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30(b)(6): The Procedural and Ethical Idiosyncrasies of Federal Corporate Representative Depositions

Christine E. Reinhard
Dylan A. Farmer

Christine E. Reinhard
Dylan A. Farmer
Schmoyer Reinhard LLP
San Antonio, TX
creinhard@sr-llp.com
dfarmer@sr-llp.com
210-447-8033

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I. Introduction

Of all the techniques and methods available to a discovering party, the Rule 30(b)(6) deposition probably inspires the most consternation among corporate counsel. Whether employed appropriately or otherwise, a 30(b)(6) designation is likely to require a substantial amount of factual and legal research, motion practice, and witness preparation. This paper attempts to illuminate the various details and features of its application by briefly reviewing its history, describing the major conflicts and resolutions regarding its application in the Fifth Circuit, and evaluating a few ethical considerations it implicates.

II. Brief History of Rule 30(b)(6)

Rule 30(b)(6) was added to the Federal Rules of Civil Procedure in 1970 for the express purpose of streamlining the discovery of corporate knowledge. *Advisory Committee Notes*, 48 F.R.D. 487, 510 (1970). Prior to Rule 30(b)(6)'s implementation, the rules allowing the depositions of corporate representatives were patchy and marred by a loophole that allowed certain corporate directors to avoid any penalty for refusing to testify. *See* M. Minnette Massey, *Depositions of Corporations: Problems and Solutions-Fed. R. Civ. P. 30(b)(6)*, 1986 ARIZ. ST. L.J. 81, 83 (1986) (noting the pre-1970 rules authorizing sanctions against a corporation only if its "officer" or "managing agent" refused to testify). In response to this loophole, many courts developed jurisprudence requiring the examining party to prove the individual it sought to depose was, in fact, subject to deposition under the procedural rules. *See id.* at 84 (identifying at least three tests used to determine whether a prospective deponent was a "managing agent" eligible for deposition). Unsurprisingly, this framework encouraged inefficient "pre-deposition" discovery – including interrogatories or even preliminary depositions – designed solely to unearth proof that the targeted individual met whatever "managing agent" test applied in a particular jurisdiction. *Id.* at 85.

Lurking behind this convoluted scheme was yet another problem: the examining party's burden not only to identify which individuals could fairly be considered "managing agents," but also to determine – often blindly – which managing agent had knowledge relevant to the claims at issue. *Id.* at 84; *see also Advisory Committee Notes*, 48 F.R.D. at 514 (noting "the existing practice whereby the examining party designates the corporate official to be deposed"). This scheme led to predictably inefficient results, as the examining party expended time and resources on rounds of preliminary discovery simply to determine the identity and knowledge of the corporation's "managing agents." Corporations also often responded by parading various officers or managing agents who each "disclaimed knowledge of facts that [were] clearly known to persons in the organization and thereby to it." *Advisory Committee Notes*, 48 F.R.D. at 515 (citing *Haney v. Woodward & Lothrop, Inc.*, 330 F.2d 940, 944 (4th Cir. 1964)); *see also* Kent Sinclair & Roger Friedrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms*, 50 ALA. L. REV. 651, 658-59 (1999) (collecting cases demonstrating this particular phenomeon).

Against this backdrop arose Rule 30(b)(6), with its redesigned emphasis on specific topics, rather than a particular deponent, and the corporation's new obligation to identify an individual "to appear and testify on its behalf with respect to matters known or reasonably available to the organization." *Id.* In the eyes of the Advisory Committee, the rule imposed a burden on the corporation "not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of an examining party ignorant of who in the corporation has knowledge." *Id.* In short, the rule purported to eliminate the inefficiencies generated by the prior scheme in favor of a renewed focus on the substantive information relevant to the case. Unsurprisingly, however, the rule's contours have been fervently debated in the fifty years since its debut, and its practical application has evolved in ways likely unexpected by its drafters.

III. Basic Application of Rule 30(b)(6)

A. Current Text and Basic Rules of Application.

The current iteration of Rule 30(b)(6) states:

> (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.[1]

FED. R. CIV. P. 30(b)(6).

The basic "twist" of Rule 30(b)(6) is clear: Unlike a standard individual deposition, where the examining party is obliged to identify a specific deponent but may withhold any indication of subject matter, a corporate representative deposition requires the examining party to divulge the anticipated topics beforehand (with a major exception discussed in Part IV.A, *infra*) and allows the corporation to choose one (or more) witnesses to testify. To avoid possibilities for abuse by

[1] The rule has undergone surprisingly few amendments since 1970. The original text was as follows:

> (6) A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

FED. R. CIV. P. 30(b)(6) (1970).

the corporate party, the Advisory Committee has in a way excepted Rule 30(b)(6) depositions from the numeric and durational limitations applicable to traditional individual depositions. For instance, Rule 30(a)(2) establishes a presumptive 10-deposition limit for any case, but "[a] deposition under Rule 30(b)(6) should . . . be treated as a single deposition even though more than one person may be designated to testify." FED. R. CIV. P. 30(b)(6) (Notes to 1993 Amendments). And, for purposes of Rule 30(d)(1)'s presumptive durational limit of "1 day of 7 hours" for any single deposition, "the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition." *Id.* (Notes to 2000 Amendments).[2]

B. The Examining Party's Duty to Identify Topics "with Reasonable Particularity."

Rule 30(b)(6) states only that the examining party must describe the matters for examination "with reasonable particularity." This is an ambiguous term, and Texas federal district courts oft have described the rigor of this standard very differently. The Northern District of Texas, for instance, has repeatedly stated that the examining party must define the intended topics "with painstaking specificity." *Lead GHR Enterprises, Inc. v. Am. States Ins. Co*., 3:17-MC-91-M-BN, 2017 WL 6381744, at *6 (N.D. Tex. Dec. 14, 2017) (quoting *Hartford Fire Ins. Co. V. P & H Cattle Co*., No. 05-cv-2001, 2009 WL 2951120, at *10 (D. Kan. Sept. 10, 2009)); *accord Dennis v. United States*, 3:16-CV-3148-G-BN, 2017 WL 4778708, at *8 (N.D. Tex. Oct. 23, 2017). The Western District of Texas, on the other hand, has specifically rejected the "painstaking specificity" language in favor of something more akin to a "notice pleading" standard. *See Rivas v. Greyhound Lines, Inc*., EP-14-CV-166-DB, 2015 WL 13710124, at *4 (W.D. Tex. Apr. 27, 2015), *amended on reconsideration in part,* EP-14-CV-166-DB, 2016 WL 11164796 (W.D. Tex. Jan. 11, 2016) ("[A] careful examination of the cases using [the 'painstaking specificity'] standard show that its purpose is merely to require that a deposing party enable the corporation to adequately prepare.").

In practice, however, it is unclear whether these divergent descriptions of the "reasonable particularity" standard make any real difference, since the determination depends on the particular facts and circumstances of each case. *See id.* (noting, after examining the standard's application in various cases, "a wide margin for what could constitute reasonably particular notice of topics for examination"). Thus, this is one of the frustrating areas in which there is no definitive rule, and contradictory holdings abound in the case law, thereby providing little guidance to practitioners on both sides of the bar. *Compare, e.g., Dennis*, 2017 WL 4778708, at *10 ("[S]eeking testimony on all 'facts upon which Defendant bases denials and affirmative defenses stated in its amended answer' is overly broad because it fails to describe the testimony sought with reasonable particularity"), *with Johnson Controls, Inc. v. A.M. Goodson Co*., CV SA-04-CA-473-FB, 2006 WL 8434011, at *3 (W.D. Tex. Sept. 18, 2006) (authorizing a 30(b)(6) deposition on various topics, including "[f]acts supporting the affirmative defenses as set forth in the pleadings on file").

[2] These procedural rules seem straightforward and, indeed, they are often easy to apply when a case involves a single 30(b)(6) deposition over a reasonably limited number of topics. As discussed below in Part IV, however, courts and practitioners have sometimes struggled to agree on the Rule 30(b)(6)'s application in more complicated contexts.

C. The Corporate Party's Duty to Object and Move to Quash or for Protective Order.

What is clear, however, is that the corporate party bears the burden of objecting to any particular 30(b)(6) topic in advance of the deposition, whether on the basis of overbreadth, oppression, duplication, privilege, or other hardship. *See, e.g., Orchestratehr, Inc. v. Trombetta*, 3:13-CV-2110-P, 2015 WL 11120526, at *2 (N.D. Tex. July 15, 2015) ("A party cannot fail to raise objections to Rule 30(b)(6) deposition notices, present a representative to testify on those topics, and then later raise objections to the scope or propriety of the topics."); *Talon Transaction Techs., Inc. v. Stoneeagle Servs., Inc.*, 3:13-CV-902-P, 2014 WL 6819846, at *2 (N.D. Tex. Dec. 4, 2014) (quoting *Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 218 F.R.D. 125, 142 (E.D.Tex. 2003)) ("When a Rule 30(b)(6) deposition notice references multiple topics, the party named in the deposition notice must either move for a protective order regarding each topic or designate a person to testify regarding each topic."). However, failing to produce a designee to appear for a 30(b)(6) deposition "is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c)." FED. R. CIV. P. 37(d)(2).

Courts analyze the propriety of 30(b)(6) topics under the equitable framework of Rule 26, which establishes the "relevant and proportionate" standard and allows a district court wide latitude to narrow the field of discoverable information. *See, e.g. Snoddy v. City of Nacogdoches*, 98 F. App'x 338, 340 (5th Cir. 2004) (noting the district court's resolution of a 30(b)(6) dispute via reference to Rule 26); *Dennis*, 2017 WL 4778708, at *3-4 (beginning review of a 30(b)(6) topic list by reciting Rule 26's "relevant and proportional" standards). Consequently, the propriety of a particular topic or list of topics invariably turns on the specific facts and procedural history of each individual case. *See Latham v. Polaris Indus., Inc.*, 3:15-CV-1209-B, 2016 WL 7389241, at *2 (N.D. Tex. Oct. 5, 2016) (allowing an additional 30(b)(6) deposition covering 52 topics even though the plaintiff had already taken ten depositions, including two of designated corporate representatives, because the corporation "has not demonstrated that the topics are unreasonably duplicative, cumulative, unduly burdensome, or over-broad").

Given this case-by-case approach and the expansive universe of potential topical objections, a comprehensive analysis is impossible. That said, a couple of topics and objections are sufficiently common to warrant further discussion:

- ***Topics Seeking Factual Bases Underlying Allegations or Affirmative Defenses:*** As noted above, some courts have rejected wide-ranging 30(b)(6) topics seeking "all facts" supporting a party's complaint, answer, or affirmative defenses on the grounds that such broad requests are not "reasonably particular." *See Dennis*, 2017 WL 4778708, at *10. However, these same courts have affirmed the propriety of "contention topics" like these, provided the specific allegations, denials, or defenses at issue are properly identified. *Id.* at *9 (noting that the "same analysis" justifying contention interrogatories seeking the factual basis of claims and defenses "applies to a Rule 30(b)(6) deposition topic seeking the identification of facts"); *accord Malibu Consulting Corp. v. Funair Corp.*, SA-06-CA-0735 XR,

2007 WL 3995913, at *1 (W.D. Tex. Nov. 14, 2007) ("I agree . . . that a Rule 30(b)(6) deposition which seeks information concerning the factual support for allegations found in the complaint, which would be discoverable through contention interrogatories, is . . . permissible.").

- ***Objections That Topics Seek Information Already Provided or Obtainable Via Other Discovery Means:*** Contrary to the wishes of many corporate counsel, Rule 30(b)(6) topics are not *per se* prohibited because they may overlap with prior discovery or concern information obtainable via other discovery means. However, some courts have limited 30(b)(6) depositions based on these particular concerns. For instance, courts have: (1) prohibited the examining party from questioning a corporate representative on topics for which he previously gave individual testimony,[3] (2) allowed the corporation to "adopt" testimony previously given by a high-ranking officer or agent,[4] and (3) denied a 30(b)(6) deposition altogether where the examining party has already obtained the information from a high-ranking officer or agent.[5] However, courts have also denied such objections on the grounds that 30(b)(6) depositions are simply different in kind from other discovery[6] or that the examining party is generally free to utilize whatever discovery methods it prefers.[7]

[3] *See Johnson Controls, Inc*., 2006 WL 8434011, at *3 ("To the extent [the corporation] elects to produce [individuals who were already deposed] as the corporate representative(s), then [the examining party] must avoid any unnecessary duplication between its Rule 30(b)(6) questioning and the prior deposition(s)."); *accord Ill. Union Ins. Co. v. La. Health Serv. & Indem. Co*., CV 16-6604, 2017 WL 2955356, at *1 (E.D. La. Apr. 26, 2017).

[4] *See Johnson Controls, Inc*., 2006 WL 8434011, at *3 ("[T]he parties may wish to confer in furtherance of an agreement that any prior deposition testimony of the corporate representative(s), or specifically designated portions of that testimony, will be binding on the corporation as a Rule 30(b)(6) deposition."); *A.I.A. Holdings, S.A. v. Lehman Bros., Inc*., No. 97-CIV-4978, 2002 WL 1041356, at *3 (S.D.N.Y. May 23, 2002) ("[T]here appears to be no obstacle to the entity's complying with its obligations under Rule 30(b)(6) by adopting the witness's testimony in his individual capacity.").

[5] *See Snoddy*, 98 F. App'x at 341 (affirming district court's decision to quash a 30(b)(6) deposition where the plaintiff, a former police officer, had already deposed the police chief and a human resources specialist regarding his claims of discrimination). The Western District of Texas has also applied the inverse of this principle: limiting the deposition of high-ranking officers with no personal knowledge on the grounds that the examining party had already taken a 30(b)(6) deposition. *Sanchez v. Swift Transp. Co. of Arizona, L.L.C., PE*: 15-CV-15, 2016 WL 10589438, at *3 (W.D. Tex. Apr. 22, 2016).

[6] *See F.D.I.C. v. Hays*, No. CIVASA92CA653EP, 1998 WL 1782547, at *2 (W.D. Tex. Jan. 9, 1998) ("Plaintiff also argues that a 30(b)(6) deposition would be duplicative of other discovery – specifically the contention interrogatories and the soon to be released expert reports – and therefore serves no purpose other than to inquire of privileged matters. However, neither an interrogatory response nor a report from a third-party expert binds or limits the party/corporation in the same manner as 30(b)(6) deposition testimony. They are not truly duplicative.")

[7] *See Function Media, L.L.C. v. Google, Inc.*, 2:07-CV-279-CE, 2010 WL 276093, at *3 (E.D. Tex. Jan. 15, 2010) ("Google suggests that its failure to comply with Rule 30(b)(6) should be excused because FM could have sought additional discovery from it on the subject of license agreements. The court rejects this argument. It is no answer that additional effort might have unearthed the facts surrounding the license agreements.").

D. The Corporate Party's Designation and Preparation Obligations.

Once the examining party describes the proposed topics "with reasonable particularity," the corporate entity is obligated to designate one or more individuals to "testify about information ***known or reasonably available*** to the organization." FED. R. CIV. P. 30(b)(6) (emphasis added). It is well-settled that the witness's testimony is **not** confined to those facts within his personal knowledge; instead, it is the corporation itself that "appears vicariously through that agent." *Resolution Trust Corp. v. S. Union Co., Inc.*, 985 F.2d 196, 197 (5th Cir. 1993). Moreover, the designee must be able to testify as to the corporation's "subjective beliefs," so long as the basis for those beliefs is "the corporate knowledge of [the company's] personnel." *GE Ionics*, 469 F.3d at 434 (allowing questions regarding whether the corporation believed whether its "products were in breach of warranty"). Consequently, the corporation "must prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources." *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006) (citing *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996). The corporation's affirmative duty may include the provision of documents, pleadings, prior deposition transcripts, or facilitating interviews with employees involved in the events at issue. *Id.*; *see Robinson v. Nexion Health At Terrell, Inc*., 312 F.R.D. 438, 442 (N.D. Tex. 2014) (awarding sanctions where a corporate representative designated to discuss prior Department of Labor Investigations in to the company "did not ask for internal records of any investigations" or seek the identities of any managerial employees with potential personal knowledge).[8]

This "duty to educate" may lead to certain unanticipated complications. For instance, it is fairly common for the corporation's attorney to undertake the arduous task of bringing an otherwise unknowledgeable witness up to speed, particularly when most of the relevant information has been unearthed or stitched together during litigation. The downside of this approach is the possible intrusion into communications protected by the attorney-client privilege or the mental processes protected by the attorney work product doctrine. *See* Sinclair & Friedrich, 50 ALA. L. REV. at 719-26 (discussing the inherent intrusion into attorney work product that occurs when an attorney selects a subset of documents, deposition testimony, or other evidence to share with a 30(b)(6) designee). Courts have tried to split the difference by authorizing an examining party to inquire as to any underlying **facts** responsive to the noticed topics, regardless of whether the deponent learned those facts from an attorney, but prohibiting inquiries into the attorney's methods of compiling the information to uncover or reveal those facts. *See, e.g.*, *Orchestratehr, Inc.*, 2015 WL 11120526, at *7 ("The attorney's investigation and the manner in which he or she gathered and organized and analyzed the information and presented it to the corporate representative may itself be protected work product, but the underlying factual information itself remains discoverable through the corporate representative's testimony.").

[8] Naturally, then, objections that the witness "lacks personal knowledge" under Federal Rule of Evidence 602 or is offering opinion testimony not "rationally based on the witness's perception" in violation of Federal Rule of Evidence 701 have no place in the 30(b)(6) context. *GE Ionics*, 469 F.3d at 434.

There is no hard-and-fast rule regarding the nature of sanctions a federal court may impose on a corporation that fails to adequately prepare a witness to testify. Instead, as with virtually every other discovery issue, trial courts have wide discretion to fashion whatever remedy may be appropriate under the equitable factors listed in Rule 37. *See* FED. R. CIV. P. 37 (describing a number of situations in which a court may impose sanctions for discovery malfeasance); *Resolution Trust Corp.*, 985 F.2d at 198 (articulating an "abuse of discretion" standard for district court determinations regarding the use of 30(b)(6) testimony). Accordingly, possible sanctions include, among other things: (1) assessing fees and costs, as appropriate; (2) requiring the corporate party to designate a "substitute" deponent who is better prepared;(3) deeming admitted, denied, or uncontested certain matters listed in the 30(b)(6) notice; or (4) requiring the corporate party to supplement its testimony with documents or written responses. *See* FED. R. CIV. P. 37(d)(1)(A)(i) (allowing a variety of sanctions if "a party or a party's officer, director, or managing agent - or a person designated under Rule 30(b)(6) or 31(a)(4) - fails, after being served with proper notice, to appear for that person's deposition"); *GE Ionics*, 469 F.3d at 433 ("If it becomes obvious that the deposition representative . . . is deficient, the corporation is obligated to provide a substitute").

One potential ambiguity is the standard for determining whether a corporate designee "failed to appear" for the deposition within the meaning of Rule 37. In some federal circuits, this test is a literal one, satisfied so long as a person physically appears in the witness chair. *See R.W. Intern. Corp. v. Welch Foods, Inc*., 937 F.2d 11, 15 (1st Cir. 1991) (quoting *Salahuddin v. Harris*, 782 F.2d 1127, 1131 (2d Cir. 1986) ("We note that 'failure to appear' for a deposition is strictly construed and Rule 37(d) sanctions apply only when a deponent 'literally fails to show up for a deposition session.'"). In the Fifth Circuit, though, the test is purely practical: "If . . . the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the appearance is, for all practical purposes no appearance at all." *Resolution Trust Corp.*, 985 F.2d at 197 (distinguishing 30(b)(6) depositions from "the deposition of a natural person[,]" who will presumably only "fail to appear" if he literally does not attend). Counsel for a corporation are thus well advised to ensure adequate preparation of the chosen designee before the deposition occurs.

E. Use of 30(b)(6) Testimony.

Rule 32, governing the use of depositions in court proceedings versus solely discovery, allows "[a]n adverse party [to] use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) . . . ." FED. R. CIV. P. 32(a)(3). Plainly, then, an adverse party may use corporate representative testimony in a summary judgment motion or response, for impeachment at trial, or potentially even "as part of his substantive proof regardless of the adversary's availability to testify at trial." *Coughlin v. Capitol Cement Co*., 571 F.2d 290, 308 (5th Cir. 1978). However, contrary to the assertions of some enterprising attorneys, a corporate representative is free to change his or her testimony at trial, subject to impeachment and a credibility determination by a jury. *See Lindquist v. City of Pasadena, Tex.*, 656 F. Supp. 2d 662, 698 (S.D. Tex. 2009), *aff'd sub nom. Lindquist v. City of Pasadena Texas*, 669 F.3d 225 (5th Cir. 2012) ("A Rule 30(b)(6) deposition is admissible against the party designating the representative but is not "binding" on the entity for which the witness

testifies in the sense of preclusion or judicial admission."); *Tec hnip Offshore Contractors v. Williams Field Servs*, CIV.A. H-04-0096, 2007 WL 869534, at *7 n.5 (S.D. Tex. Mar. 21, 2007) (rejecting the adverse party's request to "give no weight" to a corporate representative's inconsistent trial testimony since "such inconsistencies are to be judged by the fact finder in assessing the witness's credibility").

IV. Special 30(b)(6) Issues and Their Resolution in the Fifth Circuit

Rule 30(b)(6) has engendered a number of disputes among practitioners. This section briefly addresses how courts with in the Fifth Circuit have resolved (or not resolved) three common circumstances leading to conflict: (1) when the examining party's questions exceed the scope of the notice; (2) when the examining party seeks multiple 30(b)(6) depositions; and (3) when the information sought at a 30(b)(6) deposition is duplicative of information obtained or obtainable by other discovery means.

A. Exceeding the Noticed Topics During Deposition.

One of the longest-running disputes in 30(b)(6) jurisprudence concerns the legal and practical ramifications when an examining party exceeds the scope of the pre-noticed topics. The Fifth Circuit has not explicitly ruled on the issue, but, over the past few decades, court opinions from across the country have fallen into two camps.

One option is to strictly interpret Rule 30(b)(6)'s notice requirement and treat the list of topics as the **ceiling** for permissible questioning. This was the conclusion drawn by a Massachusetts district court in *Paparelli v. Prudential Insurance Company*, a 1985 personal injury action in which the plaintiff's counsel attempted to question a witness about previously unproduced documents that were not mentioned on the 30(b)(6) notice. *Paparelli*, 108 F.R.D. 727, 728-29 (D. Mass. 1985). After evaluating the Advisory Committee's stated rationale for Rule 30(b)(6) and analyzing the text of the rule, the court held that the examining party "must confine the examination to the matters stated 'with reasonable particularity' which are contained in the Notice of Deposition." *Id.* at 730.[9]

The other option, of course, is to interpret Rule 30(b)(6) broadly and treat the list of topics as the **floor** for permissible questioning. This was the conclusion drawn by a Florida district court in *King v. Pratt & Whitney*, a 1995 age discrimination case in which the corporate defendant's counsel moved for a protective order based on the examining counsel's allegedly overbroad questioning. *King*, 161 F.R.D. 475 (S.D. Fla. 1995). Taking a different approach from *Paparelli*,

[9] The Court gave two primary rationales for its decision – one based in the rule's purpose, and the other in its text. First, the court noted that the purpose of Rule 30(b)(6) was to allow examining parties to obtain testimony on certain specified topics without having to blindly search for a person with knowledge and concluded that allowing questioning on any topic (even ones not previously noticed) did not further this goal. *Id.* at 729-30. Second, the court decided that allowing open-ended questioning would render superfluous the examining party's obligation to list the matters for questioning "with reasonable particularity." *Id.* at 729-30.

the court observed that the rule does not explicitly limit the scope of questioning and appealed primarily to efficiency concerns:

> Rule 30(b)(6) should not be read to confer some special privilege on a corporate deponent responding to this type of notice. Clearly, Plaintiff could simply re-notice a deponent under the regular notice provisions and ask him the same questions that were objected to. However, Plaintiff should not be forced to jump through that extra hoop absent some compelling reason.

Id. at 476. The catch, however, is that the designated deponent is only required to have sufficient knowledge to discuss the noticed topics. As the Florida court colorfully observed, "[I]f 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." *Id.* Over time, the latter interpretation of the rule has become the majority view, including in the district courts within the Fifth Circuit. *See, e.g.*, *Rivas*, 2015 WL 13710124, at *4 (collecting dozens of cases and concluding that "courts addressing depositions of corporate representatives . . . have almost uniformly agreed that the scope of a Rule 30(b)(6) deposition is not limited to the topics listed in the Rule 30(b)(6) notice"); *Willoughby v. Cribbs*, CV H-13-1091, 2015 WL 12777188, at *1 (S.D. Tex. Feb. 6, 2015) (citing *King* for the proposition that "Rule 30(b)(6) limits the subject matter the deponent is required to prepare for, but does not restrict the examining attorney's inquiry"); *see also McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co.*, 241 F. Supp. 3d 737, 752 (N.D. Tex. 2017) (favorably citing *King*); *United States ex rel Fisher v. Ocwen Loan Servicing, LLC*, 4:12-CV-461, 2016 WL 2997120, at *9 (E.D. Tex. May 24, 2016) (same).

Having determined that questions outside the notice are permissible under the majority view, the next question is the **significance** of those answers. Are they "corporate" testimony, or not? *King*'s "judicial economy" rationale implies that the answers should be treated as individual, rather than corporate testimony. *See King*, 161 F.R.D. at 476 (implying that asking questions outside the scope of the 30(b)(6) notice is the procedural equivalent of simply "re-notic[ing] a deponent under the regular notice provisions . . . ."). Likewise, district courts within the Fifth Circuit have generally held that "questions and answers exceeding the scope of the 30(b)(6) notice will not bind the corporation." *McKinney/Pearl*, 241 F. Supp. 3d at 752 (quoting *Ocwen Loan Servicing, LLC*, 2016 WL 2997120, at *9).Instead, "[s]uch questions and answers 'are merely treated as the answers of the individual deponent.'" *Id*. (quoting *Falchenberg v. N.Y. State Dep't of Educ.*, 642 F. Supp. 2d 156, 164 (S.D.N.Y. 2008)); *see also Rivas*, 2015 WL 13710124, at *7 n.4 ("[J]ust because a designated witness speaks on behalf of a corporation with respect to matters that he or she was designated to testify about does not necessarily mean that he or she also speaks for the corporation when testifying outside the scope of those matters."). This dichotomy, however, begs the question of whether inquiries of a corporate representative in his individual capacity constitute a second deposition for purposes of the 10-deposition limit. Interestingly, at least two California district courts have held that they do not. *See Stevens v. Corelogic, Inc.*, 14CV1158 BAS (JLB), 2015 WL 8492501, at *4 (S.D. Cal. Dec. 10, 2015) ("[T]here is no legal basis for Defendant's assertion that the asking of questions that exceed the scope of a Federal Rule of Civil Procedure 30(b)(6) notice constitutes a second deposition of a witness."); *Detoy v. City & Cnty of*

San Francisco, 196 F.R.D. 362, 367 (N.D. Cal. 2000) ("Nor should one witness count as two depositions for purposes of the Local Rules' limit on the number of depositions to be taken by each party.").

The final question is a practical one: What should defending counsel do to protect the client's rights when the examining counsel exceeds the scope of the 30(b)(6) notice? One thing counsel should not do, even according to *Paparelli*'s minority view, is instruct the witness not to answer questions outside the pre-noticed topics. *See Paparelli*, 108 F.R.D. at 730 ("[A]s a general rule, instructions not to answer questions at a deposition are improper"); *Rivas*, 2015 WL 13710124, at *6 ("Courts that have addressed the proper scope of Rule 30(b)(6) depositions have also uniformly held that instructing a deponent not to answer a question on Rule 30(b)(6) grounds is improper."). Instead, in a minority rule jurisdiction, the only proper procedure is to stop the deposition and move for a protective order. *See* FED. R. CIV. P. 30(d)(3) ("At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. . ."). On the other hand, in a majority rule jurisdiction, defending counsel should "note on the record that a designated witness may be testifying based on personal knowledge and not necessarily on behalf of the corporation when answering questions outside the scope of the matters described in the Rule 30(b)(6) notice." *Rivas*, 2015 WL 13710124, at *7 n.4. The deponent should then answer the question, and counsel "may request from the trial judge jury instructions that such answers were merely the answers or opinions of individual fact witnesses, not admissions of the [corporate] party." *Detoy*, 196 F.R.D. 362, 367 (N.D. Cal. 2000).

B. Noticing Multiple 30(b)(6) Depositions.

Rule 30(b)(6) clearly authorizes a corporate entity to produce multiple representatives in response to a corporate deposition notice. *See* FED. R. CIV. P. 30(b)(6) (requiring the corporation to "designate one or more officers, directors, or managing agents, or [others]" to testify as to the noticed topics). But what if an examining party wants to notice a second (or third or fourth) 30(b)(6) deposition later in the lawsuit? On this, the rules are not so clear.

Many corporations faced with multiple 30(b)(6) notices have appealed to Rule 30(a)(2)(A)(ii), which requires leave of court to take a deposition if "the deponent has already been deposed in the case." *See, e.g.*, *Mobile Telecomm's Techs., LLC v. Blackberry Corp.*, 3:12-CV-1652-M-BK, 2015 WL 12698062, at *4 (N.D. Tex. July 15, 2015) ("Defendant responds that because Plaintiff has already deposed the corporation . . . , leave of court must be sought to take additional 30(b)(6) depositions pursuant to Rule 30(a)(2)(A)(ii)."). The implicit theory is that a corporation should be treated the same as any other individual deponent, since "[t]aking serial depositions of a single corporation may be as costly and burdensome, if not more so, as serial depositions of an individual." *State Farm Mut. Auto. Ins. Co. v. New Horizon, Inc.*, 254 F.R.D. 227, 234 (E.D. Pa. 2008). Outside the Fifth Circuit, this approach predominates. *See, e.g., id.* at 234 ("Neither the text of the rule nor the committee's note exempts Rule 30(b)(6) depositions from the leave requirement in the event of a second deposition of a party already deposed."); *Booker v. ConocoPhillips Co.*, C 07-384-CW, 2008 WL 11408436, at *2 (N.D. Cal. Apr. 25, 2008) (rejecting the examining

party's rationale that "the same individual likely would not be the person most knowledgeable" about the additional deposition topics and requiring leave of court); *In re Sulfuric Acid Antitrust Litig.*, 03 C 4576, 2005 WL 1994105, at *2 (N.D. Ill. Aug. 19, 2005) (characterizing the leave-of-court requirement as "unambiguous" and applicable to multiple 30(b)(6) depositions).

Within the Fifth Circuit, however, the opposite appears to be true. The few courts addressing the issue have held that leave of court is not required so long as the additional 30(b)(6) notice concerns topics distinct from those in prior notices. *See, e.g.*, *Mobile Telecomm's Techs.*, 2015 WL 12698062, at *4 ("Although Plaintiff has already deposed two 30(b)(6) corporate witnesses, Plaintiff need not seek leave for additional 30(b)(6) deposition testimony on topics different from those previously noticed."); *Stambler v. Amazon.com, Inc.*, 2:09-CV-310, 2011 WL 13196474, at *1 (E.D. Tex. Sept. 14, 2011) ("Rule 30(a)(2) does not require a party to seek leave of court to take a second or third 30(b)(6) deposition of a corporate entity when the topics in the disputed deposition notice are different from the topics in prior notices."); *Frank's Casing Crew & Rental Tools, Inc. v. Tesco Corp.*, 2-07-CV-015 (TJW), 2009 WL 10673627, at *1 (E.D. Tex. Jan. 21, 2009) ("There is no Rule or law from this Circuit requiring a party to seek leave of court in order to take a second 30(b)(6) deposition of a corporate entity, when the topics in the second deposition notice are different from the first."). However, these Texas district courts seem to offer unconvincing legal support for their conclusions. *Mobile Telecommunications Technologies*, for instance, acknowledged "incompatibility" between Rules 30(a)(2) and 30(b)(6), but simply cited *Stambler* and *Frank's Casing Crew* as settled law. *Mobile Telecomm's Techs.*, 2015 WL 12698062, at *4. *Stambler*, in turn, simply cited *Frank's Casing Crew*. *Stambler*, 2011 WL 13196474, at *1. But *Frank's Casing Crew* relied on the conclusion that Rule 30(a)'s use of the term "person" excludes corporations, a position that had been thoroughly refuted by an Illinois federal court several years earlier. *Compare Frank's Casing Crew*, 2009 WL 10673627, at *1 ("The rule is concerned with when '*any person*, including a party . . .' can be deposed."), *with In re Sulfuric Acid Antitrust Litig.*, 2005 WL 1994105, at *5 (citing 1 U.S.C. § 1) ("Such a reading would . . . be at odds with the almost undeviating definition in statutes of 'person' as 'includ[ing] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'"). Nevertheless, it seems that corporate entities contesting multiple 30(b)(6) notices in the Fifth Circuit face an uphill battle.[10]

[10] Again, the question arises: What is the effect, if any, of additional 30(b)(6) depositions on Rule 30(a)(2)(A)(i)'s 10-deposition limit? The case law here is practically non-existent, since it is the rare instance where the second 30(b)(6) deposition is the one that might put the examining party over the limit. That said, all of the cases listed above, including those requiring leave of court for a second (or third or fourth) 30(b)(6) deposition, imply that such a 30(b)(6) deposition will not count towards an examining party's total number of depositions. With their emphasis on "distinct topics," for instance, the Texas district court opinions imply that successive 30(b)(6) depositions should be characterized simply as continuations of the same deposition. But this opens up its own Pandora's Box: If the additional 30(b)(6) deposition is simply a "continuation" of the original, could the corporate party game the system by designating the same representative and invoking Rule 30(d)(1)'s seven-hour limit? It remains to be seen.

V. 30(b)(6) and Ethical Considerations

Given its unique procedures and potential for abuse, Rule 30(b)(6) implicates a number of Texas Disciplinary Rules of Professional Conduct for both corporate and examining counsel to consider.

A. Rule 1.12 – Organization as a Client

Ethical Rule 1.12 confirms that "[a] lawyer employed or retained by an organization represents the entity[,]" rather than any specific directors, officers, employees, or other agents. TEX. DISC. R. PROF. COND. 1.12(a). As it pertains to situations germane to Rule 30(b)(6), the rule includes two crucial subparts.

First, Rule 1.12 obliges corporate counsel to "take remedial actions" where the attorney learns that: (1) a person affiliated with the corporation has or intends to commit a legal violation, (2) the violation is likely to result in substantial injury to the corporation, and (3) the violation is related to a matter within the scope of the lawyer's representation of the organization. *Id.* § 1.12(b). Risk of learning such information is high in the 30(b)(6) context, because, often by default, corporate counsel is frequently the person responsible for compiling documents, culling transcripts, and interviewing witnesses as part of the process of preparing a corporate designee for deposition. *See* Part III.D, *supra*. As with any internal investigation, this interaction increases the chance that corporate counsel may learn of legal risks to the corporation posed by the actions of one or more of its directors, officers, or employees with respect to the issues germane to the litigation. Should corporate counsel learn of any such information, Rule 1.12 imposes internal (and potentially external) reporting obligations to ensure the corporate client's legal interests are adequately protected. *Id.* § 1.12(c).

Second, Rule 1.12 obliges corporate counsel to clearly articulate to individual directors, officers, or other corporate constituents, that the attorney represents the corporation only. *Id.* § 1.12(e) (requiring explicit disclosure when "it is apparent that the organization's interest are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part"). The comments to this Rule also require counsel to explicitly advise a corporate constituent with adverse interests that (1) counsel cannot represent the constituent in an individual capacity, and (2) the constituent may wish to obtain independent representation. *See id.* This consideration is immensely important when interacting with the many corporate constituents who may participate in the preparation and presentation of a 30(b)(6) deposition.

B. Rule 3.01 – Meritorious Claims and Contentions

Ethical Rule 3.01 prohibits an attorney from "bring[ing] or defend[ing] a proceeding, or assert[ing] or controvert[ing] an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous." *Id.* § 3.01. This Rule may come into play whenever a 30(b)(6) representative is asked to provide factual support for a specific allegation, denial, or defense, as discussed in Part III.C, *supra*. Again, because of corporate counsel's central role in aggregating, organizing, and synthesizing information for review by the corporate designee, counsel is in an excellent position to evaluate the factual and legal legitimacy for any contention

in the case. Although it may be that counsel's legal impressions and evaluations are protected as attorney work product (*see Orchestratehr, Inc.*, 2015 WL 11120526, at *7), counsel remains obligated to amend the corporation's legal strategy if facts are discovered that rendering its prior contentions frivolous.

C. Rule 3.02 – Minimizing the Burdens and Delays of Litigation

Ethical Rule 3.02 prohibits an attorney from "tak[ing] a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter." *Id.* § 3.02. This Rule applies equally to both corporate and examining counsel in the 30(b)(6) context and overlaps substantially with the concerns articulated in Federal Rule of Civil Procedure 37 (regarding failure to cooperate in discovery). As detailed above, the 30(b)(6) process is ripe for abuse by both sides, whether it is the examining party noticing dozens of unnecessary or grossly overbroad topics or the corporate party unreasonably objecting to topics or failing to present an educated witness.

As various courts have implied, the best practice in the 30(b)(6) context is cooperation between parties, as such will help obtain any necessary information at a minimum of time and money. *See, e.g.*, *Johnson Controls, Inc.*, 2006 WL 8434011, at *3 (directing the parties to "avoid duplication" where the 30(b)(6) designee had already been deposed in his individual capacity and suggesting the parties avoid the need for further discovery by allowing the corporation to adopt positions reflected in prior individual testimony). After all, the original purpose of Rule 30(b)(6) was to do just that—minimize discovery burdens on both sides. Its give-and-take mechanisms also provide ample opportunities for the parties to avoid unnecessary conflict through cooperation. *See* Part II, *supra*.

D. Rule 3.04 – Fairness in Adjudicatory Proceedings

As it bears on the application of Rule 30(b)(6), Ethical Rule 3.04 forbids an attorney from obstructing access to or destroying evidence, falsifying or counseling others to falsify evidence, and disobeying or counseling others to disobey legal rules or orders. Potential for such abuses exists in any litigation, but for corporate counsel, the ability (and responsibility) for preparing a corporate designee to testify offers room for abuse, since, more often than not, the designee will lack personal knowledge of the events about which he or she is testifying. Perhaps the area most prone to abuse is witness preparation on the corporation's "subjective beliefs," since those are almost certainly not within the personal knowledge of any one individual and may not be reflected in any documentary evidence either. *See* Part III.D, *supra*. Obviously, this Rule strictly requires corporate counsel assist in the accumulation of all information known or reasonably available to the corporation, regardless of whether it is unfavorable information or not. In this regard, ethical obligations under Rule 30(b)(6) are no different in kind than those under the procedural rules governing individual depositions. They are, however, different in practical application.

E. Rule 8.04 – Misconduct

Ethical Rule 8.04 forbids an attorney from, among other things, violating the Rules of Professional Conduct (including those listed above), engaging in dishonesty, fraud, deceit, or misrepresentation, or obstructing justice. The ethical considerations here are similar to those

implicated by Ethical Rule 3.04. Simply put, corporate counsel is obliged to fairly and comprehensively prepare the designated witness to testify as to all information known or reasonably known to the corporation (and not just favorable information), and may not suppress damaging evidence or omit unfavorable information from the witness's preparation.

VI. Conclusion

It seems a fair assessment to characterize Rule 30(b)(6) as a labyrinth of twists, turns, and uncharted passages. Although its basic framework is readily understandable, its quirks and idiosyncrasies are boundless. Many of them remain unresolved, even 50 years after the Rule's enshrinement. Moreover, thanks to the various ambiguities in the Rule's text and the ingenuity of the attorneys who routinely litigate against or on behalf of corporations, it is doubtful each party's obligations under Rule 30(b)(6) will ever be as well-defined as for other procedural rules. Nevertheless, decades of case law have brightened a few of the Rule's dark corridors, and practitioners would be well-advised to educate themselves on its contours lest they find themselves groping in the dark in the midst of litigation.