Practice Tips and Developments in Handling 30(B)(6) Depositions

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INTRODUCTION

More than most other procedural rules, Fed. R. Civ. P. 30(b)(6) (occasionally referred to as the "Rule"), at least in theory, embodies the ultimate aim of the Federal Rules of Civil Procedure, set forth in Federal Rule of Civil Procedure 1, to "secure the just, speedy, and inexpensive

determination of every action and proceeding."[1] But as with so many other discovery-related rules, Fed. R. Civ. P. 30(b)(6) has evolved into something different than what its creators no doubt envisioned, as litigation counsel on both sides of the deposition table have, over the years, sought to press that rule's boundaries – sometimes at the expense of justice, speed, and budget. The purpose of this article is to review the more significant developments that have taken place in the 30(b)(6) arena and suggest some practice tips that we believe can improve the effectiveness and efficiency of the discovery process.

Essentially, Fed. R. Civ. P. 30(b)(6) allows a party to depose an organization through one or more witnesses designated by that organization. Contrast this with the ordinary Rule 30(b)(1) deposition of a witness who happens to work for an organization and who might or might not have the information sought by the interrogating party.[2] The differences are tremendous. Most notably, while a litigation party can depose just about anyone pursuant to Fed. R. Civ. P. 30(a), there is no requirement that the deponent subject to such a deposition do anything to prepare for the deposition. In fact, it probably would not be much of a stretch to say that most litigators prepare their clients, if they are being deposed in their individual capacities, to get comfortable with the Holy Trinity of deposition responses: "Yes – no – I don't know."

Federal Rule of Civil Procedure 30(b)(6) has no truck with such tactics. The Rule provides not only that an organization must produce witnesses knowledgeable about the issues in the case (presumably set forth in the deposition notice, but that is the subject of some contention, as we will discuss later on in footnote 22); not only that the witness must be appropriately prepared to testify about those matters, even if the witness starts out with little or no personal knowledge on the issues; but also that the organization will be held strictly accountable for the deponent's poor performance. The 30(b)(6) deposition is, therefore, a powerful tool in the litigator's arsenal, and one that, if used effectively, can quickly drive a case to the resolution of key factual disputes. Consider: A well-schooled Rule 30(b)(1) witness can leave an interrogator entirely frustrated

[1] FED. R. CIV. P. 1.
[2] *Compare* FED. R. CIV. P. 30(b)(1) *with* (b)(6).

and with little ammunition to use on summary judgment or at trial. An evasive answer here, a lack of recollection there, a professed lack of understanding of the questioning, and, voila, a muddy and barely usable transcript. Yes, a skilled litigator can perhaps cut through this kind of obfuscation, and, yes, a skilled litigator can use the witness's reticence or intermittent amnesia to his or her tactical advantage, but that's not always the case. Sometimes the witness just won't provide the information the litigator needs, and so the litigator must resort to other means, often at great expense, to make up the evidentiary gap.

This is where the 30(b)(6) deposition comes in. It allows the lawyer squaring off against an organization, be it a corporation or partnership or some other organization, to demand straightforward answers to straightforward questions from witnesses who are commanded to be prepared to give straightforward answers. Of course, litigators are a clever bunch, and so things are not always as easy and straightforward as they might be. But there are techniques that can be used to ensure that the 30(b)(6) deposition is used most effectively and economically, whether on the taking or defending side. We discuss those techniques in Part II of this article. But first, in Part I, we cover the legal framework of Fed. R. Civ. P. 30(b)(6).

I

THE LEGAL FRAMEWORK

A. Background

Federal Rule of Civil Procedure 30(b)(6) was added to the Federal Rules of Civil Procedure as part of the 1970 amendment package. The primary purpose of the Rule was, according to the Official Advisory Committee Notes, to end the exasperating practice of "bandying," whereby organizations would produce deposition witness after deposition witness, each disclaiming knowledge of facts that, obviously, someone in the organization had to know.[3] Prior to the

[3] *See* FED. R. CIV. P. 30(b)(6) advisory committee's notes, subdivision (b) (1970). For an excellent review of the origins of FED. R. CIV. P. 30(b)(6), *see generally* Kent Sinclair and Roger P. Fendrich, *Discovering*

promulgation of Fed. R. Civ. P. 30(b)(6), the state of play was one game of 21 questions within another. *First*, the interrogator had to figure out whom to depose and the order in which to take the depositions. *Second*, the interrogator had to frame the deposition questions so that those questions elicited the necessary information from the appropriately knowledgeable witness. The problem for the interrogator, of course, was that the information sought might not be readily available from any one person, with the result that either insufficient information was provided or countless officers and employees had to be deposed.

Fed. R. Civ. P. 30(b)(6) was intended to cut through the tactics of bandying by introducing the concept of an organizational deposition: while a human would testify, that human was appearing not in his or her individual capacity but as the voice of the corporation or partnership or whatever form the deposed organization took. Similar to the interrogatory, as the Advisory Committee noted, but with sharper teeth (because the sworn statement provided is given in the context of a live deposition being taken by a presumably attentive lawyer able to follow up on less-than-clear answers), Fed. R. Civ. P. 30(b)(6) states as follows:

> 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.[4]

The procedure by which a 30(b)(6) deposition generally proceeds is as follows:

1. A party serves a deposition notice under Fed. R. Civ. P. 30(b)(6) by naming the subject organization, which can be a party or nonparty, as the deponent, and sets forth, either in the notice or subpoena or a rider thereto, particular topics as to which the organization must testify.

Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms, 50 ALA. L. REV. 651 (1999).

[4] FED. R. CIV. P. 30(b)(6).

2. In response to the 30(b)(6) deposition notice, the organization designates one or more individuals to testify on behalf of the organization with respect to the topics identified in the deposition notice. The organization can object to the topics as overbroad or otherwise improper (e.g., the topics improperly call for privileged information).

3. The designated witness(es) must testify about information known or reasonably available to the organization. Critically, a 30(b)(6) witness is not disqualified for lack of personal knowledge about the matters as to which he or she will testify and need not be the most knowledgeable witness for the topics; therefore, it is possible (and not uncommon) for corporate employees to be educated as to the relevant topics and thus transformed into suitable 30(b)(6) witnesses.

One of the best recent decisions outlining the parameters of Fed. R. Civ. P. 30(b)(6) is a Florida District Court case by the name of *QBE Insurance Corp. v. Jorda Enterprises, Inc.*[5] In *QBE*, a subrogation action in which the plaintiff insurer sought to recover from defendant subcontractor the sum that the plaintiff paid over to its insured following a loss, the defendant sought sanctions because the plaintiff refused to produce a suitably knowledgeable witness on various 30(b)(6) topics.[6] In 39 clearly delineated steps (was the court a secret Hitchcock fan?), the *QBE* court set forth its "de facto Bible" governing organizational depositions.[7]

The *QBE* court first explained that the purpose of Fed. R. Civ. P. 30(b)(6) is to "streamline the discovery process."[8] The court then went on to offer, in sum and substance, the following key observations:

- The primary purpose of the Rule is to prevent the situation where a stream of proffered witnesses lack sufficient knowledge about relevant topics;

- The Rule affords an organization being deposed considerable leeway in designating its own witnesses to represent the organization;

- The organization being deposed may (and must) identify as many witnesses as necessary to be responsive;

- The organization being deposed need not produce the most knowledgeable person, provided that the witness designated is prepared to testify "fully and non-evasively about the subjects" of the deposition, even if that means having the witness do as much homework as necessary to become a suitable witness;

[5] *QBE Ins. Corp. v. Jorda Enter., Inc.*, 277 F.R.D. 676 (S.D. Fla. 2012).
[6] *Id.* at 683.
[7] *Id.* at 687–91.
[8] *Id*. at 687.

- The witness's answers are binding on the organization;
- Sanctions are available for non-compliance with the Rule; and
- The organization being deposed has the right to seek a protective order if the deposition notice is overbroad or otherwise improper.[9]

After reviewing what certainly seemed to be some rather evasive testimony by the plaintiff's designee, the *QBE* court granted the defendant's motion in part, precluded the plaintiff from taking certain positions at trial, and imposed a financial sanction to boot.[10] The point stressed by the court was that there are severe litigation consequences to ignoring the letter and the spirit of Fed. R. Civ. P. 30(b)(6).

United States v. Taylor, a North Carolina District Court decision concerning 30(b)(6) depositions in a CERCLA action, remains another leading case on the subject and provides another good outline of how the Rule works.[11] The *Taylor* court was faced with a defendant's reluctance to prepare its 30(b)(6) designees to the extent demanded by the United States Government, the plaintiff. The crux of the issue was, as the court put it, "the extent of the duty which Fed. R. Civ. P. 30(b)(6) imposes on a corporation . . . to conduct an investigation prior to its deposition."[12]

The court began its analysis by observing, quite aptly, that "[f[or a Rule 30(b)(6) deposition to operate effectively, the deposing party must designate the areas of inquiry with reasonable particularity, and the corporation must designate and adequately prepare witnesses to address these matters."[13] The court then went on to articulate its own guidelines for 30(b)(6)

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[9] *Id.* at 687–91.
[10] *Id*. at 698.
[11] *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996).
[12] *Id.* at 358.
[13] *Id.* at 360. The court in *Prokosch v. Catalina Lighting, Inc*., another oft-cited case, had a similar take on FED. R. CIV. P. 30(b)(6): "The effectiveness of the Rule bears heavily upon the parties' reciprocal obligations. First, the requesting party must reasonably particularize the subjects of the intended inquiry so as to facilitate the responding party's selection of the most suitable deponent. In turn, the responding party, having been specifically notified as to the specific areas of exploration, is obligated to produce a deponent who has been suitably prepared to respond to questioning within that scope of inquiry." *Prokosch v. Catalina Lighting, Inc*., 193 F.R.D. 633, 638 (D. Minn. 2000). Perhaps in a tacit nod to baseball's three-strikes rule, the *Prokosch* court found that the defendant, in failing to provide suitably prepared deposition witnesses, had not met its 30(b)(6) obligations, but deferred any sanctions award for

depositions: (*a*) the party responding to a 30(b)(6) deposition must produce a witness who will speak "'for the corporation'" and not merely for himself or herself; (*b*) if the designees do not have the requisite knowledge, the organization must prepare the designees "so that they may give complete, knowledgeable and binding answers on behalf of the corporation"; and (*c*) the designees can be queried about facts as well as opinions and beliefs of the organization.[14] The point, explained the court, is that the 30(b)(6) designee testifies as if he or she is the organization itself – "[t]he corporation appears vicariously through its designee."[15] Accordingly, any burden that the organization must bear – such as requiring the designee to review prior deposition testimony, documents, and deposition exhibits so that he or she can testify as to the organization's position on various topics – "is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business."[16]

B. The deposition notice

What does a proper 30(b)(6) deposition notice look like? As with a 30(b)(1) notice, it contains the name of the organization to be deposed and provides the date and time of the deposition. Unlike with the 30(b)(1) notice, though, Fed. R. Civ. P. 30(b)(6) provides, either within the notice itself or as a rider to the notice, a list of topics that will be the subject of the deposition.[17] Most importantly, Fed. R. Civ. P. 30(b)(6) requires that this list identifying the topics of inquiry – which serve as the core of the deponent's preparation road map – be articulated with "reasonable particularity."[18] So what is "reasonable particularity"?

As discussed below, while there is no universally accepted, black-letter definition of this standard, it can be fairly said that reasonably particularized topic lists are those that call for

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the time being notwithstanding two prior occasions when the court "expressed dissatisfaction with [the defendant's] discovery responses." *Id*. at 639.

[14] *Id.* at 361.

[15] *Id.*

[16] *Id.* at 362.

[17] *Compare* FED. R. CIV. P. 30(b)(1) *with* 30(b)(6).

[18] FED. R. CIV. P. 30(b)(6).

information that has a logical bearing on the claims and defenses in the case. While that definition might seem somewhat vague, unreasonably overbroad topic lists can be easy to spot.

For example, "reasonable particularity" is ***not*** a list of things "including but not limited to," that favorite phrase of insecure litigators who worry that, no matter how carefully drafted, their discovery lists are somehow missing something.[19] Thus a 30(b)(6) deposition notice may not require testimony on a theoretically limitless list of topics "including but not limited to x, y and z," nor can it pretend to suggest a finite list of topics, each of which, in turn, calls for information "including but not limited to x, y and z." For the first version of this ploy, see the District of Kansas's opinion in *Reed v. Bennett*, which held that deposition topic lists must have discernible parameters and that "where the defendant cannot identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible."[20] For the latter, see the D.C. District Court's commentary in *Tri-State Hospital Supply Corp. v. United States*, *supra*, which dealt with a 30(b)(6) notice that listed certain topics and used that phrase "including but not limited to" in order to try to capture other, related topics.[21] Relying on *Reed v. Bennett*, *supra*, the *Tri-State Hospital* court struck the "including but not limited to" verbiage on the ground that "[l]isting several categories and stating that the inquiry may extend beyond the enumerated topics defeats the purpose of having any topics at all."[22]

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[19] *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 125 (D. D.C. 2005).

[20] *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000); *but see Cotton v. Costco Wholesale Corp.*, No. 12-2731-JWL, 2013 WL 3819975, at *2 (D. Kan. July 24, 2013) (holding that the use of "including" in the notice did not render it overbroad where the term was used to provide examples of subtopics, rather than to suggest that the areas of inquiry would not be limited to the topics listed).

[21] *Tri-State Hospital Supply Corp.*, 226 F.R.D. at 125. *See also Innomed Labs v. Alza Corp.*, in which the court denied a motion to compel compliance with a 30(b)(6) subpoena that sought testimony about certain documents "'including but not limited to' the areas specified." *Innomed Labs v. Alza Corp.*, 211 F.R.D. 237, 240 (S.D.N.Y. 2002).

[22] *Tri-State Hospital Supply Corp.*, 226 F.R.D. at 125. There is a difference of opinion on whether counsel can inquire beyond the topic list. In *Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 729–30 (D. Mass. 1985), a case that seems now to be the minority view, the District Court of Massachusetts said no. In *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995), the Southern District of Florida said yes. *See also Eng-Hatcher v. Sprint Nextel Corp*., No. 07 Civ. 7350(BSJ)(KNF), 2008 WL 4104015, at *4–5 (S.D.N.Y. Aug. 28, 2008) and *Crawford v. Franklin Credit Mgmt. Corp*., 261 F.R.D. 34, 38 (S.D.N.Y. 2009) ("The proper scope of questioning of a Rule 30(b)(6) witness is not defined by the notice of deposition, but by Rule 26(b)(1). . . ."). And in *Falchenberg v. N.Y. State Dept. of Educ*., the Southern District of New York permitted questions beyond the topic list but said all answers to questions outside the topic list are 30(b)(1) answers and thus not the words of, and not binding on, the organization being deposed.

Another category of unspecified and therefore unacceptable topic lists is a request for testimony on "any matters relevant." In *Alexander v. FBI*, a case that dealt with the FBI's alleged release of private information on political appointees and employees under prior administrations, the plaintiff served a 30(b)(6) notice calling for testimony and documents regarding eight specific topics and, as a ninth, "any other matters relevant to this case, or which may lead to the discovery of relevant evidence."[23] As the *Alexander* court observed, because this ninth category was, "from the face of [it]," non-compliant with the particularity rule, the request was effectively stricken and the defendants freed of the obligation to respond to it with 30(b)(6) testimony or documents.[24]

So to return to the main question, what is sufficient particularization? The court in *Prokosch v. Catalina Lighting, Inc*., *supra*, held that it is a level of detail that shows a "conscientious effort to focus" on discrete subject areas that are substantively and temporally relevant to the claims at issue.[25] Other courts, perhaps more concerned about the potential for abuse by the interrogator, have looked for something a bit more – "painstaking specificity," as a series of Kansas District Court decisions has put it.[26]

At bottom, the consensus among most courts seems to be that, as with many legal standards predicated on the concept of reasonableness, the right result is the Goldilocks approach: not too vague (that would be unfair to the deponent) and not too restrictive (that would be unfair to the interrogator) – just right.

Falchenberg v. N.Y. State Dept. of Educ., 642 F. Supp. 2d 156, 164 (S.D.N.Y. 2008), *aff'd*, 338 Fed. Appx. 11 (2d Cir. 2009).

[23] *Alexander v. FBI*, 188 F.R.D. 111, 114 (D. D.C. 1998).

[24] *Id.* at 121.

[25] *Prokosch v. Catalina Lighting, Inc*., 193 F.R.D. at 639.

[26] *See McBride v. Medicalodges, Inc.*, 250 F.R.D. 581, 584 (D. Kan. 2008); *EEOC v. Thorman & Wright Corp*., 243 F.R.D. 421, 426 (D. Kan. 2007); *Sprint Communications v. TheGlobe.Com, Inc.*, 236 F.R.D. 524, 528 (D. Kan. 2006). *But see Espy v. Mformation Technologies*, No. 08-2211-EFM-DWB, 2010 WL 1488555, at *2 (D. Kan. 2010) (questioning whether such an articulation represented a deviation from the "reasonable" particularity specified in the Rule itself).

It should be noted that moderation is not necessarily required in the number of 30(b)(6) topics that can be designated; unlike the rule governing interrogatories, there is no limit on the number of topics that can be included in the 30(b)(6) notice.[27] In *Heartland Surgical Specialty Hosp. v. Midwest Division*, *Inc.*, for example, the Kansas District Court sustained a topic list that contained 55 separate topics.[28] In *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, *supra*, the Southern District of Florida approved 47 topics.[29] And in *Banks v. Office of the Senate Sergeant-At-Arms*, the D.C. District Court approved a notice with 35 topics (although it found some of those topics to be flawed because they were intrinsically overbroad).[30]

C. The organization's obligation to be prepared

Turning next to the organization's obligation to prepare for a 30(b)(6) deposition, the first job is to designate a suitable representative to testify as a witness for the organization. There is some value in being able to self-designate. Remember that with 30(b)(1) depositions, the deponent is named by the interrogating party. With 30(b)(6) depositions, it is up to the organization being deposed to designate the witness(es) necessary to provide the requested information. However, the organization must be prepared to call as many witnesses as necessary. So, for example, in another opinion issued in *Alexander v. FBI*, *supra*, the court held that "the designating party is under the duty to designate more than one deponent if it would be necessary to do so in order to respond to the relevant areas of inquiry that are specified with reasonable particularity by the [requesting parties]."[31] Furthermore, a defendant cannot attempt to limit the number of witnesses deposed on the basis that it had the right to decide how many such witnesses to produce.[32] The number of witnesses that must be produced is the number of

[27] *Compare* FED. R. CIV. P. 30(b)(6) (no limit on topics) *with* FED. R. CIV. P. 33(a)(1) ("Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts.").
[28] *Heartland Surgical Specialty Hosp. v. Midwest Division*, *Inc.*, No. 05-2164-MLB-DWD, 2007 WL 1054279, at *1 (D. Kan. Apr. 9, 2007).
[29] *QBE Ins. Corp.*, 277 F.R.D. at 681.
[30] *Banks v. Office of the Senate Sergeant-At-Arms*, 222 F.R.D. 7, 18 (D.D.C. 2004).
[31] *Alexander v. FBI*, 186 F.R.D. 137, 141 (D. D.C. 1998).
[32] *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 338, 343 (N.D. Ill. 1995).

witnesses it takes to provide the information sought by the interrogating party, no more and no less.

As a threshold matter, the burden is on the organization being deposed to make a good faith effort to identify potential witnesses with knowledge of the topics that will be the subject of the deposition.[33] At the same time, the organization has an affirmative duty to prepare such witnesses.[34] This duty to prepare "goes beyond matters personally known to designee . . . if necessary the deponent must use documents, past employees or other sources to obtain responsive information."[35] It encompasses whatever information is reasonably at the disposal of the organization.

To reiterate, it is of no moment that the designee does not have personal knowledge of the topic at hand. Rather, when a witness is designated under Fed. R. Civ. P. 30(b)(6), it "authorize[s] him to testify not only to matters within his personal knowledge but also to 'matters known or reasonably available to the organization.' . . . Thus, [the witness] [i]s free to testify to matters outside his personal knowledge as long as they [a]re within the corporate rubric."[36] Consequently, the interrogating party cannot object to a designee if that witness lacks personal knowledge; but, by the same token, the designating party[37] cannot claim that it is unable to produce a witness because none of its employees has personal knowledge.

As the Rule plainly states, the organization being deposed must make sure that its designee is appropriately knowledgeable. That means the witness may have to be educated – to the extent the information to be provided to the designee is "known or reasonably available."[38] It should

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[33] *See, e.g., Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kan. 1999).
[34] *Id*.
[35] *Harris v. New Jersey*, 259 F.R.D. 89, 92 (D.N.J. 2007).
[36] *PPM Finance, Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894 (7th Cir. 2004) (internal citation omitted); *cf. Carriage Hills Condo., Inc. v. JBH Roofing & Constructors, Inc.*, 109 So. 3d 329, 332 (Fla. Dist. Ct. App. 2013), *review dismissed*, SC13-809, 2013 WL 2157852 (Fla. May 17, 2013), *reh'g denied* (Nov. 7, 2013).
[37] That is, at least as to party 30(b)(6) witnesses; *see infra,* pp. 12-14, regarding the discussion of the interplay between FED. R. CIV. P. 30(b)(6) and FED. R. CIV. P. 45.
[38] *See Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253 (2d Cir. 1999); *EEOC v. Thorman & Wright Corp.*, 243 F.R.D. at 425 (quoting from FED. R. CIV. P. 30(b)(6)); *Quantachrome Corp. v. Micrometrics*

come as no surprise that this issue has generated considerable litigation and decisional law, since what is "reasonably known" to the organization can be, and often is, a hotly contested issue. In some cases, the lack of preparation is obvious, as in *Starlight International, supra*, where certain defendants failed to make any good faith effort to produce 30(b)(6) designees who were educated as to the subject matter at hand.[39] Nor can a witness who simply reads from an outline consider himself "prepared" within the meaning of the Rule.[40] In other cases, however, the question is much closer and turns on issues such as the availability of documents, other employees, former employees, and other sources of information that the organization can marshal and deliver to the designee: for example, the witness must review outside documents reasonably available to the company.[41] That might very well include prior deposition testimony, documents and exhibits.[42]

One additional point bears mention: the extent to which a responding organization must prepare its witnesses will depend on whether or not the organization is a party to the action. As the court observed in *Wultz v. Bank of China*, a 30(b)(6) deposition notice served on a nonparty must comply with the overarching and overriding requirements of Fed. R. Civ. P. 45, which in all cases governs nonparty discovery.[43] Accordingly, the *Wultz* court held, a nonparty 30(b)(6) target need not take any steps that would not be required by Rule 45. So, for example, the organization would not be required to designate a witness located beyond the 100-mile territorial boundary established by Rule 45.[44] And, by extension, held the court, if the 30(b)(6) subpoena called for testimony on topics that only employees located outside the 100-mile marker could

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Instrument Corp., 189 F.R.D. 697, 699 (S.D. Fla. 1999); *Booker v. Mass. Dept. of Public Health*, 246 F.R.D. 387, 389 (D. Mass. 2007).

[39] *Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. at 635–38.

[40] *In re Neurontin Antitrust Litig.*, No. 02-1390, 2011 WL 2357793, at *2–3 (D.N.J. Jun. 9, 2011).

[41] *Fabiano, Calzaturficio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 38–39 (D. Mass. 2001).

[42] *United States v. Taylor*, 166 F.R.D. at 362.

[43] *Wultz v. Bank of China*, 293 F.R.D. 677, 680 (S.D.N.Y. 2013).

[44] *Id.* at 679–80.

handle, that subpoena would be unenforceable because of the absolute territorial limits imposed by Rule 45.[45]

But what about Rule 30(b)(6)'s requirement that an organization educate its employees about the matters known to the nonresident employees? Isn't an organization that receives a 30(b)(6) notice under such circumstances in the same position as an organization that receives a 30(b)(6) notice and the only knowledgeable employee has left the organization? In the latter situation, the organization is required to educate a currently employed employee to testify on the subject topic. Wouldn't the same logic require the organization to prepare a witness where the only knowledgeable employees are located outside the 100-mile restriction?

That was precisely the argument the Bank of China made in *Wultz*, *supra*, an argument that was soundly rejected by Magistrate Judge Gorenstein, who wrote:

> Certainly, Rule 30(b)(6) imposes upon subpoenaed corporations the duty to make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought . . . and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed . . . . However, in the case of nonparties subpoenaed pursuant to Rule 45, a corporation's duty to respond to a subpoena is subject to the requirements of Rules 45(c)(1) and 45(c)(3)(A)(iv), which mandate that a court must quash a subpoena that subjects a person to "undue burden."[46]

In short, at least to some courts, there is a special "nonparty" blanket of "undue burden protection" that insulates nonparty 30(b)(6) organizations from the full extent of the 30(b)(6) preparation rule.

There has been some effort to codify greater protections for the nonparty 30(b)(6) deponent. In 2013 the Committee on Federal Courts of the Association of the Bar of the City of New York proposed an amendment to Rule 45 "to provide nonparties who are served with Rule 30(b)(6) deposition subpoenas with greater protections against undue burdens."[47]

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[45] *Id.* at 360.
[46] *Id.* (internal citations omitted).
[47] *See* Letter from the Committee on Federal Courts of the Association of the Bar of the City of New York to the Secretary of the Committee on Rules of Practice and Procedure, Apr. 3, 2013, *available at* http://www2.nycbar.org/pdf/report/uploads/20072455-

Neither the *Wultz* court nor the Association of the Bar of the City of New York has articulated a clear reason why the burdens imposed by Rule 30(b)(6) on nonparties are different or greater than the burdens that the Rule imposes on party deponents. It would seem that the rationale behind the desire to shield nonparties from the high-cost, high-stakes world of the 30(b)(6) deposition may simply be because it seems, at a gut level, unfair to impose the costs and stakes of litigation upon organizations that have no stake in the outcome of the case.

D. 30(b)(6) motion practice

Although the parameters governing the 30(b)(6) deposition are unique, the procedural vehicles for blocking or inducing its use are not. A party can make a motion to compel pursuant to Fed. R. Civ. P. 37(a)(3), and an organization that has been noticed for a deposition can seek a protective order pursuant to Fed. R. Civ. P. 26(c).[48] The protective order motion is an especially important device in the 30(b)(6) context because of the impact of organizational testimony, which arguably is more powerful than individual testimony. Generally speaking, if the organization being deposed does not take the proverbial bull by the horns and make such a motion in advance of the date for the deposition, it cannot, at least as a technical matter, refuse to comply with the 30(b)(6) deposition notice.[49] This is of particular concern in the 30(b)(6)

LetteronProposedAmendmenttoRule45reSubpoenasforRule30b6Depos.pdf (hereinafter, "ABCNY Letter").

[48] *See, e.g.*, *Interstate Narrow Fabrics, Inc. v. Century USA, Inc.*, 218 F.R.D. 455, 462 (M.D.N.C. 2003) (discussing a motion to compel); *EEOC v. Thurston Motor Lines, Inc.*, 124 F.R.D. 110, 114–15 (M.D.N.C. 1989) (discussing a protective order).

[49] *See, e.g., Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964), holding that "Rule 30(b) places the burden on the proposed deponent to get an order, not just to make a motion. And if there is not time to have his motion heard, the least that he can be expected to do is to get an order postponing the time of the deposition until his motion can be heard . . . ." *See also Fernandez v. Penske Truck Leasing Co*., 00295-JCM-GWF, 2013 WL 438669, at *2 (D. Nev. Feb. 1, 2013) ("Absent a protective order or an order staying the deposition, the party, including its officers or Rule 30(b)(6) deponents, is required to appear for a *properly noticed* deposition.") (emphasis in original). Of course, if a district court (such as the District Court of Utah) has a local rule automatically staying a deposition pending a motion for a protective order, the making of the motion will stay the obligation to appear. *See, e.g., Petersen v. DaimlerChrysler Corp*., No. 06-cv-0108, 2007 WL 2391151, at *5 (D. Utah Aug. 17, 2007) (staying a deposition under District of Utah Local Rule 26-2). As experienced counsel know, some courts will be more forgiving than others when it comes time to considering sanctions for the deliberate refusal to attend a deposition without an order suspending or canceling that deposition. In *Fernandez*, for example, the court excused the nonappearance on the ground that the notice was not proper and the deponent sent an

context, given the amount of preparation the deponent must do in advance of the deposition. In that regard, the Committee on Federal Courts of the Association of the Bar of the City of New York's proposed amendment to Rule 45, discussed *supra*, suggested a remedy.[50] Citing the "greater burdens of compliance" imposed by a 30(b)(6) deposition, the Committee proposed a minimum notice period for 30(b)(6) depositions of nonparties, and an automatic stay of such depositions upon the filing of a motion for protective order.[51] As of the writing of the article, the rules remain unchanged. Therefore, organizations that have received deposition notices need to consider carefully the consequences of not appearing for a 30(b)(6) deposition absent an order suspending or cancelling the deposition.

E. The consequences of providing (and failing to provide) 30(b)(6) testimony

As already mentioned, there are important, sometimes case-altering, consequences (what Vincent Gambini in that favorite courtroom comedy movie *My Cousin Vinny* called "the case cracker") to the testimony proffered by 30(b)(6) designees.

First, 30(b)(6) answers are generally deemed to be binding upon and attributed to the organization,[52] although most (but not all) courts will treat the statements not as judicial admissions, but rather deposition testimony (like any other deposition testimony) theoretically (but not practically) subject to contradiction on summary judgment or at trial.[53] In this sense,

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objection letter. *See* 2013 WL 438669, at *2. The basic rule to bear in mind, though, is that it is up to the deponent to move for a protective order.

[50] *See* ABCNY Letter.

[51] *Id*.

[52] *See, e.g., Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 993 (E.D. La. 2000), *aff'd*, 31 Fed. Appx. 151 (5th Cir. 2001) ("The designee testifies on behalf of the corporation and holds it accountable accordingly."); *Rainey v. American Forest & Paper Assoc*., 26 F. Supp. 2d 82, 94–95 (D.D.C. 1998) (holding that 30(b)(6) testimony is binding, and no contradiction may subsequently be introduced).

[53] *See, e.g., Indus. Hard Chrome, Ltd. v. Hetran, Inc.,* 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000) ("The testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes."); *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989); *W.R. Grace & Co. v. Viskase Corp.*, No. 90-C-5383, 1991 WL 211647, at *2 (N.D. Ill., Oct. 15, 1991); *but see Ierardi v. Lorillard*, No. 90–7049, 1991 WL 158911, at *3 (E.D. Pa. Aug. 13, 1991); *United States v. Taylor*, 166 F.R.D. at 362. Falling on the side of not permitting contradiction, the courts in *Hyde*, *supra*, and *Rainey, supra*, refused to allow a party to contradict its 30(b)(6) testimony with a subsequent affidavit that was presented as a more fulsome explanation of the issue; those courts held that it was incumbent upon an organizational party being deposed to have prepared its witness

and in most cases, 30(b)(6) testimony has remarkable adhesive qualities: if the 30(b)(6) witness makes damaging statements or gives bad testimony, the organization that proffered the witness likely is going to be stuck with it.[54] The party might be able to explain away the testimony, but the testimony cannot be rejected by the organization.

Second, the consequences of unresponsiveness are important because sanctions under Fed. R. Civ. P. 37(b)(2)(A) are a real possibility. Thus the failure to produce a knowledgeable 30(b)(6) designee has been treated as a failure to appear for the deposition. In *Starlight International*, *supra*, the court imposed sanctions because the witness failed to make any inquiries about the topics of the deposition and made no effort to review any relevant files other than those provided by counsel.[55] Failure to comply with a proper 30(b)(6) notice may also result in the matters covered by the order being taken as established;[56] an order prohibiting the disobedient party from supporting or opposing designated claims or defenses;[57] an order precluding the disobedient party from introducing evidence on that topic;[58] or in the most extreme cases, dismissal of the action or a default judgment entry against the recalcitrant party.[59] A court might even consider a failure to comply with Fed. R. Civ. P. 30(b)(6) to be a contempt of court.[60]

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accordingly. Needless to say, counsel faced with this issue must carefully review the law in the jurisdiction where the case is pending.

[54] *See, e.g.*, *Ierardi v. Lorillard*, 1991 WL 158911, at *3.

[55] *Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. at 635–38. *See also Resolution Trust Co. v. Southern Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993) (holding that if a designee "is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the [designee's] appearance is, for all practical purposes, no appearance at all"); *United States v. Taylor*, 166 F.R.D. at 363.

[56] *See, e.g., Kyoei Fire & Marine Ins. Co., Ltd. v. M/V Maritime Antalya*, 248 F.R.D. 126, 153 (S.D.N.Y. 2007).

[57] *See, e.g.*, *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 380 (5th Cir. 1996) (refusing to allow party to introduce designated matters into evidence).

[58] *See, e.g., Ierardi v. Lorillard*, 1991 WL 158911, at *3 ("If the designee testifies that [the corporation] does not know the answer to plaintiffs' questions, [the corporation] will not be allowed effectively to change its answer by introducing evidence during trial."); *see also United States v. Taylor*, 166 F.R.D. at 362.

[59] *See, e.g., Banco Del Atlantico, S.A. v. Woods Industries, Inc.*, 519 F.3d 350 (7th Cir. 2008) (in which over a decade of deposition "fiascos," during which plaintiffs failed to produce prepared deponents and instructed witnesses to be unavailable for deposition, led to the dismissal of the case); *see also Commodity Futures Trading Com'n v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 770–71 (9th Cir. 1995) (upholding an entry of summary judgment against a party that repeatedly failed to designate a witness).

[60] *See, e.g., Pioneer Drive, LLC v. Nissan Diesel America, Inc.*, 262 F.R.D. 552, 560–61 (D. Mont. 2009).

The most common form of a response to a violation of Fed. R. Civ. P. 30(b)(6) is a sanctions order under Fed. R. Civ. P. 11 and/or 37(d). That being said, courts generally will take into account the good faith of the organization when considering sanctions. For example, in *Banks v. Office of the Senate Sergeant-At-Arms*, the court chose not to issue a preclusion order at trial, since the significance of the subject evidence, which covered "every issue in the lawsuit," would have made its preclusion tantamount to a default judgment, an excessive sanction.[61] Similarly, the court in *EEOC v. Lockheed Martin* observed that "the harshest sanctions are inappropriate if the failure to comply was due to a party's inability to comply or to circumstances beyond the party's control," as opposed to a refusal to comply.[62] In these cases, courts have other tools at their disposal to correct noncompliance. The court can order the organization being deposed to redesignate a witness.[63] Or the court might decide that on the whole the witness has met the mark, and order the deposing party to submit any remaining questions in the form of interrogatories or as a request for document production.[64]

As in most matters involving the question of discovery compliance *vel non*, it is critical in the 30(b)(6) context that counsel on both sides of a motion to compel (or, for that matter, for a protective order) consider not only the merits of their respective positions but also the impact of local rules, rules of practice of the presiding judge, and the predilections and leanings of the judge who will be deciding the motion. That takes us to our next discussion: the ways in which 30(b)(6) depositions are being used in practice or, as one might say, in the field.

II

[61] *See Banks v. Office of the Senate Sergeant-At-Arms*, 222 F.R.D. at 19.
[62] *EEOC v. Lockheed Martin,* CIV. 05-00479 SPK-LEK, 2007 WL 1521252, at *9 (D. Haw. May 22, 2007) *supplemented*, 05-00496 SPK-LEK, 2007 WL 1576467 (D. Haw. May 29, 2007).
[63] *See* discussion in *Dey, L.P. v. Eon Labs, Inc.*, No. SACV 04-00243 CJC (FMOx), 2005 WL 3578120, at *6 (C.D. Cal. Dec. 22, 2005).
[64] *Alexander v. FBI*, 186 F.R.D. at 142–43; *see also United States v. Massachusetts Indus. Fin. Agency*, 162 F.R.D. 410, 412 (D. Mass. 1995) (stating that after a Rule 30(b)(6) deposition and five Rule 30(b)(1) depositions rendered contradictory and incomplete testimony, and it became clear that an attempt to redesignate a witness would be "futile," the proper course was to require the defendant "to produce more documents and clarify its position in response to a number of interrogatories").

NOTES FROM THE FIELD: HOW TO USE 30(b)(6) DEPOSITIONS MORE EFFECTIVELY AND ECONOMICALLY

Of course, the key to conducting and defending 30(b)(6) depositions effectively and economically is knowing the boundaries set by the Rule. That was the focus of Part I. Part II covers ways in which litigants have used and can use the 30(b)(6) deposition to achieve their litigation goals.

A. Frame an effective notice

The 30(b)(6) deposition begins with the interrogating party formulating the notice, continues with the deposition itself, and ends with the use of the testimony on a dispositive motion or at trial. The notice is critical. If that is not handled properly, the effectiveness of the entire tool is diminished. The practitioner should be careful to ensure that the organization is properly named (Is the corporate parent's deposition sought or that of a subsidiary? Or perhaps a holding company?), that the deposition is held in a helpful sequence (consider whether the 30(b)(6) deposition is better taken before or after that of a 30(b)(1) witness whose individual knowledge is sought), and that the topic list is appropriately broad (or narrow, depending on the aim of the deposition).

Well-crafted deposition notices, with thoughtful topic lists, are an integral part of the litigant's discovery plan. It is worth the time (and the client's money) to prepare the notice so that it meets the litigator's objectives.

B. Consider remote depositions

Occasionally, parties will want to take a deposition, whether of the 30(b)(1) or 30(b)(6) variety, in a location other than where the witness is located. In such cases, where the parties agree or the court directs, the deposition can be taken remotely, either by audio or audiovisual means.[65]

[65] *See* FED. R. CIV. P. 30(b)(4); *see also Estate of Gerasimenko v. Cape Wind Trading Co.*, 272 F.R.D. 385, 390 (S.D.N.Y. 2011), authorizing a telephonic 30(b)(6) deposition; *RP Family, Inc. v. Commonwealth*

In the ordinary application for such relief, the issue revolves around the capability or wherewithal of one of the parties to travel to the location where the witness is located or where the case is pending. Either the deponent cannot travel to where the deposition is taking place (perhaps because of a physical disability or some other circumstance) or the interrogating lawyer cannot travel to where the witness is located. But in the 30(b)(6) situation, there is another consideration: whether an interrogating lawyer who wishes to depose an organization located beyond the 100-mile radius set by Fed. R. Civ. P. 45 is using the procedure of the remote deposition to evade Rule 45's proscription against such depositions.[66]

This was precisely the concern articulated in *RP Family, Inc. v. Commonwealth Land Title Ins. Co.,* where the court recognized that some might try to evade the 100-mile requirement of Rule 45 by taking a deposition of the distant designee remotely.[67] In that case, the court found no evidence of gamesmanship.[68] But litigants and courts should be attuned to this possibility in other cases.

C. Think through the pros and cons of the scope of the 30(b)(6) deposition

Counsel taking a 30(b)(6) deposition must carefully consider the breadth of topics to be covered by the deposition. In some cases, it might actually be to the deposing counsel's benefit to limit the number of topics to be covered at the deposition. For one thing, a concise topic list increases the likelihood that the 30(b)(6) designee will be fully prepared to testify. It also decreases the likelihood that a reviewing court will be inclined to prune the topic list or perhaps reject it outright.

On the other hand, there are considerable advantages to a more fulsome list. First, obviously, a broad list captures more information than a narrow list. Second, depending on the jurisdiction,

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Land Title Ins. Co., Nos. 10 CV 1149(DLI)(CLP), 10 CV 1727(DLI)(CLP), 2011 WL 6020154 (E.D.N.Y. Nov. 30, 2011) (same).

[66] *See supra*, pp. 13–14.

[67] *RP Family, Inc. v. Commonwealth Land Title Ins. Co.,* 2011 WL 6020154, at *4.

[68] *Id.*

the court might not permit any questioning that falls or is deemed to fall outside the topic list, or might treat such questions and answers as outside the purview of 30(b)(6) and simply the testimony of a 30(b)(1) witness.[69] A broad list makes it more likely that a line of questioning will be sustained as within that topic list. Third, a broad list can effectively give an interrogating party multiple opportunities to approach an issue from multiple angles and thus potentially create internal inconsistencies that can be used for impeachment at trial. Fourth, a broad list takes advantage of the rule, followed by most (but not all) courts, that opinions and positions are fair game on a 30(b)(6) deposition.[70] Such "contention depositions" can prove to be valuable in focusing on what is really important and spending less time and money on issues that are not central to the other side's case.

D. Carefully designate the witness – he or she *is* the organization

The designated representative has an important job. That person is speaking for the organization and therefore must be able to handle himself or herself in a deposition setting. The designating party must consider the witness's poise and demeanor, existing knowledge, teachability as to matters outside his or her personal knowledge, and responsibilities within the organization. As to this last point, the defending counsel must not forget the amount of preparation required of the 30(b)(6) witness and consider whether the senior executive being offered will really have the time to prepare the way a middle-management employee might. Moreover, since the more senior executive has probably discussed the case with counsel, that witness is more likely to be privy to communications and information better not disclosed. The defending counsel can prepare a lower-level designee with sufficient information on potential contention issues to be compliant with the Rule, while remaining in control of the information and the ability to limit it appropriately and safely.

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[69] *See supra*, fn. 22.

[70] *Compare United States v. Taylor*, 166 F.R.D. at 356 (holding that 30(b)(6) permits questioning on "not only facts but subjective beliefs and opinions of the corporation"), and *Radian Asset Assurance, Inc. v. Coll. of the Christian Bros. of N.M.*, 273 F.R.D. 689, 691–92 (D.N.M. 2011), both of which favor "contention depositions," *with SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (rejecting 30(b)(6) contention topics on the ground that they are actually invasive of the attorney work product doctrine).

There is little advantage to be gained by producing more than the minimum number of designees necessary to meet the organization's 30(b)(6) obligations. Moreover, remember that the designated witness need not be the most knowledgeable person in the organization – all the Rule requires is sufficient preparation.[71] This means that, if the most knowledgeable witness is not the best witness (or the organization wants to keep the most knowledgeable witness under wraps), that person need not be designated for 30(b)(6) purposes.

Ultimately, in most cases one witness, someone with a good handle on the topic list, is optimal. What the witness does not know can be taught, and if he or she is the only witness, there is little opportunity for internal inconsistencies. Ironically, with a broad topic list, the advantage of one witness is even greater, as the combination of a broad list and multiple witnesses can be a recipe for inconsistencies. Along the same lines, counsel defending the deposition should be careful either to object to questions that go beyond the scope or make clear that the witness's answers are offered in his or her individual capacity and not for the organization.

E. Be creative – propose a deposition by committee

In May 2004, attorneys Jerold S. Solovy and Robert Byman of Jenner & Block wrote an essay suggesting that in some cases it might make sense for 30(b)(6) depositions to take place "by committee."[72] That is, the parties would agree that instead of taking serial depositions of designated witnesses, those designated witnesses would appear in one room at one time and answer the questions put to them by the interrogator.[73] This process, which we understand a number of litigators have employed, is not required by the Federal Rules and thus is dependent upon the agreement of counsel for the parties. It is similar in concept to the "hot-tubbing" of

[71] *See Rodriguez v. Pataki,* 293 F. Supp. 2d 305, 311 (S.D.N.Y. 2003).
[72] Jerold S. Solovy and Robert L. Byman, *Deposition by Committee*, THE NATIONAL LAW JOURNAL, May 17, 2004, *available at* http://jenner.com/system/assets/assets/4557/original/05_17_2004_Deposition_By_Committee.pdf?1320177635.
[73] *Id.*

expert witnesses, where all of the experts in a case are thrown into a room and allowed to engage in a veritable battle royale over the technical issues at hand.[74]

The idea, basically, is that in order to cut to the chase on any set of 30(b)(6) topics, all possible organizational witnesses are assembled in one place and questioned, perhaps with appropriate adjustments to the time allotments under the Federal Rules.[75] The advantage of this approach, from the perspective of the taking attorney, is that it is much easier to eliminate any residual "bandying" that might otherwise take place when deposing multiple witnesses one after the other. If one witness does not know an answer, the interrogator can go down the line of designated witnesses until the one with the answer offers it. On the defending side, that process might actually make sense because the possibility of conflicting testimony is greatly reduced: since the witnesses are not effectively sequestered, as they are under ordinary circumstances, they can testify with the aid of knowing what his or her counterparts have said. Deposition by committee also offers some attraction to the budget-conscious general counsel, since the entire deposition is completed in one session, rather than multiple sessions.

Of course, this process might not fit with the tactical desires of litigation counsel on both sides who might wish to take advantage of the nature of serial depositions – such counsel might believe that their clients would be better off bearing, and imposing on the other side, the

[74] For an excellent discussion of the Australian method of hot-tubbing experts, *see* Megan A. Yarnall, *Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary*? 88 OREGON L. REV. 311 (2009).

[75] *See* FED. R. CIV. P. 30(d)(1). The application of the seven-hour time limit to Rule 30(b)(6) has generated a fair amount of motion practice. One issue is whether an organization that produces multiple witnesses subjects each witness to a seven-hour session. As the court observed in *Sabre v. First Dominion Capital, LLC*, the 2000 Advisory Committee Notes expressly provide that ""[f]or purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition." *Sabre v. First Dominion Capital, LLC*, No. 01CIV2145BSJHBP, 2001 WL 1590544, at *1 (S.D.N.Y. Dec. 12, 2001) (quoting FED. R. CIV. P. 30(d)(1) advisory committee's notes, subdivision (d) (2000)). The tougher question is how to calculate the seven-hour limit for the witness who is asked about, and gives answers to, questions that go beyond the scope of the topic list. Assuming the court has treated such extra-topical questions as individual and not organizational questions, it is likely that the court will treat the seven-hour clock as running separately as to each part of the deposition. *See, e.g., Sabre*, 2001 WL 1590544 at *1. But bear in mind the *Sabre* court's admonition that the interrogating party does not in all cases have "*carte blanche* to depose an individual for seven hours as an individual and seven hours as a 30(b)(6) witness." *Id.* at *2. Especially if the organization being deposed is a close corporation, a court might very well be inclined to issue a protective order shielding the witness from a full fourteen hours of questioning.

expense and burden of the ordinary 30(b)(6) deposition. For them, this technique would be anathema. For those looking for a creative path to effectiveness and efficiency, it should be considered.

F. Prepare the witness with care

The sloppily prepared witness, whether the result of less-than-ideal lawyering or a lazy witness, is a litigation nightmare. Remember: The witness is the organization, and the failure to be able to handle a question about a topic that was designated by the interrogator has severe consequences. Again, it is worth the time and expense to make sure the preparation is handled correctly.

A few pointers:

- **Take the time to prepare the witness**. Depending on how busy the witness is, make sure to build in adequate time to prepare. That means pushing back against a deposition notice that gives insufficient time to prepare, making sure the witness's vacation schedule is not a mystery, and checking in with the witness during his preparation. Better to be a nudge than suffer the witness's poor performance.
- **Make sure to control what the witness reviews**. The interrogating party may seek to discover what the witness reviewed to prepare for the deposition. Some courts will allow that discovery, some will not, and some will try to fashion a compromise. A witness who happens upon a privileged document or memorandum and testifies that it was part of his preparation is usually part of the proverbial worst-case scenario. The easiest way to make sure that there are no such "worst-case scenarios" is to limit the witness's review to documents and other materials preselected by the lawyer. If there is a particularly sensitive document, consider leaving it out of the binder presented to the witness and reviewing that with the witness orally.

- **Review areas beyond the topic list that are likely subjects of examination.** The well-prepared witness will be comfortable with questions that concern matters that go beyond the topic list. The defending counsel might be able to head off such questions by making timely objections, but with no guarantee that a court will sustain the objection and shield the witness from such questions, it makes sense to prepare the witness for questions that are part of the case but not on the list. Put another way, instead of gloating about the interrogating party's oversight in the topic list, assume the interrogator will get around to that topic and prepare the witness accordingly.
- **Don't forget ESI**. Remember that the existence, location, and preservation of electronically stored information is all fair game for a 30(b)(6) deposition. Make sure the witness is capable of answering questions that are likely prepared by the interrogating party's litigation geek squad. Consider using your own information technology experts to help prepare the witness.
- **Don't take the witness's preparation for granted**. Be cynical. Be paranoid. Assume your witness has not done his or her homework and take appropriate remedial action. If your witness surprises you with an Oscar-worthy performance, so much the better. Just make sure the witness can handle the questions, since a less-than-ideal performance will always be the preparing lawyer's fault.

G. Budget honestly

Whether you are handling a case on a contingency fee and thus financially responsible to your partners (or the bank), or on an hourly basis, and thus responsible for explaining your bills to your client, or working on some other alternative fee basis, budget honestly. If you are billing your client on an hourly basis, don't surprise the general counsel with a bill for preparing for 30(b)(6) depositions that swallows up the entire discovery budget. Prepare the general counsel by advising the importance of the 30(b)(6) deposition, the consequences of a 30(b)(6)

deposition that goes south, and the need for thorough preparation, including an education on topics that might not be familiar to the witness. As we all know, the reality is that litigation is rarely inexpensive, discovery is usually the most expensive part of any litigation, and 30(b)(6) depositions, in particular, demand serious attention and resources. You will be doing yourself and your client a service by making sure your budget reflects that reality.