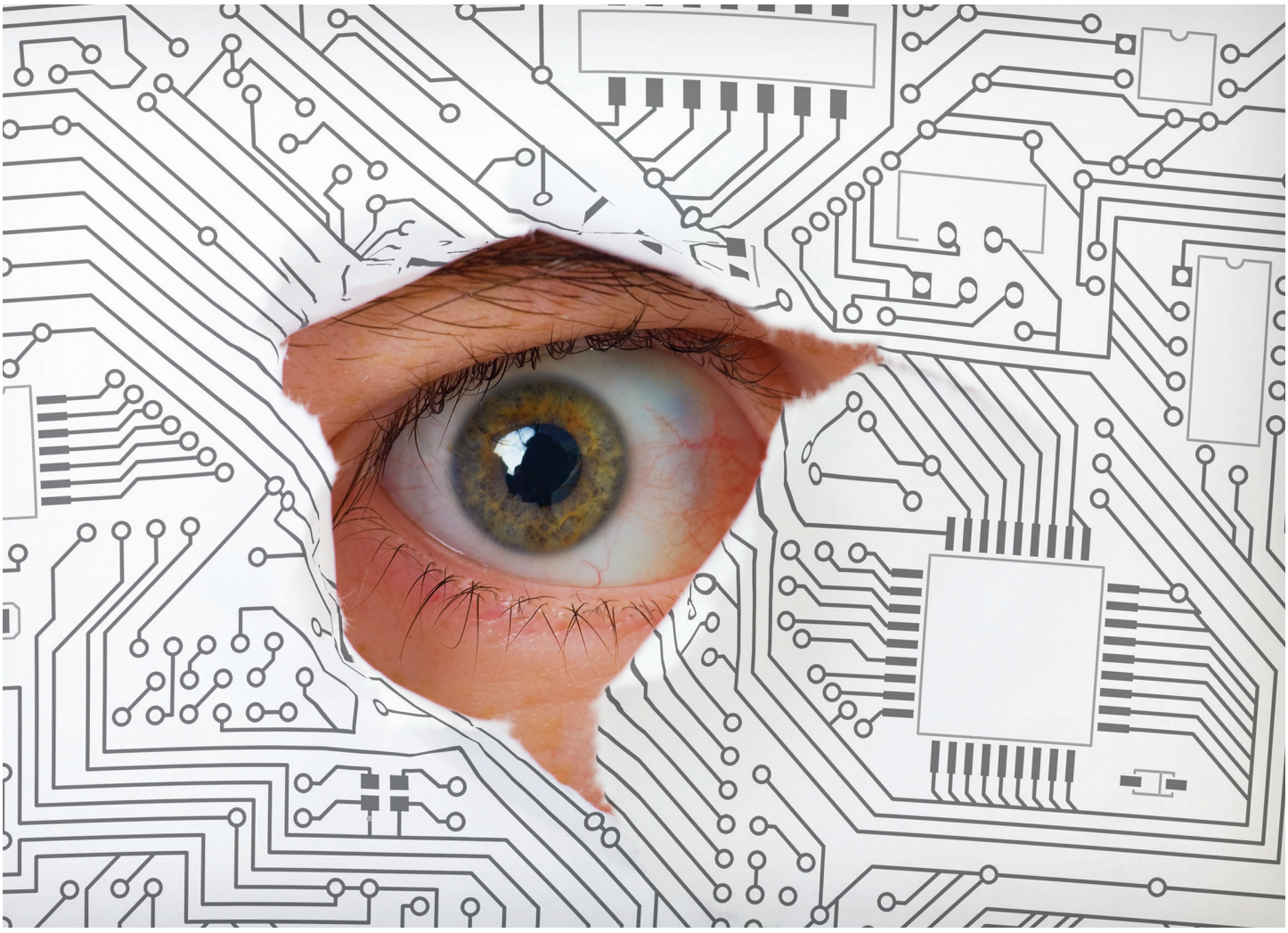
Preparing a Witness

By Bradley C. Nahrstadt

Rule 30(b)(6) Depositions in an ESI World



In the "good old days," an attorney could go for months, maybe even years, without taking or presenting an individual for a Rule 30(b)(6) deposition. The implementation of the amendments to the federal rules of civil procedure in December of 2006, which brought the issue of electronic discovery to the forefront, has changed all that. Today, as electronic discovery has become routine in civil litigation, the role of the Rule 30(b)(6) witness has become increasingly important. As one set of commentators has noted, "…the proliferation of [electronically stored information] 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." James K. Lehman, John D. Martin & Daniel R. D'Alberto, "Electronic Discovery and the 30(b)(6) Deposition," *Understanding the New E-Discovery Rules*, p. 105 (DRI 2006).

The use of Rule 30(b)(6) depositions to determine what discoverable ESI a party has, where it is stored, and what it will take to retrieve it is specifically contem-

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plated by the federal rules regarding electronic discovery. Rule 26(f) requires the parties to confer and "discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan," that addresses, among other things, "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced." Although the rule itself does not expressly authorize discovery into efforts a party may make to identify, preserve or collect ESI, the commentary to the amendments suggests that, "[i]n appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful." Indeed, in recognizing the importance of Rule 30(b)(6) depositions in the e-discovery context, one federal court said the following, "…30(b)(6) depositions to identify how data is maintained and to determine what hardware and software is necessary to access the information are preliminary depositions necessary to proceed with merits discovery." *In re Carbon Dioxide Industry Antitrust Litigation*, 155 F.R.D. 209 (M.D. Fla. 1993).

The purpose of this article is to provide a general overview of the specific requirements of a Rule 30(b)(6) deposition and to provide particular advice about selecting and preparing a Rule 30(b)(6) witness to testify regarding electronic discovery issues.

The Rule 30(b)(6) Deposition Generally

Federal Rule of Civil Procedure 30(b)(6) allows a party to a lawsuit to designate the matters upon which examination is requested from a corporate party. The rule is designed to avoid the possibility that several officers and managing agents may be deposed in turn, with each disclaiming personal knowledge of facts that are clearly known to persons within the organization and, thus, the organization itself. *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416 (5th Cir. 2006). FRCP 30(b)(6) states, in relevant part:

> Rule 30. Deposition by Oral Examination
> (b) Notice of the Deposition; Other Formal Requirements.
> (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.

Some of the states have adopted FRCP 30(b)(6) wholesale; others have adopted the rule with some modifications.

> The requesting party must reasonably particularize the subjects about which it wishes to inquire.

Obligations of the Requesting Party

There are reciprocal obligations under Rule 30(b)(6). The requesting party must reasonably particularize the subjects about which it wishes to inquire. *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633 (D. Minn. 2000). As one court has noted, "… 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." *Sprint Communications Co. v. Theglobe.com, Inc.*, 236 F.R.D. 524 (D. Kan. 2006). Failure of the requesting party to describe with reasonable particularity the matters for examination is a legitimate grounds for objecting to the Rule 30(b)(6) deposition. *See, e.g., Fowler v. State Farm Mutual Automobile Insurance Co.*, 2008 WL 4907865 (D. Hawai'i 2008); *Brunet v. The Quizno's Franchise Company, LLC*, 2008 WL 5378140 (D. Colo. 2008).

In order to comply with the rule, a party requesting a corporate witness deposition should issue a deposition notice that contains (1) a concise identification of the designated areas of requested testimony and (2) a request that the organization (a) provide the names and titles of the persons designated to give testimony and (b) identify the subject matter on which each designated person will testify.

It cannot be stressed enough that the party issuing the Rule 30(b)(6) deposition notice must make sure to describe the areas of inquiry with reasonable particularity. Avoid the phrase "including, but not limited to…" when identifying areas of inquiry. Do not list general subjects of examination that cover areas already explored during the discovery process. Resist listing areas of inquiry that are too broad in time and scope. Doing any one of these things may lead to the entry of an order quashing the deposition notice. *See, e.g., Reed v. Bennett*, 193 F.R.D. 689 (D. Kan. 2000)(use of the language "including but not limited to" turns a Rule 30(b)(6) request into an overbroad notice, in contradiction to the "reasonable particularity" required by the rule); *Innomed Labs, LLC v. Alza Corporation*, 211 F.R.D. 237 (S.D.N.Y. 2002)(same).

Obligations of the Responding Party

1. Designate the Person or Persons to Testify

Once the requesting party has issued a particularized notice for the Rule 30(b)(6) deposition, the responding party must identify and designate one or more people to testify about each subject area listed in the notice. *Resolution Trust Corp. v. S. Union Co., Inc.*, 985 F.2d 196 (5th Cir. 1993)(noting that Rule 30(b)(6) places the burden on identifying and designating responsive witnesses for corporate deposition upon the corporation itself); *Buycks-Roberson v. Citibank*

Federal Savings Bank, 162 F.R.D. 338, 342 (N.D. Ill. 1995)(corporations have a duty to "make a conscientious good faith effort to designate the persons having knowledge of the matters sought by the [discovering party]…"); *Reilly v. NatWest Mkts. Group,* 181 F.3d 253 (2nd Cir. 1999); *Poole v. Textron, Inc.,* 192 F.R.D. 494 (D. Md. 2000).

If a single person is unable to testify about all the areas of inquiry listed in the Rule 30(b)(6) notice, then the corporation has an obligation to identify multiple witnesses to testify on its behalf. *See, e.g., Beloit Liquidating Trust v. Century Indemnity Co.,* 2003 WL 355743 (N.D. 2003)(if the deponent is unable to answer questions about certain relevant areas of inquiry, then the corporation must designate another individual to satisfy a Rule 30(b)(6) notice); *Smithkline Beecham Corp. v. Apotex Corp.,* 2000 WL 116082 at *8 (N.D. Ill. 2000)("If a deponent is unable to testify about certain relevant areas of inquiry the business entity must designate additional parties to satisfy a Rule 30(b)(6) notice.").

2. Identify Areas of Testimony

In accordance with the rule, a corporation may identify the subject matter on which each designated person will testify. When more than one 30(b)(6) witness will be proffered, or there are dozens of subjects that will be the focus of the 30(b)(6) deposition, the better course is to always identify for opposing counsel the topics on which each particular witness will be giving testimony. This will not only streamline the deposition process, it will serve as a checklist for the producing counsel to make sure that each subject matter is sufficiently covered by a knowledgeable witness.

3. Prepare the Witness to Testify

When faced with a Rule 30(b)(6) deposition notice, a corporation has a duty to prepare the Rule 30(b)(6) designee "… in order that they can answer fully, completely, unevasively, the questions posed by [the discovering party] as to the relevant subject matters." *Buycks-Roberson v. Citibank Federal Savings Bank,* 162 F.R.D. 338, 342 (N.D. Ill. 1995). This means that a corporation must prepare the corporate representative "to adequately testify not only on matters known by the deponent, but also on subjects that the entity should reasonably know." *Beloit Liquidating Trust v. Century Indemnity Co.,* 2003 WL 355743 at *2 (N.D. 2003); *Mintel International Group, Ltd. v. Neerghen*, 2008 WL 4936745 (N.D. Ill.). The designated witness must be able to testify about facts within the organization's knowledge (not the witness's personal knowledge) and about the company's subjective beliefs and opinions. *Calzaturficio S.C.A.R.P.A. v. Fabiano Shoe Co.,* 201 F.R.D. 33 (D. Mass. 2001); *Paul Revere Life Insurance Co. v. Jafari*, 206 F.R.D. 126 (D. Md. 2002).

When more than one 30(b)(6) witness will be proffered, or there are dozens of subjects that will be the focus of the 30(b)(6) deposition, the better course is to always identify for opposing counsel the topics on which each particular witness will be giving testimony.

A corporate defendant is not required to produce the witness with the greatest knowledge about a particular designated subject. A witness prepared to answer questions on the subjects outlined in the deposition notice is sufficient. *Cruz v. Coach Stores, Inc.,* 1998 WL 812045 at *6–7 (S.D.N.Y. 1998)("Rule 30(b)(6) does not require a party to produce someone who is 'most knowledgeable' but only someone whose testimony is binding on the party."); *Rodriguez v. Pataki*, 293 F.Supp.2d 305, 311 (S.D.N.Y. 2003)("[I]t is settled law that a party need not produce the organizational representative with the greatest knowledge about a subject; instead, it need only produce a person with knowledge whose testimony will be binding on the party.").

Neither Rule 30(b)(6), the Advisory Notes, nor the reported case law addressing the rule define "reasonably available" information. As one court has noted, litigants may find it "difficult to determine precisely what 'reasonably available' to the organization means." *AMP, Inc. v. Fujitsu Microelectronics, Inc.,* 853 F.Supp. 808, 831 (M.D. Pa. 1994). Despite this lack of judicial guidance, the courts have made it clear that any effort to prepare a corporate designee to testify about matters that are reasonably available to the company must include a review of all corporate documentation relating the to deposition topics, as well as earlier fact witness depositions and deposition exhibits. *United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996)(if need be, the responding party "must prepare deponents by having them review prior fact witness deposition testimony as well as documents and deposition exhibits."); *Prokosch v. Catalina Lighting, Inc.,* 193 F.R.D. 633 (D. Minn. 2000); *Calzaturficio S.C.A.R.P.A. v. Fabiano Shoe Co.,* 201 F.R.D. 33 (D. Mass. 2001)(organization must prepare deponents by having them review earlier fact witness testimony as well as documents); *Berwind Property Group, Inc. v. Environmental Management Group, Inc.,* 233 F.R.D. 62, 65 (D. Mass. 2005)(it is the respondent's responsibility to prepare its Rule 30(b)(6) designee "to the extent the matters are reasonably available, whether from documents, past employees, or other sources.").

There are, however, limits to this preparation. In *Concerned Citizens of Belle Haven v. Belle Haven Club,* 223 F.R.D. 39 (D. Conn. 2004), the plaintiffs sued a homeowners' club for discriminatory membership practices based on race and religion. The court in that case held that the defendant's obligation to prepare a 30(b)(6) designee to testify as to matters "reasonably known" to the defendant did not require a separate investigation into the current racial and religious make-up of the club's membership. *Id.* at p. 44. *See also, Promega Corp. v. Applera Corp.,* 2002 WL 32340886 at *4 (W.D. Wis. 2002)("it appears unrealistic to expect a [Rule 30(b)(6)] deponent to be intimately familiar with the details of every individual transaction described in a database); *United States v. M & T Mort-*

gage Corp., 235 F.R.D. 11, 25 (D.C. 2006) ("[a]lthough Rule 30(b)(6) requires a designated witness to thoroughly educate him or herself on the noticed topic, there must be a limit to the specificity of the information the deponent can reasonably be expected to provide.").

It is important to remember that the testimony of a Rule 30(b)(6) witness "binds" the company. Several courts have held that the deposition is not binding in the sense of a judicial admission, but rather only in the way that 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.

U.S. v. Taylor, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996); *Industrial Hard Chrome, Ltd. v. Hetran, Inc.,* 92 F.Supp.2d 786, 791 (N.D. Ill. 2000)("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 Rule 30(b)(6) designee testifies on behalf of a corporate defendant, the testimony of that witness is "binding", but the company can explain away or contradict that testimony at trial.

Other Important Points About the Rule 30(b)(6) Deposition

1. Location of the Deposition

As a general rule, the deposition of an organizational representative should take place in the district of the organization's principal place of business, unless justice requires otherwise. *Thomas v. IBM*, 48 F.3d 478 (10th Cir. 1995); *Rapoca Energy Co. v. AMCI Exp. Corp.,* 199 F.R.D. 191 (W.D. Va. 2001); *Cadent Ltd. v. 3M Unitek Corp.,* 232 F.R.D. 625 (C.D. Cal. 2005). Factors that serve to dissipate the presumption that a corporate party's deposition should be held at its principal place of business and may persuade the court to require the deposition to be conducted in the forum district or some other place include location of counsel for the parties in the forum district, the number of corporate representatives a party is seeking to depose, the likelihood of significant discovery disputes arising which would necessitate resolution by the forum court, whether the persons sought to be deposed often engage in travel for business purposes, and the equities with regard to the nature of the claim and the parties' relationship. *Resolution Trust Corp. v. Worldwide Ins. Management Corp.,* 147 F.R.D. 125 (N.D. Tex. 1992); *Armsey v. Medshares Mgmt. Services*, 184 F.R.D. 569 (W.D. Va. 1998).

> Despite this lack of judicial guidance, the courts have made it clear that any effort to prepare a corporate designee to testify about matters that are reasonably available to the company must include a review of all corporate documentation relating the to deposition topics, as well as earlier fact witness depositions and deposition exhibits.

2. Questions Outside the Scope of the 30(b)(6) Notice

The courts are sharply divided over whether or not a Rule 30(b)(6) deponent may be asked questions outside the scope of the Rule 30(b)(6) notice. Some courts have held that it is improper to ask questions of the 30(b)(6) designee that are outside the scope of the notice. *See, e.g., Paparelli v. Prudential Ins. Co. of America*, 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."). Many other courts have held that questioning outside the scope of the deposition notice is permissible. *See, e.g., King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995); *Cabot Corp. v. Yamulla Enters.,* 194 F.R.D. 499 (M.D. Pa. 2000); *Bracco Diagnostics, Inc. v. Amersham Health Inc.,* 2005 U.S. Dist. LEXIS 26854 at *5-6 (D.N.J. 2005) ("More recently, a string of district courts around the country have refused to follow *Paparelli* in favor of a rule that, regardless of the information contemplated in the notice of deposition, the deponent must answer all relevant questions."). In those circumstances where questioning beyond the notice of deposition is allowed, some courts allow the party defending the deposition to object on the record to questions falling outside the scope of the notice, noting that the answers are not binding on the company. *See, e.g., Detoy v. City & County of San Francisco*, 196 F.R.D. 362, 367 (N.D. Cal. 2000)("Counsel may note on the record that answers to questions beyond the scope of the Rule 30(b)(6) designation are not intended as the answers of the designating party and do not bind the designating party."); *U.S. EEOC v. Caesar's Entertainment, Inc.,* 237 F.R.D. 428, 433 (D. Nev. 2006)(same).

3. Sanctions

An organization can be sanctioned if it refuses to designate a 30(b)(6) witness or if it designates someone who does not possess knowledge of the matters about which the organization will testify. *Resolution Trust Corp. v. Southern Un. Co.,* 985 F.2d 196 (5th Cir. 1993). Indeed, offering an unprepared designee could be considered tantamount to a failure to appear and may subject the company to sanctions under Rule 37. *See, e.g., Marker v. Union Fidelity Life Insurance Co.,* 125 F.R.D. 121, 126 (M.D.N.C. 1989) ("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."); *Resolution Trust Corp. v. S. Union Co., Inc.,* 985 F.2d 196, 198 (5th Cir. 1993)(upholding the trial court's award of fees and costs where the company's first two 30(b)(6) designees were inadequately prepared and a third, knowledgeable designee was available); *U.S. v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996); *Berwind Property Group, Inc. v. Environmental Management Group, Inc.,* 233 F.R.D. 62 (D. Mass. 2005).

The E-Discovery Rule 30(b)(6) Deposition

Understandably, the aforementioned rules will apply to any Rule 30(b)(6) deposition that is conducted regarding a party's electronic discovery. However, there are some issues relating to Rule 30(b)(6) depositions in the e-discovery arena which require some special thought and attention.

Identify the Rule 30(b)(6) Witness (or Witnesses) Early in the Case

When any case is first received, counsel should immediately ascertain whether electronic discovery will be an issue in the case. If it is likely that the identification, preservation and production of ESI will be involved in the defense or prosecution of the claim, special thought should be given to identifying a witness (or witnesses) to address ESI issues at the beginning of the case. Waiting until a Rule 30(b)(6) notice has been received may not allow counsel the time necessary to evaluate, select and prepare the best designee(s). The end result: the company is forced to offer a less than desirable witness to talk about these very important issues.

Select the Right Witness or Witnesses

When deciding who will testify on behalf of the company, keep in mind that it is possible that a person who is not in the employ of the defendant company may be the best witness to testify about electronic discovery issues. Whether that person is a former IT director who has left the company or an outside IT consultant, the courts have generally held that a responding party can meet its Rule 30(b)(6) obligations by producing a non-employee witness. *See, e.g., Employers Insurance Company of Wausau v. Nationwide Mut. Fire Ins. Co.,* 2006 WL 1120632 at *1 (E.D.N.Y. 2006)("By its terms, Rule 30(b)(6) does not limit an organization from designating a person other than an employee to be deposed on behalf of that organization."); *Village of Kiryas Joel Local Dev. Corp. v. Insurance Company of North America*, 1991 WL 41667 at *2 (S.D.N.Y. 1991)("[T]he fact that [the witness] may no longer be a director, officer or managing agent does not disable him from being a Rule 30(b)(6) designee of the plaintiff."); *Hilburn v. Deere & Co.,* 1990 WL 119690 at *3 (E.D. Pa. 1990) (holding that a current consultant/former employee was the most knowledgeable, and therefore a binding 30(b)(6) witness.).

> An organization can be sanctioned if it refuses to designate a 30(b)(6) witness or if it designates someone who does not possess knowledge of the matters about which the organization will testify.

When the notice for the Rule 30(b)(b) deposition seeks substantive information *and* information regarding the electronic data storage systems containing that information, it may be a good idea to designate more than one deponent. The first witness would testify concerning the substance of the ESI and the second witness would describe the locations and the retrieval of the ESI.

Counsel must make sure that careful thought is given to the demeanor of anyone selected to be a 30(b)(6) witness. A witness's demeanor may be the determining factor of whether or not the witness is believed and the testimony accepted. As the U.S. Supreme Court has noted:

> [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.

N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404, 408 (1962)(quoting *Dyer v. MacDougall,* 201 F.2d 265, 269 (2nd Cir. 1952).

In light of the foregoing, if the company designates its most knowledgeable IT person as its Rule 30(b)(6) witness, and that person is nervous, scared, anxious, wide-eyed, or otherwise seems uncomfortable, that discomfort may result in inaccurate or unbelievable testimony. A calm and confident demeanor goes a long way towards enabling the witness to provide accurate, clear, and credible testimony. Lehman*, et al., supra,* p. 109.

If, during the preparation stage (or even during the course of the deposition itself), it becomes apparent that the selected witness does not have knowledge about some of the topics identified in the Rule 30(b)(6) notice, promptly inform the requesting party that a second (or third) designee will be proffered to speak about the additional topics. *See, Dwelly v. Yamaha Motor Corp.,* 214 F.R.D. 537 (D. Minn. 2003)(defendant complied with Rule 30(b)(6) obligations when it sent a letter to opposing counsel, two months prior to Rule 30(b)(6) deposition, offering an additional deposition of a second designee); *Mintel International Group, Ltd. v. Neerghen*, 2008 WL 4936745 (N.D. Ill. 2008)(plaintiff's motion for sanctions denied where defendant sent a letter to opposing counsel, prior to Rule 30(b)(6) deposition, offering to produce an additional designee to discuss topics that were beyond the knowledge of the first designee).

Thoroughly Prepare the Witness to Testify

The case of *In re CV Therapeutics, Inc. Sec. Litig.,* 2006 U.S. Dist. LEXIS 38909 (N.D. Cal. 2006) provides a stern warning for those who fail to thoroughly prepare their Rule 30(b)(6) witnesses to testify at deposition. In that case, a senior corporate counsel, testifying as a Rule 30(b)(6) witness on the location of ESI and back-up media, was asked whether "all the different drives"

on his company's computer network were being searched for responsive documents. In answer to that question he stated:

> 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 of potentially responsive communications to the document requests. We do intend to move through whatever servers we haven't 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.

Later, when the plaintiffs brought a motion to compel the company to produce documents that were contained on those previously unsearched drives, the defendant argued that the burden of searching the drives would outweigh any benefits to the plaintiffs. CV Therapeutics estimated that it would take 20,000 man hours and cost approximately $2.2 million dollars to search the additional servers. In light of the witness' testimony (and despite the huge costs), the court rejected the defendant's argument and ordered a complete search of each drive (although the court did shift some of the cost associated with the search to the plaintiff). *In re CV Therapeutics,* 2006 U.S. Dist. LEXIS at *29.

The *CV Therapeutics* case, and others like it, should serve as a stern reminder to counsel preparing for a Rule 30(b)(6) deposition: prior proper planning prevents a pitiful, poor performance! Counsel must make sure that the deponent is thoroughly prepared to address the topics that are set forth in the deposition notice.

The scope of an electronic discovery focused Rule 30(b)(6) deposition can be incredibly broad. One well known publication contains a seven page checklist for possible topics to be covered at a Rule 30(b)(6) deposition. Sharon D. Nelson, Bruce A. Olsen and John W. Simek, *The Electronic Evidence and Discovery Handbook: Forms, Checklists and Guidelines*, (ABA Publishing 2006). Despite the potential broad scope, the basic objectives for Rule 30(b)(6) depositions in the electronic discovery field generally include the identification of (1) the types of responsive information the company has; (2) the authors or sources of that information; (3) the location where the information is stored; and (4) the technology used to store it. Preparation of the Rule 30(b)(6) witness should focus on enabling the designee to address these issues to the extent that they are set forth in the 30(b)(6) notice of deposition. Lehman, *et al., supra,* p. 109.

A calm and confident demeanor goes a long way towards enabling the witness to provide accurate, clear, and credible testimony.

Undoubtedly, any Rule 30(b)(6) witness who will be addressing e-discovery issues will have to be familiar with the company's IT infrastructure (as a side note, counsel will have to be familiar with the IT infrastructure as well). Counsel should expect that the deponent will be asked about the following topics:

1. Identity of IT Personnel
   - The identity of all employees who were responsible for managing and maintaining the company's technology infrastructure;
   - The identity of all non-employee consultants, consulting firms, contractors or similar entities that were responsible for managing and maintaining the company's technology infrastructure.
2. Inventory of Computer Systems, Databases and Other Sources of ESI
   - Numbers, types and locations of servers, workstations and laptops;
   - Operating systems and software, including dates they were in use;
   - File naming and location saving conventions;
   - Identity and status of legacy systems;
   - Hardware and software modifications;
   - Description of all employee e-mail accounts;
   - Description of all cell phones, PDAs, digital convergence devices or other portable electronic devices.
3. Policies & Procedures for Labeling, Managing, Storing & Archiving ESI
   - Physical location of electronic information;
   - Disc labeling or tape labeling conventions;
   - Description of policies and procedures for performing back-ups or archiving;
   - Inventory of back-up media and archived information;
   - Schedule of when back-up media and archived information was created;
   - Portable media labeling techniques (CD-ROMs, external hard drives, etc.);
   - Back-up rotation schedules and archiving procedures.
4. Policies & Procedures for Managing Electronic Information
   - User permissions for accessing, modifying, and deleting data;
   - Utilization of data deletion programs;
   - Schedule for formatting hard drives or reinstalling software.
   - A listing of current and former personnel who have or had access to network resources, technology assets, back-up, archiving and other systems operations.
5. Policies & Procedures for Use of Computers, ESI and Technology Platforms
   - Electronic records management policies and procedures;
   - Corporate policies re: employee use of company computers and data;
   - Policies and procedures governing employee use of Internet newsgroups, chat rooms or instant messaging.

Lehman, *et al., supra,* pp. 109-110; *see also, Leibholz v. Hariri*, 2008 WL 2697336 (D.N.J. 2008).

Federal Rule of Civil Procedure 26(b) limits the production of ESI from sources "the party identifies as not reasonably accessible because of undue burden or cost." According to the Committee Notes 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.

With this in mind, counsel should prepare the 30(b)(6) witness to provide testimony that can help manage the expectations regarding the existence and availability of certain types of ESI. Use the 30(b)(6) deposition as a key opportunity to identify sources of ESI that are not reasonably accessible and explain why that is so: the information is stored on back-up tapes that are not routinely used to retrieve data, the information is stored on systems that are no longer operational and no one can use; it would be too burdensome or too costly to retrieve the information or retrieving the information would result in undue hardship or expense as a result of business disruption.

Counsel should recognize that even where the Rule 30(b)(6) testimony regarding the costs of collecting electronic data do not render it inaccessible, such testimony may establish key elements for shifting some or all of the associated costs to the requesting party. Counsel must make sure that the 30(b)(6) designee is familiar with the cost shifting factors discussed in *Rowe Entertainment v. The William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002)(eight factor cost shifting analysis); *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003)(seven factor cost shifting analysis) and *Wiginton v. CB Richard Ellis*, 229 F.R.D. 568 (N.D. Ill. 2004) (eight factor cost shifting analysis; modified from *Zubulake* to emphasize the proportionality test found in F.R.C.P. 26(b)(2)(iii)) and have the witness prepared to testify about the relevant cost-shifting factors as they apply to the case at issue.

One final thought. 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, as one set of commentators has noted, 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 Rule 30(b)(6) notice, the witness may need to discuss the good faith operation of the company's systems to the extent the operation of those systems includes the routine destruction of ESI. The designee may also need to be prepared to address the company's document retention policies as well as the timing and scope of internal preservation memoranda keyed to the particular litigation. Lehman, *et al., supra,* pp. 111–112.

Other Important Points About the Electronic Discovery 30(b)(6) Deposition

1. Be Mindful of Waiving Privilege

When selecting documents to use to prepare a Rule 30(b)(6) designee for the deposition, special consideration should be given to the types of documents used in the preparation session. Showing the witness documents that contain counsel's mental impressions or specially prepared compilations of documents may result in a waiver of the attorney-client privilege or the work product doctrine. Some courts have held that a party may risk waiver if documents protected by the attorney-client privilege or the work product doctrine are used to prepare a designee for a Rule 30(b)(6) deposition. *See, e.g., Sprint Communications Co. v. Theglobe.com,* 236 F.R.D. 524, 529 (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."); *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."); *Wilson v. Lakner*, 228 F.R.D. 524 (D. Md. 2005)(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 of privilege). Offering corporate counsel as a Rule 30(b)(6) designee, however, generally should not waive the attorney-client privilege. *Motley v. Marathon Oil Co.,* 71 F.3d 1547 (10th Cir. 1995) (mere designation of counsel as corporate representative for deposition pursuant to Rule 30(b)(6) does not waive the attorney-client privilege).

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."

2. Conduct a Full-Blown Rehearsal of the Deposition

There is a great deal of truth to the old adage that practice makes perfect. The more time that is spent with the witness discussing key issues and practicing possible questions and answers, the more accurate and confident the witness is likely to be during the actual deposition. This is especially true for Rule 30(b)(6) depositions that focus on electronic evidence issues. Thorough preparation entails not only reviewing the topics to be covered during the deposition, but also practicing terminology that is accurate, precise and easily understood by those who are unfamiliar with the technology at issue. Lehman, *et al., supra,* p. 110. Suppose, for example, that the witness is asked "Did you search the company's hard drives?" The witness should be prepared to request clarification of that question. Was the examiner referring to network drives, laptop drives, e-mail servers or USB keychain drives? Preparing the Rule 30(b)(6) witness through the use of practice depositions to recognize and correct imprecise terminology and unsupported assumptions may be the most effective way to avoid unintended results at the 30(b)(6) deposition. *Id.*

Given the proliferation of electronic discovery, Rule 30(b)(6) depositions will most likely start to become more and more commonplace. As such, counsel must become familiar with the intricacies of this discovery device and take the time to properly select and prepare the person who will be offering testimony on behalf of the corporate party. A keen understanding of the parameters of such depositions, coupled with a careful selection and thorough preparation of the 30(b)(6) designee, will go a long way toward ensuring that the outcome of your case does not depend on the result of one single deposition.