Chapter 6

Electronic Discovery and the 30(b)(6) Deposition

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Electronic Discovery and the 30(b)(6) Deposition

As electronic discovery has become routine in civil litigation, the role of the 30(b)(6) witness also has become increasingly important. The massive amounts of information held by companies—and the substantial costs associated with its storage, collection, review, and production—emphasize the importance of 30(b)(6) depositions focused on electronically stored information (“ESI”).

Before the issue of “electronic discovery” became prominent during the 1990s, document management systems (i.e., a desk drawer, a file cabinet down the hall, or a box in a warehouse) were relatively simple to operate and discuss. However, the proliferation of ESI has, in many cases, created a new tier of discovery, not about the substance of the case, but about the parties’ information technology infrastructure that might contain ESI related to the substance of the case.

The most common purpose of the electronic discovery 30(b)(6) deposition is to determine what discoverable ESI a party has, on what type of platform it is stored, and what it will take to retrieve it. Most medium to large sized companies employ a wide array of information technology personnel, from the chief information officer to network administrators, who might be able to provide at least part of the information sought in an electronic discovery focused 30(b)(6) deposition. However, selecting and preparing the right witness to represent the company at the 30(b)(6) deposition goes far beyond the “who can talk about this?” inquiry. In In re CV Therapeutics, a senior corporate counsel, testifying as a 30(b)(6) witness on the location of electronic data and back-up media, was asked whether “all the different drives” on his company’s computer network were being searched for responsive documents. His response:

It’s ongoing, so I believe, at this point—we started in November, and we’re still slugging through it.

There’s a lot of data. I believe, at this point, the S drive and the H drive, perhaps the email drive or the exchange server, have all been copied to allow for searching for potentially responsive communications to the document requests. We do intend to move through whatever servers we haven’t yet gotten to, and it’s possible there’s a couple we haven’t, because we’re focused on areas where we would expect to find the most responsive documents.¹ Later, when the company sought a protective order to prevent access to the same drives, and the plaintiff brought an opposing motion to compel, the company argued that the burden of searching several of these drives would outweigh the benefit to the plaintiffs.² However, because of counsel’s 30(b)(6) testimony, the court rejected the company’s argument and required a complete search of each drive.³ CV Therapeutics estimated the additional costs to search these additional drives would require 20,000 man-hours and cost $2.2 million dollars.⁴ As In re CV Therapeutics illustrates, the potential scenarios where uninformed, overbroad, or imprecise 30(b)(6) testimony could lead to extra litigation expenses of this magnitude, or greater, are almost endless.

This chapter provides a framework to assist the practitioner in selecting and preparing a 30(b)(6) witness to testify regarding ESI and addresses how the new electronic discovery federal rules may affect ESI oriented 30(b)(6) depositions, in addition to other issues to be considered in any 30(b)(6) deposition.

The 30(b)(6) Deposition Generally

Federal Rule of Civil Procedure 30(b)(6) permits the deposition of a corporate defendant where the notice designates with “reasonable particularity the matters on which examination is requested.” Assuming

¹ In re CV Therapeutics, Inc. Sec. Litig., No. 03-03709, 2006 U.S. Dist. LEXIS 38909, at *29 n.5 (N.D. Cal. Apr. 4, 2006).
² Id.
³ Id.
⁴ Fortunately for the defendant, the court ordered some of the cost shifted to the plaintiffs. Id. at *30.
the request is not otherwise objectionable, the corporate defendant must “designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf.” The individuals designated must be prepared to “testify as to matters known or reasonably available to the organization.”

**The 30(b)(6) Deposition “Binds” the Company**

Although courts generally hold that the testimony of a 30(b)(6) witness “binds” the company, what it means to “bind” may depend on the jurisdiction. Several courts have held that the deposition is not binding in the sense of a judicial admission, but only in way a deposition binds an individual:

> When the court indicates that the Rule 30(b)(6) designee gives a statement or opinion binding on the company, this does not mean that said statement is tantamount to a judicial admission. Rather, just as in the deposition of individuals, it is only a statement of the corporate person which, if altered, may be explained and explored through cross-examination as to why the opinion or statement was altered.

“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.” Thus, the general rule is that once a 30(b)(6) witness testifies on behalf of the company, his testimony is “binding,” but the company may still explain or contradict that testimony.

**The Company Must Gather Information “Reasonably Available”**

A company’s designee must be prepared to testify “as to matters known or reasonably available” to the company. However, “[n]either Rule 30(b)(6) itself nor the Advisory Notes nor reported case law addressing the rule define ‘reasonably available.’” Litigants may find it “difficult to determine precisely what ‘reasonably available’ to the organization means.”


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5 Depositions noticed under Fed. R. Civ. P. 30(b)(6) may be objectionable on several grounds, which commonly include relevancy and the scope of the areas of inquiry set forth in the notice. Counsel may want to attempt to limit the scope of electronic discovery, and therefore the notice itself.


7 Id.


9 U.S. v. Taylor, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996); see also A.I. Credit Corp., 265 F.3d at 637.


11 Fed. R. Civ. P. 30(b)(6). It is too early to tell how “reasonably available” under Federal Rule of Civil Procedure 30(b)(6) may correlate with the Federal Rule 26’s mandate that “reasonably accessible” ESI is discoverable. Keep in mind that “reasonably available” under Rule 30(b)(6) defines the breadth of the substantive knowledge of the company as proffered through the individual chosen as the 30(b)(6) witness. “Reasonably accessible” under Rule 26, however, defines the scope of the ESI to be produced absent court order. A 30(b)(6) designee, then, for example, may be required to testify regarding the locations and extractability to the extent such information is “reasonably available” to the company under Rule 30(b)(6). During the deposition, the designee’s testimony, based on information reasonably available to the company, might testify that certain ESI is not reasonably accessible.


Co., Inc., the Federal District Court in Massachusetts compared the term “reasonably available” in Rule 30(b)(6) to the Rule 34 requirement that parties produce documents that are under their “possession, custody or control.” The court concluded that “[c]ontrol is defined not only as possession, but as the legal right to obtain the documents requested upon demand.”

“It therefore seems logical that the documents that are reasonably available are those documents that are in a party’s control.” The Federal District Court in Connecticut provided slightly more insight in Concerned Citizens of Belle Haven v. Belle Haven Club, and held that “reasonably available” does not require an independent investigation. In Concerned Citizens, the plaintiffs sued a homeowners’ club for discriminatory membership practices based on race and religion. Although the court required the club to respond based on the collective knowledge of past directors and admission committee members, it stopped short of requiring a separate investigation into the current racial and religious make-up of the club’s membership.

Even the Calzaturificio court’s interpretation, under which a company must gather all information responsive to the deposition notice that is in its control, provides imprecise guidance. Under Concerned Citizens, which provides slightly more insight, a company would not have to independently investigate the particular matters set forth in the deposition notice; the collective knowledge of the company is enough to satisfy the “reasonable available” requirement. In the context of electronic discovery, these issues may arise, for instance, where a designee may need to be prepared to answer questions regarding an off-site electronic storage facility managed by a third-party vendor. Given the current lack of judicial guidance regarding the scope of what is “reasonably available,” parties subject to a 30(b)(6) notice should carefully evaluate the availability of the specific information requested and make certain that any decision not to access certain responsive information is readily defensible if challenged.

**The Witness Must Provide Answers**

Corporate designees must answer questions regarding the subject matter of the deposition notice. Offering an unprepared designee could be considered “tantamount to a failure to appear” and may subject the company to sanctions under Rule 37. Such was

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16 Calzaturificio, 201 F.R.D. at 39.
18 *Id.* at 42–43.
19 *Id.* at 44 (“The court, however, grants defendants’ motion to the extent that it seeks relief from a requirement to independently investigate the race or religion of present or past members or applicants.”).
20 This requirement, of course, hinges on whether the inquiries are otherwise objectionable in the areas of relevancy and privilege or work product protection.
the case in Marker v. Union Fid. Life Ins. Co., an early electronic discovery case where a North Carolina federal court dealt with an insurance company’s designee who was prepared to discuss certain substantive claims information, but was unprepared to discuss the retrieval of such information from the company’s “computer operations.” The court held that the company “had a duty to substitute another person once the deficiency of its Rule 30(b)(6) designation became apparent during the course of the deposition.” The court continued:

An inadequate Rule 30(b)(6) designation amounts to a refusal or failure to answer a deposition question. Among the other remedies, the Court can require the company to re-designate its witnesses and mandate their preparation for re-deposition at the company’s expense. Because defendant unreasonably refused to satisfy plaintiff’s Rule 30(b)(6) deposition request, defendant will be required to produce such knowledgeable persons so that plaintiff may complete the deposition.

In situations where, in addition to seeking particular substantive information, the notice also seeks information regarding the electronic data storage systems containing the substantive information requested, the responding party may designate more than one witness: one to answer substantive fact questions and another to describe the locations and retrieval of ESI.

Selecting the 30(b)(6) Witness

In cases where counsel can reasonably expect electronic discovery to be an issue, it may be prudent to begin the process of identifying a witness to address ESI issues at the outset of litigation. Waiting until the 30(b)(6) deposition notice is received may not allow the time necessary to evaluate, select, and prepare the best designee, forcing the company to offer a less than desirable witness. The designee must have knowledge of the issues described in the deposition notice such that designee can answer to the fullest extent of the company’s knowledge, not simply the personal knowledge held by the individual chosen as the designee. If the designee does not have personal knowledge of the issues, additional preparation focused on the noticed topics may be required:

[The designating party] must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the discovering party] and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed by [the opposing party] as to the relevant subject matters.

"If necessary, the deponent must use documents, past employees, and other resources in performing this required preparation." Several courts have clarified this position and held that a company need not produce the witness with the greatest knowledge about a subject.

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22 125 F.R.D. at 126.
23 Id.
24 Id. (internal citations omitted).
tions on subjects outlined in the deposition notice is sufficient. It is also possible that within the context of electronic discovery, a person not in the employ of the company may also be an appropriate designee to address the issues designated in the 30(b)(6) notice. Whether this person is a regular outside IT consultant, or even a former IT director who has recently left the company, courts generally have held that a responding party can meet its 30(b)(6) obligation with such non-employee witnesses.

When selecting a witness to represent the company in response to a 30(b)(6) notice, counsel may also consider the witness’ demeanor. As the Supreme Court stated in the context of reviewing a witness’ credibility:

[T]he demeanor of a witness may satisfy the tribunal, not only that the witness’ testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

A witness’ demeanor may be a determining factor in whether the witness is understood and believed. Even if a company designates its most knowledgeable IT professional, if that employee is nervous, scared, or otherwise seems uncomfortable, that discomfort may result in inaccurate testimony. A calm and confident demeanor goes a long way towards enabling the witness to provide accurate, clear, and credible testimony. Once witness preparation is underway, counsel may discover that the selected designee may not be the most appropriate to speak on one or more of the issues outlined on the deposition notice. In such circumstances, flexibility is key and counsel may consider offering multiple witnesses in response to the 30(b)(6) notice, with each designated for certain topics listed in the deposition notice on the few subjects the original designee was not able to handle appropriately.

Preparing the 30(b)(6) Witness

Technical Knowledge

Although the potential scope of an electronic discovery focused 30(b)(6) deposition may be extraordinarily broad, the basic discovery objectives for such depositions generally include identification of: (1) the types of responsive information the company has; (2) the authors or sources of the desired information; (3) the location where the information is stored; and (4) the technology used to store it. Preparation of the 30(b)(6) witness, at its most basic level, should focus on enabling the designee to address these broad issues to the extent they are consistent with the issues set forth in the deposition notice.

Although many cases may not require the designee to master every technical detail of the company’s computer networks, certain cases may require the 30(b)(6) witness to address the company’s IT infrastructure. Preparation for this type of deposition may require knowledge of a very wide array of issues, potentially including:

- Inventory of computer systems and other technology assets currently or previously in operation, including:
  - category and number of computer systems and other technology assets, such as servers, workstations, laptops, etc.;

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28 See cases cited in footnote 27.
- locations of computer systems and other technology assets;
- operating system of computer systems and other technology assets; and
- applications residing on computer systems and other technology assets.

- Policies and procedures for labeling, storing, and archiving electronic information relevant to the legal matter, including:
  - physical location of electronic information;
  - inventory of backup media and archived information;
  - log of backup media and archived information;
  - schedule of when backup media and archived information was created; and
  - portable media labeling techniques, including CD-ROMs, diskettes, external hard drives, tapes, etc.

- Policies and procedures for managing electronic information relevant to the legal matter, including:
  - user permissions for accessing, modifying, and deleting data;
  - utilization of data deletion programs; and
  - schedule for formatting hard drives or reinstalling software applications.

- Policies and procedures for employee use of computers, electronic information, and technology platforms, including:
  - a listing of current and former employees who have or had direct access to network resources, technology assets, and relevant information during the associated times in questions.

**Practice Makes Perfect**

As with any deposition, the more time spent with the witness discussing the key issues and practicing mock questions and answers, the more accurate, comfortable, and confident the witness is likely to be during the deposition. This is especially true for 30(b)(6) depositions focused on information technology issues that may not often be a topic of discussion for the witness. Even for those witnesses, IT professionals for instance, who regularly discuss IT issues, an important goal of preparation may be to flesh out ambiguously defined terms or terms of art that have the potential of communicating an unintended or inaccurate meaning to opposing counsel or the court. Thorough preparation entails not only boning up on the topics to be covered in the 30(b)(6) deposition, but also practicing terminology that is accurate, precise, and easily understood by those unfamiliar with the technology at issue. At the deposition, the witness will be in the best position to ensure that terminology is used appropriately instead of simply adopting the imprecise or inaccurate terminology used by the examining attorney. By way of a simple example, a deposition question “Did you search the company’s hard drives?” requires clarification regarding the definition of “hard drive.” The term “hard dive” could include anything from network drives, email servers, laptop drives, USB keychain drives, or even iPods. Preparing the 30(b)(6) witness to recognize and correct imprecise terminology may be one of the most effective ways to avoid unintended results at the 30(b)(6) deposition.

**Attorney Client Privilege and Work Product Considerations**

When selecting deposition preparation materials for the 30(b)(6) witness, counsel should be mindful of attorney-client privilege and work product doctrine implications of providing such materials. The use of attorney-generated summaries or document compilations to prepare a witness could raise such issues. Courts have stated that counsel may risk waiver if privileged or work product documents are used by a designee.

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31 See, e.g., Sprint Commc’ns Co., L.P. v. Theglobe.com, Inc., 236 F.R.D. 524 (D. Kan. 2006) (“[C]ounsel may wish to exercise caution in preparing the [30(b)(6)] witness or witnesses with privileged information or documents, otherwise the privilege may be waived.”); Wilson v. Lakner, 228 F.R.D. 524, 529 (D. Md. 2005); see also Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 616 (S.D.N.Y. 1977) (“[I]t is disquieting to posit that a party’s lawyer may ‘aid’ a witness with items of work product and then prevent totally the access that might reveal and counteract the effects of such assistance.”); see also Audiotext Commc’ns Network, Inc. v. US Telecom, Inc., 164 F.R.D. 250, 253 (D. Kan. 1996); Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 386 (N.D. Cal. 1991); Peil v. Nat’l Semiconductor Corp., 105 F.R.D. 463,
For instance, in *Wilson v. Lakner*, an attorney had conducted an internal investigation of a hospital prior to receiving a 30(b)(6) notice. The court warned that using the attorney’s notes and impressions made during the investigation to prepare a non-attorney witness during witness preparation may result in waiver. While the court did not describe the circumstances in which the waiver may take place, providing privileged materials to the witness to review physically could render them vulnerable to discovery.

Although the court did not discuss how such waiver may occur, the court may have had in mind the subject matter test for application of the attorney-client privilege from *Upjohn Co. v. U.S.* Counsel should argue against waiver in this context, but may want to weigh the risks of waiver against the benefits of using each document when preparing the designee.

### 2006 Electronic Discovery Federal Rule Amendments and the 30(b)(6) Deposition

The 2006 electronic discovery amendments to the Federal Rules of Civil Procedure are likely to influence the focus and implications of IT related 30(b)(6) depositions.

#### Reasonably Accessible

Amended Rule 26(b) limits the automatic production of ESI from sources “the party identifies as not reasonably accessible because of undue burden or cost.” According to the Committee Note to Rule 26, the responding party must “provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.”

The 30(b)(6) deposition may be a key opportunity to identify data sources that are not reasonably accessible and explain why. Parties who claim, or anticipate they will claim that certain ESI is inaccessible due to undue burden or cost should be mindful of such issues when preparing a witness to respond to ESI focused 30(b)(6) depositions. Depending on the posture of the case, the 30(b)(6) witness may need to be prepared to discuss the methods and costs associated with the particular ESI at issue, including the time and resources needed to collect ESI that is not reasonably accessible, in addition to the concomitant business disruption. An ESI focused 30(b)(6) deposition occurring early in a case may provide an opportunity to manage expectations regarding the existence and availability of certain types of ESI and potentially avoid costly discovery disputes rooted in unrealistic expectations of the requesting party.

#### Preservation Obligations

Amended Federal Rule of Civil Procedure 37(f) establishes a “safe harbor” for ESI lost due to the “routine, good-faith operation of an electronic information system.” However, some circumstances may impose a preservation obligation requiring the suspension of certain routine operations. Depending on the scope of the topics set forth in the 30(b)(6) notice, the witness may need to discuss the “good-faith operation”

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464 (E.D. Pa. 1984). Offering corporate counsel as a 30(b)(6) witness, however, generally should not waive the attorney-client privilege. See, e.g., *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1552 (10th Cir. 1995) (stating that mere designation of counsel as corporate representative for deposition pursuant to Fed. R. Civ. P. 30(b)(6) does not waive attorney-client privilege).

32 228 F.R.D. at 526.
33 *Id.* at 529.
34 *Id.*
36 Amended Fed. R. Civ. P. 26(b).
37 Amended Fed. R. Civ. P. 26 advisory committee’s note.
38 Where 30(b)(6) testimony regarding the costs of collecting ESI do not render it inaccessible under amended Rule 26, such testimony may establish key elements for shifting some or all of the associated costs to the requesting party.
40 Amended Fed. R. Civ. P. 37(f) advisory committee’s note.
of company’s ESI system to the extent such operations include the routine deletion of certain types of ESI. The 30(b)(6) witness may also need to address the applicable document retention or other company policies, in addition to the timing and scope of internal preservation memoranda keyed to the particular litigation.

The Deposition

Although the 30(b)(6) deposition notice defines the areas of inquiry for the deposition, deposing counsel sometimes ask questions beyond the scope of the notice. If questions beyond the scope of the notice are challenged, the court may limit the examination to only those issues specified in the 30(b)(6) notice. However, many courts have also held that questioning outside the scope of the deposition notice is permissible. Thus, in addition to covering the specific topics set forth in the 30(b)(6) notice, the witness may also need to prepare to either answer other anticipated areas of inquiry, or where appropriate, respond that such issues are beyond the witness’s personal knowledge. In such circumstances, some courts allow the responding party defending the deposition to object on the record to questions falling outside the scope of the notice, noting that it is not binding on the company.

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41 See, e.g., Paparelli v. Prudential Ins. Co. of Am., 108 F.R.D. 727, 730 (D. Mass. 1985) (“[i]f a party opts to employ the procedures of Rule 30(b)(6)… to depose the representative of a company, that party must confine the examination to the matters stated ‘with reasonable particularity’ which are contained in the Notice of Deposition.”).
