Preparing Remote Deposition Defenses For Corporate Entities

By **Kathleen Carlson, Elizabeth Austin and Emily Scholtes** (October 19, 2021)

Kathleen Carlson

Elizabeth Austin

Emily Scholtes

As discovery schedules currently being set for the months and years ahead amply demonstrate, remote depositions are here for the foreseeable future.

Remote depositions have their benefits, including reduced cost for the client, less travel, and increased flexibility and convenience. As practitioners know well, however, they also present unique challenges.

On the defense side of the table, remote depositions can pose particular difficulties when it comes to preparing witnesses and strategizing with clients remotely, because the limitations of teleconferencing often result in remote preparation sessions that are shorter and more tightly focused than was the prepandemic norm.

Shorter preparation sessions are beneficial in that they save money and employee time, but they require outside counsel to be fully prepared proactively to anticipate and address any and all potential issues that may arise, as a more regimented schedule affords less time for clients and witnesses to process information and pose questions or concerns to counsel.

It can also be difficult to establish via remote preparation sessions the level of rapport with witnesses that is often beneficial when defending depositions.

When it comes to defending remote Rule 30(b)(6) depositions, remote preparation can be a particular challenge, because it is crucial that clients and witnesses understand the unique features of Rule 30(b)(6) depositions and the reasons why they necessitate strategies that may differ from those typical for fact witness depositions.

In many cases, those strategies, in turn, require additional time from counsel, client and the witness, as well as conversations with far-flung employees across an organization, all of which have become more challenging in this remote era.

The goal of this article is to provide a guide for conversations regarding a few of the particular challenges of Rule 30(b)(6) depositions and potential solutions so that even in the remote context, all parties are better prepared for what lies ahead when a Rule 30(b)(6) notice comes in.

Rule 30(b)(6) Depositions

Rule 30(b)(6) allows parties to direct a deposition notice or subpoena to an organization, including a public or private corporation, partnership, association, governmental agency, or other entity.

At the core of a Rule 30(b)(6) deposition is the organization's designation of a witness who

can testify to matters "known or reasonably available to the organization," including matters that extend beyond the individual witness's personal knowledge.[1] A responding organization has an affirmative duty to educate and prepare its witness to testify to the "organization's position, knowledge, subjective beliefs, and opinions on identified topics."[2]

Unique Challenges in Preparation

Granularity and Breadth of Testimony

Rule 30(b)(6) requires that the noticing party's deposition notice state with reasonable particularity the topics the noticing party intends to address during the deposition. Once served with proper notice, the noticed party — the organization — must adequately prepare a 30(b)(6) witness regarding each of the topics in the notice such that he or she can answer fully, completely and unevasively.[3]

Courts have required such testimony even where the topics are broad, and where the topics are not within the witness's personal knowledge or the knowledge of any one individual at the organization.

Courts also have refused in many cases to impose limits on the granularity or specificity of facts permitted to be sought in a Rule 30(b)(6) deposition, so long as the facts are covered by the noticed topics.[4] And courts similarly have refused in some instances to impose prescribed limits on how far and wide the witness must search at the organization in order to educate him or herself regarding the facts at issue.[5]

For a long-ranging issue at a larger organization, witnesses may be required to gather facts from dozens of employees and from corporate records, including regarding details of meetings or other events occurring many years in the past.

Courts frequently have held that, even with regard to long-past events, simply producing relevant documents and preparing a Rule 30(b)(6) witness to testify regarding the maintenance and collection of documents is not sufficient where consulting with individuals regarding past events would result in the ability to testify more completely.[6]

Topics in a Rule 30(b)(6) notice must be stated with painstaking specificity,[7] and one tactic counsel may take when faced with potentially onerous preparation is to attempt to meet and confer with the noticing party's counsel as required under the 2020 amendment to Rule 30(b)(6) to attempt to narrow the topics, or to seek more specificity in order to focus preparation efforts.

Assuming the noticing party is not amenable to modification of the topics, counsel may consider seeking a protective order in this regard. Courts in some cases have been sympathetic to such requests, particularly where the topics are potentially unlimited — for instance, where topics include phrases like "including but not limited to."[8]

In other cases, however, courts have been less sympathetic to such requests, and have refused to narrow 30(b)(6) topics, even if they necessitate extremely laborious preparation.[9]

The typical consequence of inadequate preparation of witnesses with respect to topics noticed for a Rule 30(b)(6) deposition is the imposition of sanctions by the court.[10]

However, where the list of topics is broad and preparation is laborious, courts frequently will

decline to impose sanctions on a corporation who made a good faith effort to prepare its designated witness but that witness, nonetheless, failed to recall certain minutia.[11]

Courts' decisions along these lines provide some reassurance that the amount of preparation required is not unlimited. However, they are not the end of the story. Even if a witness is sufficiently prepared to avoid a sanctions ruling, an answer of "I don't know" to an important question may have an impact on case strategy.

Even a small detail or long-ago issue may be important to the litigation, and counsel should consider whether the organization taking a position of lack of knowledge with respect to these matters could have a negative outcome on the case.

As an example, if the litigation concerned multiple meetings held years in the past, whether a certain matter was discussed at one or all of those meetings could be a crucial fact to the litigation strategy.

But the individuals who attended those meetings may no longer be employees of the organization, or the meetings could have been attended by numerous employees over the years, each of whose knowledge would be required in order to formulate a complete answer in response to a question about the meetings. Under these circumstances, preparing a Rule 30(b)(6) witness could be quite laborious and time-intensive.

Courts have come to differing conclusions on the extent to which an organization that is a party to litigation is bound by an "I don't know" answer at a Rule 30(b)(6) deposition, with the minority holding that the Rule 30(b)(6) deponent's testimony is similar to a judicial admission — conclusively binding and typically incontrovertible thereafter.[12]

In such a court, once a Rule 30(b)(6) witness has testified that he or she does not know a particular fact, contrary testimony from the organization or a fact witness would not be considered by the court unless the organization could "prove that the information was not known or was inaccessible at the time of the deposition,"[13] according to the U.S. District Court for the District of Columbia in Rainey v. American Forest & Paper Association Inc. in 1998.

The majority of courts, on the other hand, hold that the testimony "is binding in the sense that it constitutes the official testimony of the corporation," and that it rises to the level of an evidentiary admission, such that evidence at trial can be presented to explain, contradict or correct a statement made during the deposition.[14]

But even in such a jurisdiction, counsel should consider attempting to prevent "I don't know" answers with respect to critical facts, because even if not a judicial admission, the answer will carry evidentiary weight.

Special Considerations Regarding Hearsay

As discussed above, preparing a Rule 30(b)(6) witness to avoid an "I don't know" response may require educating the witness on matters outside the witness's personal knowledge, which in turn may require collecting knowledge and information from many employees and records of an organization.

While a Rule 30(b)(6) witness is free to testify to matters outside the witness's personal knowledge but reasonably known to the organization in the deposition, if either side's counsel wishes to call that witness to share testimony at trial, that testimony must comply

with the Federal Rules of Evidence, including Rule 801 as it pertains to hearsay.

Courts often treat Rule 30(b)(6) testimony as falling under Rule 801(d)'s exception for party admissions, which means the testimony is not treated as hearsay, even if it is outside the witness's knowledge and would be treated as hearsay coming from a fact witness.[15]

To illustrate, if a fact witness were to testify that a different employee at the organization told the organization's customer a certain fact during a call in which the fact witness did not participate and of which the witness did not have first-hand knowledge, that testimony might be treated as hearsay at trial, depending on whether any other exclusions or exceptions to Rule 801 applied.

If a Rule 30(b)(6) witness offered the same testimony, it would often be treated by courts as a party admission and not hearsay, despite the witness's lack of first-hand knowledge.

If a Rule 30(b)(6) witness is called to testify to crucial facts outside of his or her personal knowledge, counsel should consider confirming that courts in the relevant jurisdiction conform to the general view set out above.

Counsel should additionally be aware that this treatment does not necessarily apply in all scenarios. In particular, some courts have held 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.[16]

Courts — such as the U.S. Court of Appeals for the Fifth Circuit in Brazos River Authority v. GE Ionics Inc. in 2006 — have held that a Section 30(b)(6) deponent can testify as to information that is within the "corporate knowledge of the organization," but it may not, for example, testify as to another party's knowledge.[17]

By way of illustration, information gathered from a former employee may be treated as no longer within the corporate knowledge of the organization, and may be treated as hearsay if offered as part of Rule 30(b)(6) testimony without independent verification.

Testimony on Topics Outside the Rule 30(b)(6) Notice

A final complication of Rule 30(b)(6) depositions is that, while the scope of a 30(b)(6) deposition is governed by the notice, in many jurisdictions questions outside the notice may be fair game as well.

While courts are split on this point, many jurisdictions hold that questions outside the notice will be treated as directed at the deponent as a fact witness, rather than a Rule 30(b)(6) deponent.[18]

In such jurisdictions, counsel are not permitted to instruct a Rule 30(b)(6) witness not to answer when asked a question outside the scope of the notice is asked. Instead, counsel should object to the question and state for the record that the testimony provided by the witness is so provided in the witness's personal capacity as a fact witness, not in representation of — and therefore not binding upon — the organization.[19]

In advance of Rule 30(b)(6) depositions, counsel should confirm the rules in the applicable jurisdiction, and should consider whether also to prepare the Rule 30(b)(6) witness as a fact witness.

Because it may be most efficient to prepare multiple individuals as Rule 30(b)(6) witnesses (e.g., where a disparate set of topics touch upon the personal knowledge of two or more individuals), the preparation of multiple individuals as both fact and Rule 30(b)(6) witnesses may be required.

Preparation of a Rule 30(b)(6) witness to testify in the witness's personal capacity may be a matter of particular salience if the witness does not have first-hand knowledge of the topics in the notice, and is instead collecting information from a multitude of sources.

In such instances, counsel may choose a sophisticated but neutral party, such as one of the organization's attorneys. In such cases, however, counsel should carefully consider how to prepare the witness to answer questions both within the scope of the notice and outside the scope — particularly where the witness's personal knowledge is likely to include matters covered by attorney-client privilege or work-product protections.

Guide for Advance Preparation

In light of the issues discussed above, remote outside counsel should consider making time to discuss the following with their client:

The Topics

When receiving a Rule 30(b)(6) notice, counsel should take time to review the topics with their client and should consider what information must be gathered to respond to the topics, including information that may be difficult to compile but crucial to the case. Counsel should consider whether to make an effort to narrow or focus the topics, through the required meet-and-confer process and ultimately by seeking a protective order.

The Sources of Information

While it can be more difficult with employees scattered in remote locations, counsel and their clients should take time to consider all possible sources of information, and should be prepared to interview employees in addition to gathering records, if necessary.

If information is only in the possession of former employees or available from other sources that a court may treat as outside the company's knowledge, counsel should consider getting this information into the record independently, rather than including it in Rule 30(b)(6) testimony, in order to avoid a potential hearsay exclusion.

Witness Preparation

Counsel should ensure that ample time is devoted to preparing the Rule 30(b)(6) witness or witnesses, even in a remote setting. This may require gathering outside information, sometimes in substantial amounts, particularly where an organization wants to avoid an "I don't know" response with respect to a particular matter.

Counsel may need to spend a significant amount of time with the witness or witnesses to ensure they have absorbed all the information collected, and may consider drafting cheat sheets for the witnesses to bring to the deposition, with the understanding that those documents may be discoverable and not protected by attorney-client privilege.

If the 30(b)(6) preparation is not coextensive with preparation of the witnesses to testify to their personal knowledge, counsel should consider preparing the witnesses in their personal

capacity as well, and should consider preparing the witnesses for how questions in this regard will be handled if they come up at the deposition.

Each of these steps in itself requires additional time from clients and employees, which can be particularly difficult to schedule in a remote setting.

Our hope is that in providing a guide for addressing them, we have at least removed the initial step of raising the issues, with the aim of facilitating the kinds of conversations that may once have occurred over lunch or dinner on a preparation day, and that now must, for better or worse, be fit into a short telephone or videoconference.

Kathleen L. Carlson is a partner, Elizabeth Y. Austin and Emily Scholtes are associates, at Sidley Austin LLP.

Sidley Austin summer associate Emma Silberstein and summer intern Gabriela Perez contributed to this article.

[1] See, e.g., United States v. Taylor, 166 F.R.D. 356, 360 (M.D.N.C. 1996) (quoting Fed. R. Civ. Pro. 30(b)(6)); Brazos River Auth. v. GE Ionics Inc., 469 F.3d 416, 434 (5th Cir. 2006).

[2] In re Neurontin Antitrust Litig., MDL No. 1479, 2011 WL 253434, at *7 (D.N.J. Jan. 25, 2011), aff'd 2011 WL 2357793 (D.N.J. June 9, 2011).

[3] See Wilson v. Lakner, 228 F.R.D. 524, 528 (D. Md. 2005); Briddell v. St. Gobain Abrasives Inc., 233 F.R.D. 57, 60 (D. Mass. 2005) (quoting Mitsui & Co. (U.S.A.) v. Puerto Rico Water Resources Auth., 93 F.R.D. 62, 67 (D.P.R. 1981)).

[4] See generally State Farm Mutual Auto. Ins. Co. v. New Horizont, Inc., 250 F.R.D. 203, 207 (E.D. Pa. 2008); Hooker v. Norfolk Southern Ry. Co., 204 F.R.D. 124, 126 (S.D. Ind. 2001).

[5] Cf. Hooker, 204 F.R.D. at 126.

[6] See Taylor, 166 F.R.D. at 358-61, 67-68 (concluding that the fact that the case involved events which occurred two to three decades prior did not alter the application of Rule 30(b)(6)).

[7] See, e.g., Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 638 (D. Minn. 2000).

[8] See, e.g., Reed v. Bennett, 193 F.R.D. 689, 692 (D. Kan. 2000); Winfield v. City of New York, 2018 WL 840085, at *5 (S.D.N.Y. Feb. 12, 2018).

[9] See, e.g., Taylor, 166 F.R.D. at 360; Tamburri v. SunTrust Mortg. Inc., 2013 WL 1616106, at *3-6 (Apr. 15, 2013).

[10] Taylor, 166 F.R.D. at 361 (noting that the corporation may be subject to sanctions for inadequate preparation of a Rule 30(b)(6) deponent); see also Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co., 251 F.R.D. 534, 542-43 (D. Nev. 2008) (outlining potential sanctions including costs and attorneys' fees as well as monetary sanctions against the non-complying party and its counsel).

[11] See State Farm Mutual, 250 F.R.D. at 216 ("Moreover, certain questions may seek details so minute that a witness could not reasonably be expected to answer them.").

[12] See Rainey v. Am. Forest & Paper Ass'n, Inc., 26 F. Supp. 2d 82, 94 (D.D.C. 1998).

[13] Id.

[14] See, e.g., Monopoly Hotel Grp., LLC v. Hyatt Hotels Corp., 2013 WL 12246988, at *5 (N.D. Ga. June 4, 2013); Snapp v. United Transp. Union, 2018 WL 2168653, at *11-12 (9th Cir. May 11, 2018) (agreeing with the Second, Seventh, Eighth, and Tenth Circuits' views that 30(b)(6) testimony does not have conclusive effect and may be corrected or explained with additional evidence).

[15] See Brazos River Auth., 469 F.3d at 434-35; see also Univ. Healthsystem Consortium v. UnitedHealth Grp., Inc., 68 F. Supp. 3d 917, 921 (N.D. Ill. 2014).

[16] See Union Pump Co. v Centrifugal Tech. Inc., 404 F. App'x 899, 907-08 (5th Cir. 2010).

[17] See Brazos, 469 F.3d at 435 (concluding that a corporate deponent could not testify about a co-defendant's purported misrepresentations, but it could testify about what the co-defendant had told the corporation's employees about its representations).

[18] See, e.g., Calif. Found. for Independent Living Centers v. County of Sacramento, 142 F. Supp. 3d 1035, 1046 (E.D. Cal. 2015) (citing other cases); King v. Pratt & Whitney, 161 F.R.D. 475, 476 (S.D. Fla. 1995); Eng-Hatcher v. Sprint Nextel Corp., 2008 WL 4104015, at *4-5 (S.D.N.Y. Aug. 28, 2008). The narrower view confines the deposition to the matters stated with reasonable particularity in the notice. See Paparelli v. Prudential Ins. Co. of Am., 108 F.R.D. 727, 729-30 (D. Mass. 1985).

[19] See Duke Energy Progress, Inc. v. 3M Co., 2014 WL 7182580, at *4, *7 (E.D.N.C. Dec. 16, 2014); see also EEOC v. Freeman, 288 F.R.D. 92, 99 (D. Md. 2012) (gathering additional authorities).