What It Means to Be Deposed

Save to myBoK

By Ron Hedges

In this blog I talk about legal consequences. I usually provide current examples of what those consequences might be under a specific set of facts. Here, instead, I want to highlight a litigation-related event that readers might experience in the future—or perhaps already have: a deposition. Depositions can involve inquiry into electronic and other types of information.

By way of introduction to the topic, I am going to discuss an oral deposition rather than one on written questions. The latter is governed by Federal Rule of Civil Procedure ("Rule") 31 or its State equivalents and is rarely used. The oral deposition, governed by Rule 30 or, again, its State equivalent is what most of us—lawyers, health information management professionals, and others—understand a deposition to be. Moreover, although this blog is about you being deposed in a civil action in which your employer—not you—is a party, the applicable rules apply to either.

The oral deposition begins with a notice served by a party on another. According to Rule 30(b)(1):

> "A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs."

The deponent (that's the party being deposed) can be deposed on anything that falls within the definition of discoverable information in Rule 26(b)(1). The deposition should seek information known to you and, as a general rule, is limited to one day of seven hours.

Presumably, you would be deposed with regard to an event involving your employer (perhaps a healthcare provider) and particularly with regard to electronic or other health records. You should expect to be prepared (or "prepped") for the deposition by an attorney who represents your employer. It is important to remember that this attorney does not represent you; if you think that you are at risk for something you might have done in the course of your employment, you should consult with a separate attorney of your choice.

Once the deposition begins, your opportunity to confer with any attorney is extremely limited, and might not be an option at all. You will be sworn under oath (in other words, you have to be truthful under penalty of perjury), and you must answer any question based on your personal knowledge. There is nothing wrong with saying, "I don't know," and you should never guess at an answer if you are unsure. When the deposition is completed a written transcript will be prepared and, within circumscribed limits, you will have an opportunity to correct what you are reported in the transcript to have said.

I have stated that the deposition is about what you know. However, there might come a time when you are deposed not about what you know, but instead about what your employer knows. This is called a 30(b)(6) deposition after the Federal Rule of Civil Procedure, which allows such a deposition. That Rule provides:

> "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."

This Rule imposes serious obligations on you if you are "designated" a deponent under it because it is about information that may not be known by you personally but, instead, about information "known or reasonably available" to your employer. This

requires you, as a designated 30(b)(6) deponent, to inquire about the matters which you will be deposed about. You should be assisted by the attorney who represents your client and who may or not be the attorney who sits in the deposition with you. You should make an inquiry about everything the 30(b)(6) notice served on your employer wants you to testify about. That means, if you are asked to be a 30(b)(6) deponent, you should ask for the deposition notice, read and appreciate the matters to be inquired into at the deposition, and understand what information your employer has that is responsive to the notice.

This is a serious obligation on your part: Your answers at a 30(b)(6) will bind your employer and your inability to answer questions posed of you at the deposition may result in sanctions. For all these reasons, and sometimes to avoid the designation of an employee such as yourself as a designated 30(b)(6) deponent, employers sometimes retain an independent third person such as a consultant to be designated.

What does all this mean for you? First, if you are ever deposed, be truthful and NEVER SPECULATE OR GUESS. An answer to a question asked of you may be used against you or your employer later in the litigation (or sometimes elsewhere). Second, understand what you will be asked about. This entails a discussion with an attorney before the deposition. That attorney may be one retained by your employers to represent it in the litigation or may be an in-house attorney. Do not be afraid to ask questions of the attorney about the nature or scope of the deposition. Third, you should understand that there might be times when you are deposed not because your employer is a party to a particular litigation but, rather, because you or your employer may have information relevant to pending litigation. Under such circumstances Rule 45 (or, once again, its State equivalent) controls. However, the procedure of Rule 30 will remain applicable.

***Editor's note: The views expressed in this column are those of the author alone and should not be interpreted otherwise or as advice.*

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