

Rule 30(b)(6) Deposition Mystery Revealed: What Records Professionals Need to Know

The legal department called. Your organization is being sued, and the other party wants to depose a records manager – and that’s you. Now what? Don’t panic. Be prepared.

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Litigation is no longer the unique domain of the legal department. When organizations were paper-based, it was relatively simple to organize files, desk drawers, and boxes of information in warehouses. It was also easier to pull paper documents relevant to the litigation at hand and give them to the legal staff.

Now, organizations have complicated IT and document management systems. Lawyers on both sides of the litigation have to learn about these complicated systems, in addition to reviewing the data that pertains to the substance of the case. E-discovery is now a routine part of civil litigation, and more attorneys are using the *U.S. Federal Rules of Civil Procedure* (FRCP) Rule 30(b)(6) deposition as a way to acquire information. As such, litigation is spilling over into other departments, including IT and records management.

E-discovery is forcing records professionals to be actively involved in corporate litigation. They are increasingly being called to testify as 30(b)(6) witnesses, which are witnesses who testify about the corporate operations and not necessarily the facts of the case. While this process may sound scary, 30(b)(6) depositions do not have to be.



What Is a 30(b)(6) Deposition?

Almost all civil litigation has a discovery phase – or the time before the trial commences when the parties exchange information relevant to the case. There are many ways to do this, but the primary discovery devices are:

- Interrogatories (written questions)
- Request for admissions (a written factual statement)
- Request for productions (written request to provide documents and data)
- Depositions (out-of-court recorded testimony)

At times, the lawyers in a case need background information on an organization’s method of doing business, as it pertains to the case, before they can zero in on the exact subject of the litigation. When a party to a lawsuit is a person, that person can be deposed. But, who speaks for an organization? That’s where the 30(b)(6) deposition comes into play. Under the FRCP (the rulebook that governs civil actions in the U.S. District Court), a represen-

sional’s knowledge becomes essential. In fact, he or she may be designated by the legal department to “speak on behalf of the organization” at a deposition.

A records professional may be asked to testify about:

- Information known or reasonably available to the organization
- What information is related to the case
- What infrastructure the information is housed in
- How the information is retrieved
- How the information is safeguarded

A 30(b)(6) deposition “binds the organization,” meaning it is “as if the organization said it.” It is evidence that can be explained and contradicted at trial. It can be used by the opposing party in the litigation for any purpose. Most importantly, the organization will be bound by the records professional’s lack of knowledge of any of the topics explored.

There is no limit to the number of topics that can be specified in a 30(b)(6) deposition notice. Additionally, the topics listed in the notice are a starting point, not an ending point, for the deposition. The legal department must make a good faith effort to designate those who have the knowledge of the matters listed in the deposition notice.

An organization may elect to have multiple representatives deposed in response to a single deposition notice. The legal department has a duty to prepare all individuals so they can completely answer the questions surrounding the subjects in the deposition notice. In addition, documents and other resources will help prepare the designated representatives. Preparation is crucial and should be an exhaustive process. However, the deposition is not a memory test. It is not reasonable for a person to remember every fact, as seen in *Equal Opportunity Comm’n. v. American Intl. Group*.

If a witness is unprepared to testify about a subject and cannot speak to it, then it could be considered a failure to appear. This may leave the organization vulnerable to sanctions. If the 30(b)(6) witness does not know an answer to a question, then the organization may be precluded from introducing that evidence at trial. This would put the organization at a serious disadvantage.

In the case of *Resolution Trust Corp. v. S. Union Co., Inc.*, the organization proffered two 30(b)(6) witnesses who were inadequately prepared. The third witness was deemed to be adequately prepared on the topics; however, the organization was still sanctioned. The court stated:

Rule 30(b)(6) streamlines the discovery process. It places the burden of identifying responsive wit-

(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.

tative can be designated to speak on behalf of the organization about particular topics.

For example, an individual from IT may be called upon to answer questions regarding data storage. A records professional may be called upon to discuss how data is created, stored, and deleted.

In the case of *Re: Carbon Dioxide Industry Antitrust Litigation, State of Florida, Ex Rel., et al.*, the plaintiffs served 30(b)(6) deposition notices on defendants and asked them to identify data maintained on the organization’s computers, as well as the hardware and software necessary to access the information. The court ordered the 30(b)(6) depositions to take place because they were necessary to proceed with the merits of discovery.

What Is Expected of the Deponent?

As seen in the graphic above, the opposing party in the litigation sends a subpoena, which must describe with “reasonable particularity” the matters the attorneys wish to learn more about. When the attorneys need to know about records management, a records profes-

nesses for a corporation on the corporation. Obviously, this presents a potential for abuse which is not extant where the party noticing the deposition specifies the deponent. When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent. If that agent is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all. *Id.* at 197.

After the organization becomes aware of the deficiency, it has a duty to substitute another deponent who can speak to the subject. The legal department does not have to proffer the witness with the greatest knowledge on the subject, just a witness who is prepared to answer the subjects outlined in the deposition notice.

Strategies of a 30(b)(6) Deposition

Get the Lay of the Land

Depositions are used to flesh out a topic so the opposing party in the litigation can send more specific and tailored discovery requests, such as interrogatories and document requests. In the case of *Alexander v. FBI*, for example, the court allowed depositions to learn about e-mail systems, acquisition systems, as well as location and disposition of computer equipment to guide substantive discovery on the issues of the case.

Massive amounts of data that organizations create and store add substantial cost to the litigation budget. That cost involves identifying, collecting, reviewing, and producing data to the opposing party in litigation. The more attorneys can narrow the field of what to collect, review, and produce, the more money they will save their client. Therefore, the records professional is often the first person the attorney visits to find out about the types of data that are relevant to the litigation.

Narrow the Scope

The 30(b)(6) deposition is a valuable tool for opposing counsel to acquire information about an organization's data and systems. It's also a valuable tool for the organization's attorney as he or she will most likely seek to narrow the scope of the information universe, which can greatly reduce the litigation budget. A reduction in the information universe can be accomplished by limiting the number of departments or custodians, as well as the geographic and temporal scope of the litigation.

Prevent a Fishing Expedition

Just as the organization's attorney seeks to narrow the scope of information, sometimes the opposing party seeks to broaden it. This can happen for a few reasons:

- It drives up the costs of the litigation, so the organization may settle the matter instead of pursuing a trial on the merits.
- The more information provided, the more likely the opposing party will find the ever-elusive "smoking gun," or data that illustrates corporate misconduct.
- The more information "in play" in the litigation, the more likely the opposing party will *spoliate*, or lose, destroy, or alter, something.

If opposing counsel can prove that an organization intentionally lost, altered, or destroyed information relevant to the subject matter of the litigation ... the organization could be sanctioned.

Put the Brakes on Spoliation

In the electronic era, some attorneys affirmatively seek out sanctions against the opposition as a weapon in litigation. If opposing counsel can prove that an organization intentionally lost, altered, or destroyed information relevant to the subject matter of the litigation, which is called *spoliation* of evidence, the organization could be sanctioned. Sanctions could include monetary fines, dismissal of a claim or defense, or *adverse inference* instructions to the jury, which allows the jury to infer that the missing, destroyed, or altered documents contained unfavorable information.

Sanctions cases are on the upswing, which can mean big money for the person who can prove that evidence was destroyed, giving the attorneys an incentive to look for data that is not there. The 30(b)(6) deposition can be used to put together a spoliation case. Opposing counsel will try to elicit information from the records professional to demonstrate that data was not properly preserved, or spoliated, and/or that an incomplete search for the data was conducted.

In the *Alexander v. FBI* case, plaintiffs filed a Rule 30(b)(6) deposition notice on the Executive Office of the President for information about the system of files, e-mail systems, systems for recording devices, and White House office databases. The government objected and claimed that the deposition sought to inquire into the

Topics that may be addressed at the 30(b)(6) deposition.

- Your qualifications (e.g., education, training, and experience)
- Organization structure
- Steps taken to prepare for deposition
- Corporate system(s)
- Backup systems (e.g., tapes, hard drives, servers, and e-mail system)
- Disaster recovery procedures
- How data is created, stored, organized, and deleted
- Document retention policy
- Litigation hold procedures
- Alternative sources for electronic information

thoroughness of the searches conducted by the government.

The court found the government's affidavit regarding the thoroughness of the searches had not been rebutted, and plaintiffs were not allowed to inquire into the matter. However, the court permitted a Rule 30(b)(6) deposition to proceed to learn about:

1. The e-mail systems and the construction of user identification tables
2. The computer system containing a database of persons who had contacted the White House
3. The system for acquisition, location, and disposition of computers

It is common for multiple depositions to take place. There are many areas where two types of depositions, such as IT and records management, can have overlapping substantive areas. Attorneys will make sure everyone is singing from the same sheet of music, but be aware opposing counsel may seek to use a divide-and-conquer strategy. If records management says the backup rotation schedule is this way and the IT person says it is that way, then opposing counsel may be able to find a way to use the inconsistency against the organization.

A Records Professional's Responsibilities

Be Prepared

There is no such thing as over-preparing for a 30(b)(6) deposition. Uniformed, overbroad, or imprecise testimony can lead to increased litigation expenses as seen in the case *In Re CV Therapeutics, Inc. Securities Litigation*. As a records professional, you will be asked about the

types of information; the author or custodian of the information; the locations where the information is stored; how it is stored; and any processes that may impact the integrity of the data. Make it clear when speaking on behalf of the organization or on behalf of personal knowledge.

Be Careful with Demeanor

If the deposition is actually occurring at trial or being videotaped, be aware that your demeanor may help or hinder the case. The judge or jury can take into account your demeanor and whether it makes the testimony more or less believable. If you are nervous or jittery, it may reflect negatively, and your testimony may not be believed. A calm and confident demeanor goes a long way toward assuring the trier of fact that your testimony is credible.

Be Flexible

There may be multiple witnesses called to testify for a 30(b)(6) deposition, and the subject matter for each designee may overlap with yours. Although attorneys will do their best to prepare you for the deposition by going over the topics in question, the deposing attorney may still ask you questions beyond the scope of the notice. Some courts allow this – so be prepared for those types of questions and do not to be thrown off guard by them.

Be Ready to Practice, Practice, Practice

The organization's attorneys will likely practice with the designated spokespersons. But it also helps to practice recounting the storage system and the basic organizational chart, which describes the various functions of the organization and what data each area is responsible for. During the practice session, work on terminology to make sure it is precise and cannot be easily misunderstood. The legal team may ask you to engage in a mock deposition.

Take Cues from Your Attorney

After you are asked a question, pause before answering, which provides the opportunity for your attorney to make an objection. Most likely, you will be instructed to answer the question in spite of the objection. Take a moment and think about why the attorney objected and answer the question accordingly.

Your role with regard to litigation has grown exponentially in the electronic era. The 30(b)(6) deposition is especially important in that the testimony binds the organization. It is incumbent upon you to be prepared for your own 30(b)(6) deposition. **END**

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