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# Don't get blown up: (avoiding) the perils of the 30(b)(6) deposition

October 2, 2019



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## The Rule: Fed. R. Civ. P. 30(b)(6):

(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 in its behalf; and it may set out the matters on which each person designated will testify. A subpoena shall advise a non-party 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 Bandyng Problem



- Prior the rule, witnesses dodge and deflect.
- “You would have to ask Joe.”
- Joe then says, “You would have to ask June.”
- June then points to someone else.
- Rule designed to get the story straight.



# AVOID THE BLOW UP



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18 A. Yeah, I don't know.

7 A.  
8 disco 12 of the estimator as to the cause of the fault of the  
9 Q  
10 durin 13 leak?  
11 early  
12 A. 14 A. I don't recall.  
13 Q  
14 A.  
15 Q.  
16 A.

14 A. I don't know.

9 A. I don't know.

24 A. Well, I'm -- I don't recall, but, you know,  
25 who knows.

2 A. Some work was authorized. I don't know if

25 A. I don't know. I just don't

23 A. You know -- I don't know.





# How to Get Blown Up

- Play hard to get.
- Play close to the vest.
- Don't volunteer.



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# Blow Up

Q: In your answer to interrogatory no. 9, you answered a similar question, to issue 9 which asked for all evidence to support your affirmative defense of contributory negligence, by saying this, and I quote:

“Defendant has no knowledge of document or any person who has information regarding facts or circumstances relating to the cause of the subject incident.” Did I read that correctly?

A: Yes. I see you learned how to read in law school

Q: Sitting here today, do you have any additional information, evidence, documents, witnesses you can identify that would supplement or change or alter or add to the statement I just read?

A: **I do not.**



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# The Rule: Three “MUST” Provisions

- (1) MUST describe with reasonable particularity:** “must describe with reasonable particularity the matters for examination.”
- (2) MUST designate:** “must then designate one or more officers ... or other persons...”
- (3) MUST testify about matters ‘known’ or ‘reasonably available’:** “The persons designated must testify as to matters known or reasonably available to the organization.”





# Lighting the fuse... (the Depo Notice)

## “TAKER” Considerations:

- Who (do you want to depose),
- What (do you want to learn),
- When (before or after fact depositions),
- Where (depends if plaintiff or defendant),
- Why (to bind, create pressure)



# “Reasonable Particularity”

- Simple, but complicated.
- Federal and state rules (including NC and SC) require it;
- IS NOT: “any matters relevant to this case;”
- IS NOT: “including but not limited to” - nonexclusive list of topics also will not suffice. *Alexander v. FBI*, 188 F.R.D. 111, 121 (D.D.C. 1998)



# Reasonable Particularity – Example of “Funnel” Topics

- **Property Ownership:** Ownership of the Property from 2005 to the present, *including* the date(s) of ownership, and any relationship, contract, or agreement you have with such owner(s).
- **Revenue:** Your revenue sources and amounts, expenses, distributions, profits, bonuses, or salaries paid from 2009 to the present.
- **Water problems:** All water problems (e.g., leaks, ruptures, drain clogs, clean up, remediation, and repairs) at the Premises from its inception to the present, *including* identification of each water-related issue by nature/date/room/location, date of clean up, remediation, repairs, and person(s) or entities performing repair.
- **Damages:** All damages by category and amount, and for each category, identify and describe how damages were calculated and identify facts that support your calculation.



## ***What's the harm in asking?***

- Wasteful;
- No winners in discovery games;
- You get what you give.



## Why Reasonable Particularity Avoids the “blow up”

18 A. Yeah, I don't know.

14 A. I don't know.

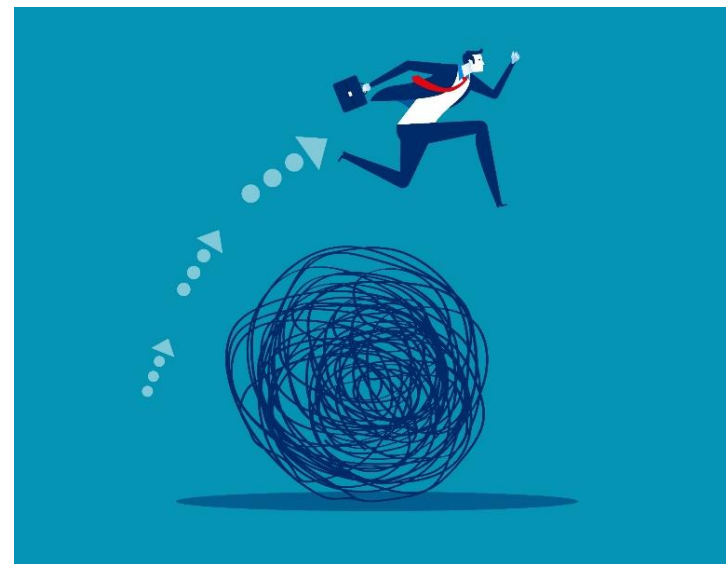
14 A. I don't know.

25 A. I don't know. I just don't



# Can the depo be avoided?

- Remind outside counsel to alert you.
- 30(b)(6) is not inevitable;
- DON'T: Hide the ball;
- DO: Be 'open book';
  - “Help” opposing counsel understand docs;
  - “Offer” the right fact witnesses;





# Response Pointers

- Don't agree to depo date earlier than next possible hearing date.
- Serve objections early, in writing, and before the deposition;
- Objections should be specific;
- *But* objections are not enough;
- If you cannot agree, to be fully protected, you must file a motion for protective order.
  - *Without a protective order, your witness is exposed.*



# Identifying the right witness(es)

- “PMK” may not be the right person;
- multiple witnesses?;
- Considerations:
  - recurring depo (e.g., mass litigation)?
  - Is the witness “willing” and “able” to testify?
  - Are they engaged and committed?
  - Do they have time
  - Do they know too much?
  - Demeanor / Temperament;
  - Do you trust them?



# Proper Prep Defuses the Situation

- Documents often drive the prep;
- Must gather all “reasonably available” information;
- documents, depositions, other employees, former employees, *even counsel*;
- **Minimum standard = “good faith”**
- Practice, Practice, Practice.



# Practical: Witness Unprepared.

- Make a record, including:
  - Detail on preparation (docs, interviews, etc.)
  - What they did not do to prepare;
- Ask: will they put up another witness?
  - Who pays?
- Move for “sanctions” under Rule 37;



# Sanctions: “I don’t know” *is* a sanction

- Rule 37 sanctions include:
  - Ultimately could be striking a claim or defense;
  - More likely – restricting evidence.
- “I don’t know” is its own sanction;
  - It may preclude evidence at trial;
- “Good faith” preparation avoids Rule 37 sanction;



# Practical: Questions Outside the Scope

- A “speaking objection” is a must.
- Make clear: witness not testifying on behalf of corp
- Try to get agreement on the record that answer is not binding.





# Key Takeaways



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