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Using Federal Rule of Civil Procedure 30(b)(6) to Depose an Organization and Avoid the "Discovery Runaround"

By Greg Bass

[**Editor's Note:** This periodic column aims to give practical help on litigation issues that advocates encounter in federal or state court. It outlines the problems, offers some basic legal research results and analyses, and suggests possible approaches to resolving the issues. The columnist Greg Bass, litigation director, Greater Hartford Legal Aid, welcomes reader feedback. Send your comments and questions as well as suggestions for topics to gbass@ghla.org.]

The Question

During the depositions of several state agency employees in your federal court challenge to the failure to issue expedited food stamps to destitute households, you keep getting repeated "I don't know about that part of the operation" responses to critical questions. The testimony from these witnesses, whom you learned about through interrogatory responses, leaves you without needed testimony regarding the agency's computer protocols for processing these benefit applications. What should you do?

The Answer

Consider using Federal Rule of Civil Procedure 30(b)(6) to force the defendant to designate one or more knowledgeable witnesses who are prepared to be deposed on behalf of the government agency about these computer protocols.

The Basics

Federal Rule of Civil Procedure 30(b)(6) facilitates depositions of party and nonparty organizations, including "a public or private corporation or a partnership or association or governmental agency."[1] Once you serve a deposition notice or subpoena, which names the organization and "describe[s] with reasonable particularity the matters on which examination is requested," the entity must then "designate" one or more individuals who "shall testify as to matters known or reasonably available to the organization."[2]

A government agency or corporation itself obviously may not be deposed.[3] Rule 30(b)(6) offers a tool for obtaining organization knowledge.[4] The rule states:

> A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the per-

[1]Fed. R. Civ. P. 30(b)(6).

[2]*Id.*

[3]8A Charles Alan Wright et al., Federal Practice and Procedure § 2103 (2d ed. 1994) (information must be obtained from natural persons speaking for the corporation).

[4]See *Resolution Trust Corporation v. Southern Union Company*, 985 F.2d 196, 197 (5th Cir. 1993) ("When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent."). Accord *Crouse Cartage Company v. National Warehouse Investment Company*, No. IP02-071CTK, 2003 WL 23142182, at *5 (S.D. Ind. Jan. 13, 2003) (Magistrate Order), aff'd, No. IPO2-0071-C-T/K, 2003 WL 21254617 (S.D. Ind. April 10. 2003).

> son will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.[5]

Rule 30(b)(6) expressly sets out two burden-shifting steps. The requesting party initially gives to the organization a notice that describes the matters into which the deposition will inquire. The corresponding duty of the organization is to supply a designated individual to testify on its behalf regarding matters known or reasonably available to it.

Purpose and Benefit of Rule 30(b)(6)

In the past, deposing business entities involved naming "the corporate official to be deposed on behalf of the corporation."[6] One of the reasons for adding Rule 30(b)(6) to the Federal Rules of Civil Procedure in 1970 was to prevent serial depositions of organizational witnesses lacking knowledge of relevant facts. The drafters sought to eliminate this practice of "bandying" a party about from one witness to another, "each disclaim[ing] knowledge of facts that are clearly known to persons in the organization and thereby to it"—in short, the "discovery runaround."[7] The rule provided "an additional, supplementary and complimentary deposition process designed to aid in the efficient discovery of facts."[8]

The advantages of Rule 30(b)(6) come from the specific compliance burdens that it creates for an organization, which must (1) determine which deponents it will produce, (2) produce as many individuals as necessary to satisfy the request, and (3) sufficiently prepare each to be able to give complete, knowledgeable, and binding answers on behalf of the organization.[9]

Federal Rule of Civil Procedure 30(b)(6) operates most effectively when the party seeking discovery is reasonably specific in the deposition notice about the subjects to be taken up, and the responding party produces a person or persons who are correspondingly prepared to give thorough, informed, and binding answers on behalf of the organization. Court rulings often hinge in part upon how well the parties carry out their respective functions.

Requesting Party's Duty to Craft the Notice

A properly drafted Rule 30(b)(6) notice or subpoena must first specify the corporation, partnership, association, or governmental agency on whose behalf the individual designated by the organization will be testifying at the deposition.[10] It then must "describe with reasonable particularity" the "matters" to be covered in the deposition."[11]

The need for careful drafting of the notice is obvious. The rationale for the undefined "reasonable particularity" requirement is "to facilitate the responding party's selection of the most suitable deponent."[12] Some decisions have produced fairly specific guidelines for advocates on crafting a proper notice.[13] Other decisions have generally instructed

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[5]Fed. R. Civ. P. 30(b)(6).

[6]*Mitsui and Company v. Puerto Rico Water Resources Authority*, 93 F.R.D. 62, 64 (D.P.R. 1981).

[7]1970 Amendments to Fed. R. Civ. P. 30(b)(6), advisory committee notes; *see Prokosch v. Catalina Lighting Incorporated*, 193 F.R.D. 633, 638 (D. Minn. 2000) (noting both a requesting party "vainly searching for a deponent who is able to provide a response which would be binding upon that corporation" and a corporation being "confronted with a seemingly endless sequence of depositions" interfering with its business operations (citations omitted)). Accord *United States v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996) (magistrate order), aff'd, 166 F.R.D. 367 (M.D.N.C. 1996).

[8]*Mitsui*, 93 F.R.D. at 65 (citing 1970 amendments to Fed. R. Civ. P. 30(b)(6), advisory committee notes (further citation omitted)); see also *Resolution Trust Corporation*, 985 F.2d at 197 (5th Cir. 1993) (Fed. R. Civ. P. 30(b)(6) "streamlines the discovery process"); *Prokosch*, 193 F.R.D. at 637 (characterizing Fed. R. Civ. P. 30(b)(6) as a "specialized form of deposition" performing a "unique function").

[9]*Taylor*, 166 F.R.D. at 360–61.

[10]See Fed. R. Civ. P. 45 (deposition subpoena may be issued to nonparty witness); Fed. R. Civ. P. 30(b)(6) (deposition subpoena to nonparty organization for a Rule 30(b)(6) deposition must recite duty to designate deponent).

[11]Fed. R. Civ. P. 30(b)(6).

[12]*Prokosch*, 193 F.R.D. at 638; see also *Steil v. Humana Kansas City Incorporated*, 197 F.R.D. 442, 444 (D. Kan. 2000) (an "overbroad … notice subjects the noticed party to an impossible task …. Where the defendant cannot identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible" (citing *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000)).

[13]E.g., *Reed,* 193 F.R.D. at 692 (declaring overbroad the use of "including but not limited to" as qualifier for enumerated topics in notice).

parties to "take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute."[14] Some have summarily declared a particular Rule 30(b)(6) notice to be defective.[15]

Responding Party's Duty to Produce Witnesses Prepared to Give Complete, Knowledgeable, and Binding Answers

A government or business entity receiving a proper Rule 30(b)(6) notice "is compelled to comply, and it may be ordered to designate witnesses if it fails to do so."[16] The objective is discovery of organizational knowledge; "personal knowledge of the designated subject matter by the selected deponent is of no consequence."[17] The designated witness "does not give his personal opinions, but presents the corporation's 'position' on the topic."[18] The witness refers to "both the facts within the knowledge of the business entity and the entity's opinions and subjective beliefs, including the entity's interpretation of events and documents."[19]

Federal Rule of Civil Procedure 30(b)(6) expressly mandates the designation of witnesses who "shall testify as to matters *known or reasonably available* to the organization."[20] If the rule is designed "to promote effective discovery regarding corporations the spokesperson must be informed."[21] Accordingly, an implied requirement is that the entity must actually prepare its designated deponent, if necessary, to be able to present testimony on those "matters known or reasonably available" to the organization.[22] The organization must exercise its duty in a "conscientious good-faith" manner, to prepare its witnesses so that "they can answer fully, completely, unevasively, the questions posed" by the requesting party "as to the relevant subject matters."[23] This paramount duty not only to designate but also to ensure that the witness is adequately prepared to give testimony is what underscores the fundamental difference between Rule 30(b)(6) depositions and individually noticed depositions inquiring into the deponent's personal knowledge, as the court in *United States v. J.M. Taylor* emphasized:

> [A] corporation … can discharge its "memory," i.e., employees, and they can voluntarily separate themselves from the corporation. Consequently, it is not uncommon to have a situation … where a corporation indicates that it no longer employs individuals who have memory of a distant event or that such individuals are deceased. These problems do not relieve a corporation from preparing its Rule 30(b)(6) designee to the extent matters are reasonably available, whether from documents, past employees, or other sources.[24]

The organization's preparation of the designated witness thus necessarily draws from reasonably available sources of information, including docu-

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[14] *Sprint Communications Company v. TheGlobe.Com Incorporated*, 236 F.R.D. 524, 528 (D. Kan. 2006); *Prokosch*, 193 F.R.D. at 638; *Overseas Private Investment Corporation v. Mandelbaum*, 185 F.R.D. 67, 69 (D.D.C. 1999) (requiring notice of specific topics and rejecting claim that "general discovery standard" is applicable limit).

[15] E.g., *Kalis v. Colgate-Palmolive Company*, 231 F.3d 1049, 1057 n.5 (7th Cir. 2000) (the "generic Rule 30(b)(6) notice … does not meet this standard").

[16] *Taylor*, 166 F.R.D. at 360 (citation omitted).

[17] *Sprint Communications Company*, 236 F.R.D. at 528.

[18] *Brazos River Authority v. GE Ionics Incorporated*, 469 F.3d 416, 433 (5th Cir. 2006) (citing *Taylor*, 166 F.R.D. at 361); see also *Reed*, 193 F.R.D. at 692.

[19] *Canal Barge Company v. Commonwealth Edison Company*, No. 98 C 0509, 2001 WL 817853, at *1 (N.D. Ill. July 19, 2001) (citing *Taylor*, 166 F.R.D. at 361).

[20] Fed. R. Civ. P. 30(b)(6) (emphasis supplied); see *Crouse Cartage Company*, 2003 WL 23142182 at *5 (deponent must be prepared "on subjects that the entity should reasonably know" (citation omitted)).

[21] *Dravo Corporation v. Liberty Mutual Insurance Company*, 164 F.R.D. 70, 75 (D. Neb. 1995) (interior quotation marks omitted).

[22] *Sprint Communications Company*, 236 F.R.D. at 527–28.

[23] *Mitsui*, 93 F.R.D. at 67 (emphasis supplied). Accord *Brazos River Authority*, 469 F.3d at 433; *Sprint Communications Company*, 236 F.R.D. at 527; *Dwelly v. Yamaha Motor Corporation, USA*, 214 F.R.D. 537, 540 (D. Minn. 2003); see also *Elliott v. Textron Incorporated*, 192 F.R.D. 494, 503 (D. Md. 2000) (organization should make "diligent inquiry" to designate witness properly).

[24] *Taylor*, 166 F.R.D. at 361 (citations omitted).

ments and, if appropriate, former employees.[25] This helps forestall the potential for abusive discovery practices, such as the "'sandbagging' of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial. This would totally defeat the purpose of the discovery process."[26] As one court observed in reviewing the lack of preparation of a designated deponent:

> [P]erhaps most troubling was [the organization's] … indifferent attitude to areas that the designee could not cover. A party cannot take a laissez faire approach to the inquiry. That is, producing a designee and seeing what he has to say or what he can cover. A party does not meet its obligations under Rule 26 or 30(b)(6) by figuratively "throwing up its hands in a gesture of helplessness" as … the corporate designee did in this case. If the originally designated spokesman for the corporation lacks knowledge in the identified areas of inquiry, that does not become the inquiring party's problem, but demonstrates the responding party's failure of duty.[27]

While this may present an onerous, time-consuming burden on the organization, the preparation mandate is needed to prevent the bandying of witnesses—the discovery runaround.[28]

Rule 30(b)(6) expressly contemplates that the governmental or business entity may have to designate more than one deponent in response to the notice.[29] The organization must produce an appropriate number of witnesses to satisfy the deposition request adequately.[30] If it becomes obvious that the designee is deficient, the organization is obligated to present a substitute.[31] If a single witness cannot be prepared on all topics, the organization cannot simply avoid the deposition; it must designate an additional or substitute deponent who can be adequately prepared to speak to relevant issues.[32]

Scope of the Rule 30(b)(6) Deposition

You may want to inquire beyond the topics specifically referred to in the Rule 30(b)(6) notice into facts based on the personal knowledge of the individual designated by the organization. If so, you have two basic options. First, you may conduct two separate depositions of the individual—one under Rule 30(b)(6) to elicit organizational testimony and the other to obtain factual discovery based on the deponent's personal knowledge.[33] This option is contemplated by the design of Rule 30(b)(6) as

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[25]*Brazos River Authority*, 469 F.3d at 433; see *Calzaturficio S.C.A.R.P.A. v. Fabiano Shoe Company*, 201 F.R.D. 33, 38 (D. Mass. 2001) (designated deponents were "required to review all documentation and to educate themselves to the extent possible on all of the 30(b)(6) topics"); *Sprint Communications Company*, 236 F.R.D. at 529 (adequate deponent review to include memoranda, notes, applications, and all other reasonably available matters). Cf. *Ierardi v. Lorillard Incorporated*, No. 90-7049, 1991 WL 158911, at *2 (E.D. Pa. Aug. 13, 1991) (no requirement actually to designate former employee as Rule 30(b)(6) deponent).

[26]*Taylor*, 166 F.R.D. at 362. Accord *Sprint Communications Company*, 236 F.R.D. at 528 (organization not allowed to "sandbag" by responding to the Rule 30(b)(6) notice that "no witness is available who personally has direct knowledge concerning the areas of inquiry" (citing *Taylor*, 166 F.R.D. at 362)). See also *3M Innovative Properties Company v. Tomar Electronics*, No. 05-756(MJD/AJB), 2006 WL 2670038, at*10 n.5 (D. Minn. Sept. 18, 2006) (noting apparent example of sandbagging by defendant who downloaded thousands of relevant e-mails after Rule 30(b)(6) deposition of its unprepared witness).

[27]*Poole*, 192 F.R.D. at 504-05 (footnote omitted).

[28]See *Sprint Communications Company*, 236 F.R.D. at 528; *Buycks-Roberson v. Citibank Federal Savings Bank*, 162 F.R.D. 338, 343 (N.D. Ill. 1995); see also *Calzaturficio*, 201 F.R.D. at 37 (review of "voluminous" documents required, to avoid leaving requesting party "at an unfair disadvantage, having no understanding of what the corporation's position is as to many areas of inquiry"); *Ierardi*, 1991 WL 158911, at *1 ("if a corporate employee familiar with the structure and organization of the corporation would find this task difficult, plaintiffs, who have no such familiarity, likely would find it impossible").

[29]Fed. R. Civ. P. 30(b)(6) ("[T]he organization so named shall designate *one or more*" [witnesses] … and may set forth, *for each person designated*, the matters on which the person will testify.") (emphasis supplied).

[30]*Marker v. Union Fidelity Life Insurance Company*, 125 F.R.D. 121, 126 (M.D.N.C. 1989). Accord *Sprint Communications Company*, 236 F.R.D. at 528.

[31]*Brazos River Authority*, 469 F.3d at 433 (citing *Marker*, 125 F.R.D. at 126).

[32]*Dwelly*, 214 F.R.D. at 540; see also *Prokosch*, 193 F.R.D. at 639. But see *Dwelly*, 214 F.R.D. at 540 (no automatic duty to produce a single deponent who can speak to every noticed topic); see also *Calzaturficio*, 201 F.R.D. at 38 (organization's duty ceases if complete responses cannot be given despite preparation, and no other available witnesses exist; it "is not infinite").

[33]See *King v. Pratt and Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (Rule 30(b)(6) deponent could be renoticed individually and asked questions based on personal knowledge).

a supplemental discovery procedure.[34] The rule also expressly prohibits the preclusion of any other method of taking depositions.[35] A second, more efficient approach typically combines the two depositions into one, if possible.[36] The weight of authority holds that the scope of questioning in a Rule 30(b)(6) deposition may extend beyond the noticed categories into facts based on the deponent's personal knowledge, subject only to the general discovery limits of the Federal Rules of Civil Procedure.[37]

"Binding" Nature of Rule 30(b)(6) Deposition Testimony

A Federal Rule of Civil Procedure 30(b)(6) deposition may be used to impeach the testimony of the deponent as a witness at a hearing or at trial.[38] The Rule 30(b)(6) deposition of a party, if otherwise admissible under the Federal Rules of Evidence, may be used against that party in a motion hearing or at trial, "for any purpose."[39] The deposition of a witness, whether or not a party, may otherwise be used "for any purpose," subject to certain restrictions.[40]

The actual extent of the "binding" nature of the "complete, knowledgeable and *binding* answers on behalf" of the organization that the witness must be prepared to give led courts to differing conclusions.[41] Some courts sought to prevent "trial by ambush" by disallowing affidavits offered in support of summary judgment that contradicted prior Rule 30(b)(6) deposition testimony.[42] Other courts sought the same result by disallowing trial testimony controverting the deponent's sworn statements indicating lack of knowledge.[43] The Seventh Circuit ruled, however, that "[n]othing in the advisory committee notes indicates that the Rule goes so far" as to bind a corporation to its designee's Rule 30(b)(6) testimony absolutely.[44] This view holds that the designee's testimony is not "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 [impeachment on] cross-examination as to why the opinion or statement was altered."[45]

Compelling Responding Party's Compliance

Designating a clearly inadequate Rule 30(b)(6) deponent may subject the organization to sanctions, even in the absence of a prior court order. Federal Rule of Civil Procedure 37(d) provides in part:

> If a party or an officer, director, or managing agent of a party or a person designated

[34]See 1970 Amendments to Fed. R. Civ. P. 30(b)(6), advisory committee notes.

[35]See Fed. R. Civ. P. 30(b)(6) ("This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.").

[36]Absent stipulation, leave of court is generally required to redepose an individual. Fed. R. Civ. P. 32(a)(2)(B). At least one court has dispensed with this requirement, however, for an individual deposition of a person previously deposed pursuant to Rule 30(b)(6). See *Williams v. Sprint/United Management Company*, No. CIV A032200JWLDJW, 2006 WL 334643 (D. Kan. Feb. 8, 2006).

[37]See *Equal Employment Opportunity Commission v. Caesars Entertainment, Incorporated*, 237 F.R.D. 428, 432 (D. Nev. 2006). Accord *Employers Insurance Company of Wausau v. Nationwide Mutual Fire Insurance Company*, No. CV 2005-0620(JFB)(MDD), 2006 WL 1120632, at *1 (E.D.N.Y. April 26, 2006); see *King*, 161 F.R.D. at 476; see also *Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 366 (N.D. Cal. 2000) (description of topics in Rule 30(b)(6) notice constitute "the minimum about which the witness must be prepared to testify, not the maximum" (citing *King*, 161 F.R.D. 475)). Cf. Fed. R. Civ. P. 26(b)(1) (discovery relevancy standard). But see *Paparelli v. Prudential Insurance Company of America*, 108 F.R.D. 727 (D. Mass. 1985) (Rule 30(b)(6) deposition must be confined to matters listed in notice).

[38]Fed. R. Civ. P. 32(a)(1).

[39]*Id.* 32(a)(2).

[40]*Id.* 32(a)(3).

[41]*Marker*, 125 F.R.D. at 126 (emphasis supplied; citations omitted).

[42]E.g., *Rainey v. American Forest and Paper Association*, 26 F. Supp. 2d 82, 95–96 (D.D.C. 1998); see also *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992 (E.D. La. 2000), aff'd mem., 31 Fed. App'x. 151 (5th Cir. 2001).

[43]*Ierardi*, 1991 WL 158911, at *3; see also *Donald M. Durkin Contracting Incorporated v. City of Newark*, No. CVIA 04-163 GMS, 2006 WL 2724882, at *5 (D. Del. Sept. 22, 2006) (disallowing, as "sham fact issue," introduction at trial of errata sheets containing corrected Rule 30(b)(6) deposition testimony).

[44]*A.I. Credit Corporation v. Legion Insurance Company*, 265 F.3d 630, 637 (7th Cir. 2001).

[45]*Taylor*, 166 F.R.D. at 362 n. 6 (citing *W.R. Grace and Company v. Viskase Corporation*, No. 90 C 5383, 1991 WL 211647, at *2 (N.D. Ill. Oct. 15, 1991); *Industrial Hard Chrome Limited v. Hetran Incorporated*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000) (denying motion *in limine* to exclude evidence contradicting Rule 30(b)(6) testimony).

> under Rule 30(b)(6) … to testify on behalf of a party *fails … to appear* before the officer who is to take the deposition, after being served with a proper notice, … the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule ….[46]

Producing an unprepared designee is the equivalent of a sanctionable "failure to appear" under Federal Rule of Civil Procedure 37(d).[47] The organization generally may not successfully oppose the motion on the grounds that the Rule 30(b)(6) deposition sought objectionable discovery, unless it first requested a protective order.[48]

Practice Pointers

1. Give careful thought to the description of topics in your Rule 30(b)(6) deposition notice. Balance the filling of discovery gaps in your case with anticipating and avoiding, if possible, unnecessary disputes over the "reasonable particularity" of your deposition notice.

2. Properly carry out the requesting party's burden, in a manner that allows the responding party to determine appropriate information sources who can best be prepared to speak on behalf of the organization. This should help persuade a court to resolve a notice dispute in your favor since "the effectiveness of the Rule bears heavily upon the parties' reciprocal obligations."[49] Some specific points to keep in mind:

   - Remember that, unlike a typical individual deposition notice, a Rule 30(b)(6) notice designates topics to be examined, not specific persons to be deposed. Specify "matters," not individuals, in the notice.
   - Do not use "including, but not limited to" qualifiers in your description of topics; they virtually guarantee a discovery dispute.
   - Be specific, but avoid unnecessarily narrowing the scope of the request in a way that will hamper getting needed discovery.
   - While Rule 30(b)(6) has no express numeric limits on noticed topics, assume that the likelihood of objections being raised corresponds roughly to the number and scope of specified categories that require greater preparation of the deponent, and plan accordingly.

3. Consider the timing of the deposition in terms of the sequencing of your overall discovery plan. A Rule 30(b)(6) deposition conducted early in the process can uncover essential persons you need to depose individually, as well as documents you need. Alternatively, if you first acquire this discovery through responses to interrogatories and document production requests, a subsequent Rule 30(b)(6) deposition may be more useful for trying to extract specific, binding organizational testimony. Either way, avoid having to ask for an extension of any court-imposed time limits to conduct further discovery that you determine is needed after the Rule 30(b)(6) deposition.[50]

4. Be prepared to meet with opposing counsel to attempt mutually to refine the Rule 30(b)(6) deposition topics. Insist on being able to inquire into critically relevant matters, but keep in mind that truly overbroad requests are rarely a cost-effective use of time and resources. Cooperative counsel can work out reasonably specific requests that can be matched with appro-

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[46]Fed. R. Civ. P. 37(d) (emphasis supplied); see also *id.* 37(b)(2)(A), 37(b)(2)(B), 37(b)(2)(C) (discovery sanctions available for violations of court orders, including, e.g., establishment of designated facts; prohibiting party from supporting or opposing designated claims, defenses, or introducing designated matters in evidence; striking of pleadings; and dismissal of action).

[47]*Black Horse Lane Associates v. Dow Chemical Corporation*, 228 F.3d 275, 304 (3d Cir. 2000) ("In reality if a Rule 30(b)(6) witness is unable to give useful information he is no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it."); see also *Continental Casualty Company v. Compass Bank*, No. CA04-0766-KD-C, 2006 WL 533510, at *17 (S.D. Ala. March 3, 2006) ("consensus of most federal courts" considering issue is that sanctionable failure to appear under Rule 37(d)(1) applies when Rule 30(b)(6) designee is unprepared to testify).

[48]See Fed. R. Civ. P. 37(d); see also *id.* 26(c) (discovery protective orders).

[49]*Prokosch*, 193 F.R.D. at 638. These burdens "are as taxing as they are mutually beneficial." *Id.* See also *Steil*, 197 F.R.D. at 444 (an "overbroad … notice subjects the noticed party to an impossible task …. Where the defendant cannot identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible.").

[50]See Fed. R. Civ. P. 16(b) (requiring court to impose a "scheduling order" establishing limits and deadlines for discovery).

priate organizational witnesses to supply the discovery you need.

5. Note on the record during the deposition when you are inquiring into matters specifically referred to in the Rule 30(b)(6) notice. This clarifies that you are seeking the deponent's testimony on behalf of the organization, as opposed to personal knowledge. Be prepared for opposing counsel to try to make the same demarcation, through objections or otherwise, of organizational versus personal testimony.[51]

6. Get the deponent's affirmation on the record of authorization to give binding testimony on behalf of the organization.[52] Be prepared for opposing counsel's attempt to "clarify" how binding the deponent's testimony will actually be.

7. If you are given "I don't know" responses to critical inquiries, establish on the record the extent of the deponent's deposition preparation, including all information consulted or reviewed.

8. If you encounter a significantly unprepared witness, you may informally request a substitute, prepared deponent, or move to compel the production of one under Federal Rule of Civil Procedure 37, coupled with a request for appropriate sanctions. Of course, consider whether "I don't know" organizational responses under oath may actually help your case.

9. Leave sufficient time to accomplish your discovery goals within applicable limits imposed by the Federal Rules of Civil Procedure.[53]

10. Assess the potentially "binding" use of Rule 30(b)(6) testimony in support of a motion for summary judgment or at trial. Even if not rising to the level of a judicial admission, contradictory statements given under oath at the deposition can, at a minimum, be used against the organization for impeachment purposes.

11. Rule 30(b)(6) requires a business or governmental agency to take significant steps to ensure that you are given organizational knowledge, based on adequate preparation of a deponent speaking on behalf of the agency. Consider using the rule.

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[51]See *Detoy*, 196 F.R.D. at 367.

[52]See *T&W Funding Company XII v. Pennant Rent-A-Car Midwest Incorporated*, 210 F.R.D. 730, 734–35 (D. Kan. 2002); see also *Brazos River Authority*, 469 F.3d at 433.

[53]Depositions are presumptively limited to one seven-hour day. Fed. R. Civ. P. 30(d)(2). Depositions of a person as a Rule 30(b)(6) witness and as an individual witness may, however, be conducted subject to independent seven-hour time limits. See *Sabre v. First Dominion Capital*, No. 01CIV2145BSJHBP, 2001 WL 1590544 (S.D.N.Y. Dec. 12, 2001). Parties are presumptively limited to ten depositions. Fed. R. Civ. P. 30(a)(2)(A). A Rule 30(b)(6) deposition "should, for purposes of this limit, be treated as a single deposition, even though more than one person may be designated to testify." 1993 Amendments to Fed. R. Civ. P. 30(a)(2)(A), advisory committee notes.

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