

*Rule 30(b)(6) depositions being  
conducted via remote means and  
uploading and sharing exhibits using  
remote technology*

By: Andrea Rosholt  
Hawley Troxell

# The Notice & Scope

Federal Rule of Civil Procedure 30(4) addresses taking depositions by remote means. That section provides:

The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules [28\(a\)](#), [37\(a\)\(2\)](#), and [37\(b\)\(1\)](#), the deposition takes place where the deponent answers the questions.

**\*\*Practice tip:** While COVID-19 likely constitutes cause to take the deposition by remote means, make sure that you have a stipulation from the other side or seek Court intervention.

# Deposing the Corporate Witness: History

- Rule 30(b)(6) was added in 1970. According to the Notes of the Advisory Committee:
  - The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the depositions process.
  - It will curb the “bandying” by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it.
  - The provisions should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge.

## Federal Rule of Civil Procedure 30(b)(6)

*Notice or Subpoena Directed to an Organization.* 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.

## Rule 30(b)(6) Mandatory Requirements

1. The notice must describe with reasonable particularity the matters for examination.

# Rule 30(b)(6) Mandatory Requirements

(cont'd)

1. The notice must describe with reasonable particularity the matters for examination.
2. 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.

# Rule 30(b)(6) Mandatory Requirements

(cont'd)

1. The notice must describe with reasonable particularity the matters for examination.
2. 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.
3. A subpoena must advise a nonparty organization of its duty to make this designation.

# Rule 30(b)(6) Mandatory Requirements

(cont'd)

1. The notice must describe with reasonable particularity the matters for examination.
2. 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.
3. A subpoena must advise a nonparty organization of its duty to make this designation.
4. The persons designated must testify about information known or reasonably available to the organization.



# Deposing the Corporate Witness Cont.

Consider the following facts:

- A Rule 30(b)(6) deposition notice is issued and received by sophisticated and experienced counsel.
- Prior to the Rule 30(b)(6) deposition, counsel had discussions about the notice, which included objections to the topics and scope of the objections.
- No agreement among counsel was recorded in a writing.
- Despite notice of the parties' disagreement, the noticing party did not substantively amend the deposition notice and the party receiving the notice did not move for a protective order.
- Instead, the parties simply proceeded to a deposition on the notice, mutually ignoring the procedural implications of their pre-deposition discussions.
- Not surprisingly, the deponent appeared to have little information regarding some of the designated topics.
- Neither counsel made any meaningful objections on the record.
- The noticing party filed a motion to redo the deposition and for monetary sanctions. Alternatively, the noticing party sought an order from the court requiring the organization to “affirmatively state that it has no witnesses that would be more knowledgeable” than the designee.
- The corporation objected in large part on the basis that notice failed to describe with reasonable particularity the matters for examination.

# Deposing the Corporate Witness(cont'd)

The foregoing factual background played out in *International Brotherhood of Teamsters, Airline Division v. Frontier Airlines, Inc.* When the court was finally presented with the dispute, the court struggled with the remedy. As the court explained:

In my view, the “good cause” issue requires examination of several factors, including whether the parties made sufficient efforts to confer in good faith about disputes prior to the deposition, whether the deposition notice was sufficiently specific, whether the unanswered questions sought relevant information, whether the deponent sufficiently answered the questions in dispute, and whether the deponent made sufficient efforts to obtain information from its agents, to name a few. **In light of the procedural posture of this case, where the parties hotly dispute the extent, content and results of their pre-deposition communications, where neither party sought pre-deposition relief from the Court, and where the entire deposition was conducted without a single objection on the record to which either party refers, the Court is at a loss to determine whether “good cause” exists.** If the Airlines are correct about the scope of pre-deposition communications and agreements between the parties, good cause for a second deposition may well exist. If IBT is right about reaching an agreement with the Airlines that the proposed topics were too indefinite, too broad, or simply irrelevant, it is more difficult to find “good cause” for a second bite at the apple. The bottom line is that the parties' versions of the facts are diametrically opposed, and the Court does not know who to believe.

*Id.*, WL 627149, at \*8 (D. Colo. Feb. 19, 2013), *order amended on reconsideration*, No. 11-CV-02007-MSK-KLM, 2013 WL 12246941 (D. Colo. Sept. 12, 2013) (emphasis added).

# Deposing the Corporate Witness: Why a *Thoughtful* Approach Is Important (cont'd)

Ultimately, the court refused to get in the middle of a credibility dispute between counsel, ordered a do-over of the deposition and the noticing party to amend its deposition notice to meet the reasonable particularity requirement. As to the dispute between counsel, the court expressed its frustration, providing:

“The Court's inability to determine ‘who to believe’ regarding the disputed discussions and agreements was a significant part of the reason why a do-over deposition was ordered. Counsel's suggestion that the Court had a ‘duty’ to resolve the issue is remarkable, particularly in light of counsel's utter failure to take reasonable steps to document the discussions in dispute. Judges do not resolve serious credibility issues between licensed attorneys and officers of the Court by flipping a coin. When lawyers' credibility is questioned and impossible to accurately assess, the best approach is to point out the errors made and to allow counsel a fair opportunity to correct them on behalf of their clients.”

*Int'l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc.*, No. 11-CV-02007-MSK-KLM, 2013 WL 12246941, at \*5 (D. Colo. Sept. 12, 2013).

# Deposing the Corporate Witness: Why a *Thoughtful* Approach Is Important (cont'd)

Takeaway: There existed multiple opportunities for the parties to avoid the dispute:

- First, the noticing party could have taken more care to draft the topics.
- Second, to the extent possible the parties could have documented any agreement as to the topics and scope in writing.
- Third, to the extent the parties could not reach an agreement, the receiving party could have filed a motion with the court seeking a protective order.

## Requirement #1: Reasonable Particularity

- The rule requires that the noticing party describe topics with “reasonable particularity.”
- Courts interpreting the requirement of the rule have held that in order to “allow the Rule to effectively function, the requesting party must 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.”

*E.E.O.C. v. Thorman & Wright Corp.*, 243 F.R.D. 421, 426 (D. Kan. 2007).

# Requirement #1: Reasonable Particularity, continued

- The Rule does not limit what opposing counsel can ask the witness, even if those questions are outside the scope of the Rule 30(b)(6) deposition notice. *FCC v, Mizuho Medy Co.*, 257 F.R.D. 679, 682 (S.D. Cal. 2009).
- Instead, answers outside the “scope” will not bind the organization.

# Requirement #1: Reasonable Particularity (cont'd)

The Rule has inherent limits:

- A Rule 30(b)(6) notice that required a corporate designee to testify about facts supporting numerous denials and affirmative defenses in its answer and counterclaims, was declared “overbroad, burdensome, and a highly inefficient method through which to obtain otherwise discoverable information.”
- A Rule 30(b)(6) notice requesting designation of a witness to testify regarding plaintiff's responses to defendants' interrogatories and requests for production, was declared “overbroad, unduly burdensome, and an inefficient means through which to obtain otherwise discoverable information.” *Krasney v. Nationwide Mut. Ins. Co.*, No. 3:06 CV 1164 JBA, 2007 WL 4365677, at \*3 (D. Conn. Dec. 11, 2007).
- A Rule 30(b)(6) notice containing 229 topics is “facially excessive.” *Apple, Inc. v. Samsung Elec. Co., Ltd.*, 2012 WL 1511901 (N.D. Cal. Jan. 27, 2012).

# Requirement #1: Reasonable Particularity

## (cont'd)

*E.g., Castillon v. Corr. Corp. of Am.*, No. 1:12-CV-00559-EJL, 2014 WL 4365317, at \*2 (D. Idaho Sept. 2, 2014).

In *Castillon*, the plaintiff's Rule 30(b)(6) deposition notice sought to require the corporation to designate a witness to testify as to the facts or data the corporation contended mitigated the need for a substantial punitive damages verdict in the case. The corporation objected on the basis that the topic was not described with reasonable particularity. The court agreed. Citing to *In re Independent Service Organizations Antitrust Litigation*, 168 F.R.D. 651, 654 (D. Kan. 1996), the court held as follows:

Requiring Defendant to prepare a deponent to testify as to all such matters is overbroad and unduly burdensome. "Even under the present-day liberal discovery rules, [a party] is not required to have counsel marshal all of its factual proof and prepare a witness to be able to testify on a given defense or counterclaim."

*Id.*



# Requirement #2: Designation of One or More Corporate Representatives

## Text of the Rule:

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.

- The rule does not require the organization to produce the person “most knowledgeable” about a given subject.
- The rule does not require the organization to produce a person with “first hand knowledge” about a topic. *See QBE Ins. Corp. v. Jorda Enters.*, 227 F.R.D. 676, 688 (S.D. Fla. 2012).
- The rule does not require the organization to produce a current employee, and the organization may appoint (or be required in some case to appoint) a former employee.

# Requirement #4: What Is Known or Reasonably Available

## Text of the Rule:

The persons designated must testify about information known or reasonably available to the organization.

By far, the majority of disputes concern this requirement.

# Requirement #4: What Is Known or Reasonably Available (cont'd)

*Ellis v. Corizon, Inc.*, No. 1:15-CV-00304-BLW, 2018 WL 1865158, at \*3 (D. Idaho Apr. 18, 2018), Winmill.

- “The testimony of a Rule 30(b)(6) designee ‘represents the knowledge of the corporation, not of the individual deponents.’” *Id.*, citing *Great Am. Ins. Co. of New York v. Vegas Const. Co., Inc.*, 251 F.R.D. 534, 538 (D. Nev. 2008) (quoting *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996)).
- “[A] corporation has ‘a duty to make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them to fully and unequivocally answer questions about the designated subject matter.’” *Ellis*, citing *Starlight Int’l, Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kan. 1999).
- “The memory of a corporation extends beyond that of its present employees.” *Ellis*, citing *Taylor*, 166 F.R.D. at 361. Therefore, “[a]lthough a corporation, through its designee, may plead lack of institutional memory or knowledge as to a specific topic or topics, it may do so only after it reviews ‘all matters known or reasonably available to it’ prior to the deposition.”
- “Preparing for a Rule 30(b)(6) deposition may be burdensome but ‘this is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business.’” *Id.*

# Requirement #4: What Is Known or Reasonably Available (cont'd)

Three takeaways from *Taylor*:

- 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.
- The corporation must prepare a witness by having them review prior fact witnesses, deposition testimony as well as documents and deposition exhibits.

# Requirement #4: What Is Known or Reasonably Available (cont'd)

In *Teamsters*, the court addressed the issue of whether information known to an affiliate or related party is “reasonably available” to the organization.

In considering the issue, the court employed the “control” standard of Rule 34(a) as a guideline to determine whether the information of a corporate affiliate is “reasonably available” to the deponent. *Int'l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc.*, 2013 WL 627149, at \*5, citing *Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.*, No. 01 Civ. 3016, 2002 WL 1835439, at \*4 (S.D.N.Y. Aug. 8, 2002).

The court, citing with the majority, provides that “information is within a deponent's ‘control’ and thus ‘reasonably available’ for purposes of Rule 30(b)(6) when the deponent ‘either can secure [information] from the related entity to meet its business needs or acted with it in the transaction that gave rise to the suit.’”

*Id.* (citations omitted).

## A Thoughtful Approach

- Counsel should discuss Rule 30(b)(6) when preparing the discovery plan and at the discovery conference.
- The Rule 30(b)(6) notice should be provided well in advance of the discovery and the parties should work together to define the topics, scope and designation of witnesses (although that last point is not required by rule).
- If the parties cannot reach an agreement, they should seek early court intervention and instruction.

# Admissions

- Admission gained in the Rule 30(b)(6) are “evidentiary admissions” as opposed to “judicial admissions.”
- A judicial admission is an act done in the course of a judicial proceeding, which waives or dispenses with the production of evidence, by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true.
- An evidentiary admission (quasi judicial) is a statement made by a party or its agent regardless of whether it is made out of court or in court, typically used to contradict or otherwise impeach the party’s current assertion.

# Taking the Deposition by Remote means

- Advance preparation is critical. Identify and mark all exhibits in advance. You will want to pre-mark your exhibits
  - Practice Tip: Create a folder Titled Rule 30(b)(6) and then sub-folders for each separate topic. Pre-mark your exhibits in each folder for ease of access.
- Discuss with counsel in advance how best to handle documents protected by disclosure that may be confidential or trade secret.
- Familiarize yourself with the Platform. Most depositions are taken by Zoom. When you get into the Zoom platform, make sure that you “pin” your screen to the witness.
- Consider setting your “background” to a neutral background to avoid distraction. If you don’t use this feature make sure there is nothing distracting in the background.



# Taking the Deposition by Remote means

- When you start. Ask the Witness if they can hear you clearly, and whether there is an “echo” or “delay”.
  - Practice Tip: Do a brief run-through the day before to determine whether your computer audio or phone audio is clearer.
- Always Ask the Witness to describe what is in the “room” and ask that they not use any features on their screen. \*\*You don’t want the witness communicating or being fed answers.
  - Practice Tip: consider a pre-deposition stipulation that bars communication between the deponent and defending counsel other than to confer regarding the assertion of a privilege. Also consider stipulating that the deponent’s mobile device will be powered down during the entirety of the deposition or not used during the deposition

# Taking the Deposition by Remote Means (cont.)

- Exhibits are uploaded into the “Chat” feature. This allows the Court reporter to mark the Exhibits
  - Practice Tips:
    - Always confirm with the Court reporter they have had time to mark the Exhibit before beginning your line of questioning.
    - You cannot upload Exhibits before all participants have joined. It just doesn't work.
    - Excel does not upload. You will need to have the Court reporter as well as opposing counsel's e-mail addresses already populated. As will be discussed Excel does well in the “Shared Screen” feature.

# Sharing Your Screen: Technology Is a Blessing and a Curse.

- Have your first five exhibits open and ready to share before you start the deposition..
- If the deposition is by video means, note that the video will only pick up the shared screen during this time so you will want to share your screen judiciously.
- When you share your screen, make sure you ask the witness to confirm what they are seeing

# Sharing Your Screen: Technology Is a Blessing and a Curse

- Deposition by remote means and shared screens have upsides: Notably, you can use Excel or even online calculators with the witness to confirm equations, or math.
- The person taking the deposition is in control of the exhibits. If you want a witness to focus on only a single portion of an exhibit, you can easily accomplish this goal.
  - Practice Tip: Bookmark your shared exhibits so that you can quickly get to the page or portion of the exhibit you are desirous of the witness to review.
- Plan for contingencies: Be prepared to pivot in the deposition if you suffer technological difficulties. Be prepared to have the witness use and download exhibits from the Chat feature.
- Even if you don't share your exhibits before the deposition, consider having a sharefile link ready to go in case technology fails or the witness is unable (or unfamiliar with) downloading documents using the chat feature.

# Sharing Your Screen: Technology Is a Blessing and a Curse

- Remember: When you are done with the Exhibit make sure to stop sharing your screen so you can refocus the witness.
- If you want to mark up Exhibits in the share screen feature, you may want to ask the Court reporter to mark the Exhibit.
  - Practice Tip: If you have already pre-marked your exhibits you may ask the Court reporter to simply mark the Exhibit as Exhibit 1-A or 1-B.

# Final Tips

- Close all programs (e-mail etc.) during the deposition.
- Make sure your phone is set to do not disturb
- Plan for the remote deposition to take longer than an in-person deposition.
- Have IT or someone with technical expertise standing by.
- Have patience!!