Is Live Trial Testimony Permissible?

A Primer on Rule 30(b)(6) Witnesses

By Lauren Bragin

With the right circumstances and ample preparation, you can overcome objections to a witness testifying live during a trial on the grounds that he or she "lacks personal knowledge."

Even though we routinely prepare Federal Rule of Civil Procedure 30(b)(6) witnesses to testify on behalf of our corporate clients, we often overlook that they lack personal knowledge, as it is traditionally understood, to give admissible testimony at trial.

Consider this scenario. You're working on a personal injury case and the plaintiff serves a request for a Rule 30(b)(6) deposition. The incident happened several years ago at your client's facility and your client, Corporate 500, has gone through some employee turnover in the interim years. There's no one left at the company who was involved in handling the incident or who worked in a related capacity at the facility at the time the incident occurred. Corporate 500's former employees are in the wind; you don't know where they live or work, or how to find them. You work with your client to identify a current employee in an appropriate role at Corporate 500 who can get prepared to testify as a Rule 30(b)(6) witness. Corporate 500 suggests Martha Martin, the new manager of the facility, who started working there a few months after the incident. If the incident had occurred while Ms. Martin was working at the facility, she would have been the person in charge of following up and documenting what happened. She's personable, knows a lot about the company history, and seems like a solid choice.

You prepare and produce Ms. Martin for deposition. While she is able to answer the majority of the plaintiff's attorney's questions based on her review of the relevant company files, the plaintiff's attorney objects vociferously that she lacks personal knowledge. Discovery moves along steadily and you pay little attention to the objections.

Time passes and trial is around the corner. You put Ms. Martin on your witness list as a Rule 30(b)(6) company witness. You expect her to testify about the safety and operating procedures, protocols, and standards that were in place at the time of the incident. You also expect her to testify about company documents detailing the relevant events. The plaintiff's attorney objects on the grounds that Ms. Martin's testimony is hearsay and that she lacks personal knowledge because she wasn't present at the facility or employed by Corporate 500 at the time of the incident. The attorney also argues that Rule 30(b)(6) only applies to discovery. Without Ms. Martin, you have no company witness to explain and defend Corporate 500's procedures.

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Can a Rule 30(b)(6) witness testify at trial? Does the plaintiff's attorney's argument have merit? How can Rule 30(b)(6) be reconciled with Federal Rule of Evidence Rule 602, which limits the scope of a witness' testimony to matters that are within his or her personal knowledge, and with Rules of Evidence 801–805, which prohibit hearsay evidence except under limited circumstances?

In short, while Rule 30(b)(6) was designed to address depositions, it has been interpreted to inform the meaning of "personal knowledge" as applied to company witness testimony at trial. Personal knowledge in the context of a company witness does not require a first-hand account; rather, information learned in the ordinary course of business, including through review of documents and procedures predating employment, is admissible. Even information learned solely for purposes of testifying in litigation should qualify as personal knowledge, which means that insofar as your 30(b)(6) witness in the scenario outlined above evaluated a range of evidence and interpreted that evidence based on her knowledge of and experience working for the company, you may have her testify.

What Is a Proper Rule 30(B)(6) Designation?

Federal Rule of Civil Procedure 30 addresses depositions by oral examination. The purpose of Federal Rule 30(b)(6) is to allow a party to depose an organization through designated witnesses. Fed. R. Civ. P. 30(b)(6). The deposition of a corporation or other business entity under 30(b)(6) is treated as a single deposition, although the entity may designate several persons to testify on its behalf. *See* Adv. Comm. Notes on 1993 Amendments to Fed. R. Civ. P. 30(a)(2)(A).

As opposed to a "regular" fact witness, a Rule 30(b)(6) witness represents the corporate entity's knowledge, not the individual deponent's. *Great Am. Ins. Co. of New York v. Vegas Const. Co.*, 251 F.R.D. 534, 538 (D. Nev. 2008). Thus, personal knowledge "is of no consequence." *Bd. of Trustees of Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253 F.R.D. 524, 526 (C.D. Cal. 2008). *See also F.C.C. v. Mizuho Medy Co.*, 257 F.R.D. 679, 681 (S.D. Cal. 2009) ("The deponent need not have personal knowledge of the designated subject matter."); *PPM Fin., Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894–95 (7th Cir. 2004) (stating the Rule 30(b)(6) deponent was "free to testify to matters outside his personal knowledge as long as they were within the corporate rubric").

Can a 30(B)(6) Witness Testify Live at Trial?

While there is ample case law interpreting the application of Rule 30(b)(6) in the discovery context, there is relatively little addressing the use of live Rule 30(b)(6) testimony at trial. Under certain circumstances, Federal Rule of Civil Procedure 32(a)(3) permits the introduction of *deposition* testimony—including Rule 30(b)(6) testimony—by an adverse party for any purpose at trial, but does not contemplate the introduction of live Rule 30(b)(6) testimony. *See Roundtree v. Chase Bank USA, N.A.*, 13-239 MJP, 2014 WL 2480259 (W.D. Wash. June 3, 2014) ("FRCP 30(b)(6) is inapplicable to the issue of witness testimony at trial."). In other words, Rule 30(b)(6) allows corporate representatives to testify to matters within the corporation's knowledge during deposition, and Rule 32(a)(3) permits an *adverse* party to use that deposition testimony during trial. *See Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 434 (5th Cir.2006).

There is no rule expressly authorizing live trial testimony by a Rule 30(b)(6) witness or resolving the conflict with Federal Rule of Evidence 602, which limits the scope of a witness's testimony to matters that are within his or her personal knowledge, and Federal Rules of Evidence 801–805, which address hearsay. The lead case discussing Rule 30(b)(6) trial testimony, *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 434 (5th Cir. 2006), held that when a witness "acts as the agent for the corporation, he should be able to present [the corporation's] subjective beliefs… as long as those beliefs are based on the collective knowledge of [the corporation's] personnel." In *Brazos*, the defendant corporation designated its employee to be deposed as its representative under Rule 30(b)(6). *Id.* at 432. The employee was then called to testify at trial, and the plaintiff objected on the basis that the witness lacked personal knowledge for his testimony. *Id.* The Fifth Circuit held that a Rule 30(b)(6) deponent is permitted to testify during a trial regardless of personal knowledge about information that should be within the corporate knowledge of the entity that he or she represents. *Id* at 432, 434–435 ("[I]f the corporation makes the witness available at trial he should not be able to refuse to testify to matters as to which he testified at the deposition on grounds that he had only corporate knowledge of the issues, not personal knowledge.").

As opposed to a "regular" fact witness, a Rule 30(b)(6) witness represents the corporate entity's knowledge, not the individual deponent's.

In *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 F. App'x 899, 907–08 (5th Cir. 2010), the Fifth Circuit seemingly limited the *Brazos* holding, stating that "a corporate representative may not testify to matters outside his own personal knowledge to the extent that information [is] hearsay not falling within one of the authorized exceptions." *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 F. App'x 899, 908 (5th Cir. 2010) (internal quotations omitted). *Union Pump* has been interpreted to suggest that "while Rule 30(b)(6) permits [a corporate witness'] deposition testimony to be based on matters outside his personal knowledge, Rule 602 limits his trial testimony to matters that are within his personal knowledge." *Indus. Eng'g & Dev., Inc. v. Static Control Components, Inc.*, 8:12-CV-691-T-24-MAP, 2014 WL 4983912, at *3 (M.D. Fla. Oct. 6, 2014) (At trial, "Rule 30(b)(6) does not eliminate Rule 602's personal knowledge requirement."). *See also L–3 Commc'n Corp. v. OSI Sys., Inc.*, No. 02 Civ. 9144(PAC), 2006 WL 988143, at *2 (S.D.N.Y. Apr.13, 2006) ("[A]t trial, [a non-adverse party] may only offer testimony from [its corporate representative] as a

fact witness based on his personal knowledge and in compliance with Federal Rule of Evidence 701").

Notably, the *Union Pump* decision did not overturn and cites *Brazos,* which clearly holds that "if a certain fact is within the collective knowledge or subjective belief of [a company]," it is admissible "even if it is not within [the company witness'] direct personal knowledge, provided the testimony is otherwise permissible lay testimony." *Brazos River Authority,* 469 F.3d 416, 434. *Union Pump*, on the other hand, excluded testimony regarding a series of internal investigations when no written reports were issued as a result of the investigations, and the corporate witness did not conduct or have any role in them, but rather learned of the facts that he testified to solely through conversations with others. *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 F. App'x 899, 908 (5th Cir. 2010). Reading these cases in harmony suggests that the key inquiry in determining requisite personal knowledge for purposes of Rule 30(b)(6) trial testimony is the quality of the underlying information and whether a witness's testimony is "based on the witness's own perceptions and knowledge and participation in the day-to-day affairs of the business." *United States v. Polishan,* 336 F.3d 234, 242 (3d Cir.2003) (internal citations and quotations omitted). *See also* Fed. R. Evid. 701.

Moreover, district courts in other circuits have found that "a Rule 30(b)(6) witness may testify both in a deposition and at trial to matters as to which she lacks personal knowledge, notwithstanding the requirements of Federal Rule of Evidence 602." *Univ. Healthsystem Consortium v. UnitedHealth Grp., Inc.*, 13 CV 6683, 2014 WL 4685753 (N.D. Ill. Sept. 19, 2014) (noting that there is "little principled distinction" between allowing a Rule 30(b)(6) witness to testify at trial without personal knowledge and allowing him to testify at deposition or via affidavit without personal knowledge.). *See also Sara Lee Corp. v. Kraft Foods Inc.*, 276 F.R.D. 500, 503 (N.D. Ill. 2011) (declining to limit 30(b)(6) testimony strictly to matters within the witness' personal knowledge because "[w]hen it comes to using Rule 30(b)(6) depositions at trial, strictly imposing the personal knowledge requirement would only recreate the problems that Rule 30(b)(6) was created to solve. For example, a party might force a corporation to 'take a position' on multiple issues through a Rule 30(b)(6) deposition, only to be left with the daunting task of identifying which individual employees and former employees will have to be called at trial to establish the same facts.").

The mere fact that a witness learned about an incident after it occurred is not dispositive of the personal knowledge question, but rather requires investigation.

What Constitutes "Personal Knowledge"?

Federal Rule of Evidence 602 states that "a witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." However, personal knowledge does not require firsthand observation or experience. *See Stuart v. UNUM Life Ins. Co. of Am.*, 217 F.3d 1145, 1155 (9th Cir.2000) (finding a vice president of Corporate Services had sufficient personal knowledge of company procedures to testify that his employer contributed directly to its employee insurance plan). As Judge Posner has observed, given that "[a]ll perception is inferential, and most knowledge social… [k]nowledge acquired through others may still be personal knowledge within the meaning of Fed. R. Evid. 602, rather than hearsay." *Agfa–Gevaert, A.G. v. A.B. Dick Co.,* 879 F.2d 1518, 1523 (7th Cir.1989).

When testimony is based on knowledge acquired during the course of employment, such testimony is properly within the scope of Federal Rule of Evidence 701. *See United States v. Thompson,* 559 F.2d 552, 554 (9th Cir. 1977) (finding that an employee familiar with "normal company procedures… had ample personal knowledge to testify on that subject"); *see also Mora v. Harley-Davidson Credit Corp.,* 1:08-CV-01453OWWGSA, 2009 WL 464465, at *4 fn. 1. (E.D. Cal. Feb. 24, 2009) (overruling personal knowledge objections and allowing an employee to testify regarding account records based on his experience, position with the company, access to account records, and personal knowledge based on a review that he initiated of account data); *Cleveland v. United States*, 546 F. Supp. 2d 732, 774 (N.D. Cal. 2008) (finding requisite personal knowledge regarding historical facts and matters predating the witness's employment); *United States v. Munoz-Franco*, 487 F.3d 25, 35-36 (1st Cir. 2007) (finding sufficient personal knowledge of company practices acquired through course of employment). The mere fact that a witness learned about an incident after it occurred is not dispositive of the personal knowledge question, but rather requires investigation into the sources of information. For example, in *U.S. v. Thompson*, 559 F.2d 552, 554 (9th Cir.1977), a restaurant manager was permitted to testify that a guest check produced by the defendant's father was not the type of receipt that was normally issued to customers, even though he did not become manager of the restaurant until three months after the date of the relevant receipt. The court held that he had "ample personal knowledge to testify about what normal company procedures were on a date prior to his employment." *U.S. v. Thompson*, 559 F.2d 552, 554 (9th Cir.1977). *See also Los Angeles Times Commc'ns, LLC v. Dep't of Army*, 442 F. Supp. 2d 880, 886 (C.D. Cal. 2006) ("Plaintiff fails to appreciate that a declarant can testify about practices or procedures in place before the witness was employed with the organization about which he is relating information.").

Likewise, in *In re Texas*, the court permitted trial testimony establishing historical practices by an employee who became responsible for the relevant jobsite after the relevant incident occurred. *In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 870 F. Supp. 1293, 1303–04 (E.D. Pa. 1992), *aff'd,* 15 F.3d 1249 (3d Cir. 1994), and *aff'd,* 995 F.2d 219 (3d Cir. 1993), *vacated* (Jan. 6, 1994), *on reh'g,*

15 F.3d 1230 (3d Cir. 1994), and *opinion reinstated in part,* 15 F.3d 1249 (3d Cir. 1994), and *aff'd in part*, 15 F.3d 1230 (3d Cir. 1994). The employee acquired personal knowledge by reviewing relevant documents and discussing the issues with senior management and other personnel. *Id.* The court was not persuaded that a witness's knowledge cannot be personal to him or her because it was acquired from third parties and noted that "[a]ll perception is inferential to some degree." *Id.* The court found that the employee in *In re Texas* had established personal knowledge because rather than relying solely on the "say so" of third parties, he consulted various sources including documents and vouched for the statements' truth himself. *Id.*

Best Practices for Selecting a Rule 30(B)(6) Witness

When selecting a Rule 30(b)(6) deponent, consider early whether he or she may be asked to testify at trial. While objections to a 30(b)(6) witness's deposition testimony as lacking personal knowledge are irrelevant in the discovery context, they are an opportunity to establish a strong basis for the kind of personal knowledge required for admissibility at trial. Be sure to choose a witness with an appropriate position at a company and ensure that he or she has multiple sources on which to rely for his or her testimony. A well-selected Rule 30(b)(6) witness should be able to vouch for the truthfulness of his or her testimony through information that he or she learned in the ordinary course of business. Martha Martin in our scenario above, for example, would be an excellent choice for Corporate 500 because if the incident had occurred while Ms. Martin was working at the facility, she would have been the person in charge of following up and documenting what happened. It is therefore naturally within the purview of her role at Corporate 500 to review documents regarding the type of incident at issue. She is also likely to know about protocols and procedures currently in place, as well as their history and evolution. Thus, procedures existing before her employment by Company 500 could still be categorized as within her personal knowledge.

In your representation of a company similar to Corporate 500, carefully evaluate a potential Rule 30(b)(6) witness' day-to-day responsibilities in the context of the type of information to be elicited to ensure admissibility of live trial testimony. You should likewise encourage Rule 30(b)(6) witnesses to become knowledgeable about the relevant issues through as many means as possible by reviewing documents, talking to current and former employees, and conducting an independent assessment.