F.R.D. 441 (1993).

13. *Peshlakai*, 2014 U.S. Dist. LEXIS 14278 at *76, *81; *American General Life Ins. Co. v. Billard*, 2010 U.S. Dist. LEXIS 114961, *25 (N.D. Iowa 2010) ("Rather than simply walking out, it would have been preferable . . . to call a magistrate judge in an attempt to resolve the issue.").

14. *Peshlakai*, 2014 U.S. Dist. LEXIS 14278 at *80-81.

15. *EEOC v. Freeman*, 288 F.R.D. 92, 99 (D. Md. 2012); *ZCT Systems Group, Inc. v. Flightsafety Int'l.*, 2010 U.S. Dist. LEXIS 29298, *6 (N.D. Okl. 2010).

16. *Freeman*, 288 F.R.D. at 99.

17. *See Duke Energy Progress, Inc. v. 3M Co.*, 2014 U.S. Dist. LEXIS 174197, *70-71 (E.D.N.C. 2014); *American General Life Ins. Co. v. Billard*, 2010 U.S. Dist. LEXIS 114961, *12, *20 (N.D. Iowa 2010).

18. *Mass Engineered Design, Inc. v. Ergotron, Inc.*, 2008 U.S. Dist. LEXIS 123347, *15-17 (E.D. Tex. 2008) (imposing sanctions of attorneys' fees for instructing Rule 30(b)(6) witness not to answer questions beyond scope of notice or seeking legal conclusions).

19. *Boyd v. University of Maryland Med. System*, 173 F.R.D. 143 (D. Md. 1997).

20. *Freeman*, 288 F.R.D. at 98-99.

21. *See Cat Iron*, 2011 U.S. Dist. LEXIS 63162 at *23-24 (citing *First Internet Bank of Indiana v. Lawyers Title Ins. Co.*, 2009 U.S. Dist. LEXIS 59673 (S.D. Ind. 2009)).

22. *Cat Iron*, 2011 U.S. Dist. LEXIS at *23.

THIS ARTICLE ORIGINALLY APPEARED IN
THE ILLINOIS STATE BAR ASSOCIATION'S
FEDERAL CIVIL PRACTICE NEWSLETTER, VOL. 13 #4, JUNE 2015.
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