Revisiting the Apex Doctrine

By Christopher R. Christensen and Justin M. Schmidt

A FREQUENTLY employed tactic in contentious litigation is the service of a notice seeking the deposition of a senior company executive. Such a tactic is often used for intimidation or harassment of the corporate defendant. The proper response to such a deposition notice is to consider the applicability of the apex doctrine.

As a general matter, the apex doctrine requires the party seeking the deposition of a senior corporate executive to demonstrate that the deponent has relevant – and often unique or superior – knowledge that is unavailable through less intrusive discovery methods. However, the apex doctrine is not an absolute shield for avoiding an apex deposition, particularly if the objections to the deposition merely consist of boilerplate assertions of undue burden, harassment, and the obligatory reminder of the apex deponent's "extremely busy schedule."

Not all jurisdictions recognize the apex doctrine. In such jurisdictions, counsel can often reach the same result by obtaining a protective order to prevent an apex deposition. The specific requirements for obtaining a protective order against an apex deposition vary from jurisdiction to jurisdiction. For instance, some courts place the burden of persuasion on the party seeking to prevent the apex deposition while other courts shift the burden to the party seeking the deposition. Regardless of the jurisdiction, counsel seeking to avoid an apex deposition should file a motion for a protective order that includes an affidavit of the apex deponent detailing the extent of his or her knowledge of and involvement with the dispute, and if applicable, identifying less burdensome methods for obtaining the requested information, such as questioning lower level employees through interrogatories or depositions.

Christopher R. Christensen is a partner with Condon & Forsyth LLP in New York City. He concentrates his practice in the areas of complex aviation, product liability, and commercial litigation.

Justin M. Schmidt is an associate who works in the same practice group.

The IADC Privacy Project last addressed the apex doctrine in 2007 with an excellent article by Ralph Streza and Patrick T. Lewis titled *Privacy in the Executive Suite: The Apex Doctrine*, which analyzed the doctrine's origin, application, and leading cases. This is an update to that article. As such, this article focuses on trends and factual nuances in federal and state cases decided since publication of Messrs. Streza and Lewis' article and also identifies federal district courts that have incorporated aspects of the apex doctrine into their local rules.

I. Defining the Apex Doctrine

The apex doctrine is primarily a common law doctrine that allows courts to balance a party's right to liberal discovery with an apex deponent's right to be protected from abuse and harassment.[1] When a party objects to the deposition of an apex deponent (usually by filing a motion for a protective order),

the apex doctrine generally requires courts to consider, before compelling an apex deposition, "whether the executives possess personal or superior [or] unique knowledge" and "whether the information could be obtained from lower level employees or through less burdensome means, such as interrogatories."[2]

Strictly speaking, the apex doctrine requires courts to shift the burden of persuasion of these considerations onto the party seeking the deposition.[3] However, many courts that follow the traditional protective order rule of placing the burden on the party opposing the deposition recognize that apex deponents are particularly susceptible to harassment and abuse and will not hesitate to issue a protective order if warranted under the circumstances.[4] This can be true even of those courts that expressly reject the apex doctrine.[5] In other words, whether a court places the burden of persuasion on the moving or opposing party is not necessarily determinative of whether the court will grant or deny a protective order for an apex deponent.

For procedural purposes, however, it is important to note that courts are split on whether the burden of persuasion lies with the party seeking the deposition[6] or with the party seeking to prevent the deposition.[7] In some states, such as Texas, the state courts place the burden on the former,[8] while the federal courts place the burden on the latter.[9] One Texas federal district court explained that although federal courts apply state substantive law in diversity jurisdiction claims, federal procedural law governs discovery procedures in federal court (i.e., the protective order requirements of Federal Rule of Procedure 26 or the requirements to quash a subpoena under Rule 45(c)).[10] While Rule 26 does require the moving party to show "good cause" for a protective order, many federal courts require the party seeking the deposition to show that the apex deponent has personal or unique knowledge of the dispute or that other discovery methods are unavailable or have been exhausted.[11] To the extent possible, counsel should determine which side of the burden divide the judge in their particular case falls on as judges within the same court may disagree on which party bears the burden.[12]

Regardless of which party the court places the burden of persuasion on, a party seeking to avoid an apex deposition can often attain the same result under either approach with a well-supported motion for a protective order.

II. Who Qualifies as an Apex Deponent?

As a preliminary matter, courts must decide whether the person seeking to invoke the apex doctrine is sufficiently high-ranking. Courts still point to Lee Iacocca, then Chairman of the Board of Chrysler Corporation, in the leading case of *Mulvey v. Chrysler Corp.*[13] as the epitome of an apex deponent.[14] In *Mulvey*, the court required the plaintiff to propound interrogatories instead of deposing Mr. Iacocca because "he is a singularly unique and important individual who can be easily subjected to unwarranted harassment and abuse. He has a right to be protected, and the courts have a duty to recognize his vulnerability."[15] In recent cases, courts had no trouble declaring the following

individuals apex deponents: UAW President Ron Gettelfinger, Continental Airlines CEO Larry Kellner, Google founders Sergey Brin and Larry Page, and Microsoft CEO Steven Ballmer.[16]

Senior management personnel need not be household names or the highest executive in their corporation or organization to be designated an apex deponent. Courts have found a variety of corporate officers and their equivalents in non-corporate organizations[17] to be sufficiently high-ranking for purposes of the apex doctrine, such as chief legal officers, general counsel, executive vice presidents, directors, university presidents, and the Cardinal of the Catholic Archdiocese of New York.[18] No rule defines a specific cut-off point in the corporate hierarchy between apex and non-apex deponents. However, one district court found persuasive the plaintiff's argument that "a vice president position is hardly the 'apex' of a company."[19] Another district court was not convinced that the defendant insurance company's director of corporate claims, vice president of corporate claims, and senior director for corporate claims were "officials or managers at the highest level or 'apex' of corporate management to which the particular rules of apex depositions would apply."[20]

Courts also apply the apex deponent designation to former or retired executive officers.[21] While retired executives may not be able to argue that a deposition would impede their schedules as it would an employed executive, courts will nonetheless evaluate whether the retired executive has unique knowledge of the issues and whether the party seeking the deposition has sought the information through less intrusive means.[22] If the former executive is not retired, but simply employed elsewhere, courts may compare the duties and responsibilities of the current and prior positions to determine whether the executive is still an apex deponent. For example, the district court in *WebSideStory, Inc. v. NetRatings, Inc.* rejected the defendant corporation's contention that the plaintiff's executive whom defendant sought to depose was not an apex deponent because he was no longer the CEO of plaintiff's corporation, but only serving as a director.[23] The court explained that:

> since [the deponent] is currently the CEO and Chairman of the Board of Directors for another company . . . as well as a member of the Board of Directors for WebSideStory and its former CEO, [the deponent] is an official at the highest level or "apex" of a corporation, and while he may not possess the celebrity status of apex deponents in other cases, the Court finds his responsibilities to current and prior employers to be of similar proportions.[24]

The party seeking to have its officer designated an apex deponent should provide the court with information of the company or organization's size, how many people it employs, how many different offices it has, the amount of its business that is concentrated in the region where the officer is employed, and exactly where the officer ranks in the company or organization's hierarchy.[25] Providing this information to the court is

especially important when the size of the company or organization is not readily known.

III. Apex Deponent's Knowledge of the Dispute Is Usually the Deciding Factor

Even if the court designates an individual as an apex deponent, it still may permit the deposition to proceed. This typically occurs when the court finds that the apex deponent has relevant personal knowledge of or involvement in the dispute.

The first question counsel should ask when deciding how to respond to a deposition notice for an apex officer is: What level of knowledge does the deponent have concerning the dispute? The answer to this question usually drives the court's decision on whether to grant or deny a protective order because the apex doctrine "is normally aimed at high level decision makers who have no particular direct knowledge of the facts pertaining to the particular lawsuit."[26]

The requirement of "no particular direct knowledge of the facts" does not mean that a high-level officer must be completely unaware of the issues in the pending litigation for the apex doctrine to apply. Two recent cases demonstrate that CEOs and other high-level officers are often the "public face" of a corporation. Consequently, the fact that they may make public appearances to address events that are the basis of a pending lawsuit does not necessarily mean they have unique or superior knowledge of the issues involved.

The Texas Court of Appeals applied Texas' well-established apex doctrine[27] and held that Continental Airlines' CEO, Larry Kellner, lacked unique or superior knowledge about the causes of a 2008 Continental accident in which 37 passengers were injured.[28] Plaintiffs argued that Kellner had discoverable information about the cause of the accident based on the following: (1) public statements he made after the accident indicating that he would learn the cause of the accident to prevent future accidents; (2) personal letters he sent to each of the passengers; (3) his interviews of flight crew members following the accident; and (4) his knowledge of Continental's implementation of safety policies.[29] Using Kellner's affidavit, the court found that Kellner lacked unique or superior knowledge because the information he gave at a press conference came from other employees; he did not discuss with the flight crew members what occurred before, during, and after the accident; and he did not receive information about the cause of the accident in executive briefings.[30]

Moreover, the court found that plaintiffs had not demonstrated that less intrusive discovery methods had proven insufficient, despite the fact that plaintiffs had submitted 110 requests for production, 74 interrogatories, and taken 11 depositions.[31] The court observed that plaintiffs had not deposed employees with critical information about the accident, including a Rule 30(b)(6)[32] witness, and emphasized that "[m]erely completing some less-intrusive discovery does not trigger an automatic right to depose an apex official."[33] The court held that plaintiffs had failed to show that Kellner's deposition would lead to the discovery of admissible evidence because

his "subjective intent in making the public statements does not establish anything regarding negligence, proximate cause, or damages."[34]

The Michigan Court of Appeals relied extensively on the *Continental Airlines* decision in holding that the apex doctrine protected Toyota's Chairman and CEO and its President and COO from being deposed in a wrongful death action involving the alleged sudden acceleration of a Toyota Camry.[35] Plaintiffs asserted that both executives had made public appearances to discuss Toyota's safety problems and vehicle recall campaign (which did not include the subject vehicle). The court found that the Toyota executives had general knowledge about alleged Camry unintended acceleration issues, but had no unique or superior knowledge of the vehicle's design, testing, and manufacturing process.[36] The court noted that an apex officer "often has no particularized or specialized knowledge of day-to-day operations or of particular factual scenarios that lead to litigation, and has far-reaching and comprehensive employment duties that require a significant time commitment."[37]

The *Continental Airlines* and *Alberto* decisions show that the highest executives in large corporations are often far removed from the issues and events that give rise to litigation. Therefore, such executives usually lack unique or superior knowledge of specific issues in the litigation, which lower level employees most likely possess.

However, the apex doctrine is not an absolute shield that prevents an apex officer from being deposed under any circumstance.[38] For instance, the smaller the corporation, the more likely the apex officer has particular knowledge of or had a role in the dispute and can therefore be deposed.[39] Also, mid-level managers who are not at senior levels of the company are more likely to have discoverable information.[40] Apex officers who are named as individual defendants tend to be more closely associated with the issues in the litigation.[41] Regardless of the size of the company or of the apex officer's rank, courts often will not accept assertions by defense counsel that an apex deposition will result in abuse, harassment, or unreasonable interruption of the officer's busy schedule if the apex deponent is likely to have discoverable information. The following cases illustrate this point.

The Sixth Circuit reversed a district court's denial of plaintiff employee's request to depose her employer's CEO.[42] The employer argued that the CEO was not personally involved in and lacked personal knowledge of the employment decisions that led plaintiff to file discrimination and retaliation claims.[43] The court observed that while plaintiff did not report directly to the CEO (who was the highest ranking officer at a multi-national corporation with over 10,000 employees), the two worked in the same headquarters building, regularly interacted with each other, and were separated by only one direct supervisor.[44] Accordingly, the court found that the CEO had an active role in the adverse employment decisions at issue, and stated that although the record may not currently support a retaliation claim, "it is more than sufficient to support further discovery."[45] Moreover, the court rejected the CEO's "bald assertions" that the deposition would pose an undue

burden because other executives had already been deposed and the CEO likely had information critical to the plaintiff's claims.[46]

The Western District of Arkansas denied a protective order for Wal-Mart's CEO and its Executive Vice President despite Wal-Mart's contention that the apex doctrine should apply and that the depositions "would cause 'annoyance, embarrassment, oppression, or undue burden and expense.'"[47] The court noted that the test for deciding a motion for a protective order "is not whether a putative deponent had personal involvement in an event, or even whether they have 'direct' knowledge of the event, but whether the witness may have information from whatever source that is relevant to a claim or defense."[48] The court found that the executives may have relevant information about their instructions not to shred documents pertinent to a government investigation and whether their employees followed the instructions.[49]

These cases demonstrate that apex officers of any level can be deposed if the court concludes that they possess relevant, unique, or superior knowledge of issues in the litigation. Even if a court issues a protective order on the grounds that lower level employees have not been deposed or other less intrusive discovery means have not been exhausted, courts will often permit a party to renew its request to depose an apex officer if it shows that the alternate discovery methods proved insufficient.[50]

IV. Limitations on Apex Depositions

Due to the broad discovery rules in state and federal courts, some courts may be disinclined to grant a motion that seeks to completely prevent an apex deposition. For example, one district court in deciding whether to completely prohibit an apex deposition found that:

> [T]he issuance of a broad protective order precluding any discovery from [an apex deponent] goes too far. Given the fact that knowledge is frequently proved circumstantially, precluding all discovery of a highly placed business, government or clerical official based solely on their unchallenged denial of knowledge sets the bar for a protective order too low. . . . [P]arties to an action are ordinarily entitled to test a claim by a potential witness that he has no knowledge.[51]

Depending on the court's prior disposition to such prophylactic motions, counsel may want to consider requesting certain limitations on taking the apex deposition, rather than (or in the alternative to) requesting complete prevention of the deposition. Counsel may be able to avoid or at least defer an oral deposition by proposing that the apex deponent answer interrogatory questions or written deposition questions.[52] Courts also may allow depositions to be conducted by telephone or video conference.[53]

Standard oral depositions, however, may not always be avoidable. Fortunately, courts have granted a wide range of limitations on oral apex depositions. One of the most commonly granted limitations relates to the deposition location. The general rule is that depositions of apex deponents "'are

ordinarily taken at the [deponent's] principal place of business unless justice requires otherwise.'"[54] Courts often grant time restrictions on oral apex depositions, limiting the deposition to less than the seven hours allotted under Federal Rule of Civil Procedure 30(d)(1).[55] Counsel may also request that the scope of inquiry be narrowed to specific issues in the case.[56]

Courts may take into consideration the health and age of the apex deponent. The standard for "'seeking to prevent or delay a deposition by reason of medical grounds'" is that "'the moving party has the burden of making a *specific and documented factual showing* that the deposition would be dangerous to the deponent's health.'"[57] Brief and conclusory doctor's notes are insufficient.[58] Even without a documented medical condition, however, a court may limit an apex deposition based on the deponent's age. In *Minter v. Wells Fargo Bank, N.A.*, the court limited the 75-year old deponent's deposition to five hours on the first day and two hours on the second day, even though he submitted no opinion from a medical professional and merely asserted that "he has health problems that 'flare up from time to time' and his 'stamina has declined over the years.'"[59]

Finally, parties may enter into discovery agreements with opposing counsel that provide restrictions or logistical conditions for taking apex depositions. In a case involving the explosion of a BP oil refinery in Texas City, Texas, that killed fifteen people, the Texas Supreme Court directed a trial court to enforce the parties' discovery agreement, which limited BP's CEO's deposition to one hour by telephone.[60]

V. Incorporation of the Apex Doctrine into Local Rules

Several federal district courts have incorporated aspects of the apex doctrine into their local rules.[61]

The Eastern District of New York Local Rule 30.5 provides:

> (a) Where an officer, director or managing agent of a corporation or a government official is served with a notice of deposition or subpoena regarding a matter about which he or she has no knowledge, he or she may submit reasonably before the date noticed for the deposition an affidavit to the noticing party so stating and identifying a person within the corporation or government entity having knowledge of the subject matter involved in the pending action.
>
> (b) The noticing party may, notwithstanding such affidavit of the noticed witness, proceed with the deposition, subject to the witness's right to seek a protective order.

Rule 30.5 allows a corporate or government officer noticed for a deposition to designate a Rule 30(b)(6) witness to testify on behalf of the corporation or government body regarding the issues involved in the litigation. The noticing party may accept

the Rule 30(b)(6) witness or proceed with the apex deposition subject to the deponent's right to file a motion for a protective order.

The language of District of Wyoming Local Rule 30.1 is nearly identical to that of Eastern District of New York Local Rule 30.5. The District of Kansas provides a document titled "Deposition Guidelines," which is separate from its local rules, but contains a paragraph titled "Depositions of Witnesses Who Have No Knowledge of the Facts," which also is nearly identical to the local rules mentioned above.[62]

The Eastern District of Virginia's Local Rule 45 requires permission of the court before issuing a subpoena for the attendance at any hearing, trial, or deposition of the following government officials:

> (1) the Governor, Lieutenant Governor, or Attorney General of any State; (2) a judge of any court; (3) the President or Vice-President of the United States; (3) any member of the President's Cabinet; (5) any Ambassador or Consul; or (6) any military officer holding the rank of Admiral or General.

In addition to local rules, some district court judges have incorporated aspects of the apex doctrine into their case management orders and pretrial orders.[63]

VI. Conclusion

The apex doctrine provides counsel with the ability to avoid, or at least limit, the deposition of a high-ranking executive or officer. Before filing a motion for a protective order to prevent an apex deposition, counsel should thoroughly familiarize themselves with the apex doctrine's procedural and substantive nuances, which vary depending on the jurisdiction or judge, such as which party has the burden of persuasion, who qualifies as an apex officer, and what factual information the court requires to apply the doctrine. Counsel also should determine whether the local rules incorporate elements of the apex doctrine or consider requesting that the court place any guidelines pertaining to apex depositions in the case management, pretrial, or scheduling orders.

Even in those courts that reject or do not expressly apply the apex doctrine, the party seeking to avoid an apex deposition can often obtain the same relief with a well-supported motion for a protective order. No apex deponent is immune from being deposed, especially if the officer has relevant, unique, or superior knowledge of the issues in the case that cannot be obtained through alternative discovery methods. Under these circumstances, counsel should seek to achieve reasonable limitations on the time, place, scope, and/or method of the deposition.

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[1] *See* Abarca v. Merck & Co., No. 07 Civ. 0388, 2009 WL 2390583, at *3 (E.D. Cal. Aug. 3, 2009) ("'Virtually every court that has addressed deposition notices directed at an official at the highest level or 'apex' of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment.'" (citations omitted)).

[2] Reif v. CNA, 248 F.R.D. 448, 451 (E.D. Pa. 2008) (analyzing a number of leading apex doctrine cases).

[3] *See* Crest Infiniti II, LP v. Swinton, 174 P.3d 996, 1003 (Okla. 2007) (citing Crown Cent. Petroleum Corp. v. Garcia, 904 S.W.2d 125, 128 (Tex. 1995)); *see also* Gauthier v. Union Pac. R.R. Co., No. 07 Civ. 12, 2008 WL 2467016, at *4 n.2 (E.D. Tex. June 18, 2008); Alberto v. Toyota Motor Corp., No. 296824, 2010 WL 3057755, slip op. at 3 (Mich. Ct. App. Aug. 5, 2010) (the page numbers cited for this case refer to the court's slip opinion because the Westlaw version was not paginated when this article went to print).

[4] *See, e.g.*, Tabor v. Hilti, Inc., No. 09 Civ. 189, 2010 WL 2990004, at *1 (N.D. Okla. July 23, 2010); Mehmet v. PayPal, Inc., No. 08 Civ. 1961, 2009 WL 921637, at *3 (N.D. Cal. Apr. 3, 2009); Stelor Prods., Inc. v. Google, Inc., No. 05 Civ. 80387, 2008 WL 4218107, at *5 (S.D. Fla. Sept. 15, 2008); Bouchard v. N.Y. Archdiocese, No. 04 Civ. 9978, 2007 WL 2728666, at *6 (S.D.N.Y. Sept. 19, 2007), *aff'd*, 2007 WL 4563492 (S.D.N.Y. Dec. 18, 2007).

[5] *See, e.g.*, *Gauthier*, 2008 WL 2467016, at *4 & n.2 (rejecting the "Texas apex doctrine," which shifts the burden to plaintiffs, yet quashing executives' depositions and requiring plaintiffs to "first attempt to obtain the sought information through the less burdensome means of discovery described herein").

[6] *See, e.g.*, *Abarca*, 2009 WL 2390583, at *4; Chick-Fil-A, Inc. v. CFT Dev., LLC, No. 07 Civ. 501, 2009 WL 928226, at *1 (M.D. Fla. Apr. 3, 2009); Wagner v. Novartis Pharm. Corp., No. 07 Civ. 129, 2007 WL 3341845, at *1 (E.D. Tenn. Nov. 8, 2007); *Alberto*, 2010 WL 3057755, slip op. at 3.

[7] *See, e.g.*, Meharg v. I-Flow Corp., No. 08 Civ. 0184, 2009 WL 1404603, at *1 (S.D. Ind. May 15, 2009) (citing *In re* Bridgestone/Firestone Inc. Tires Prods. Liab. Litig., 205 F.R.D. 535, 536 (S.D. Ind. 2002) (determining that decisions where courts imposed a burden on the proponent to demonstrate unique personal knowledge by an executive before being deposed does not establish "rigid adherence to the burdens imposed under the facts of those cases")); Prosonic Corp. v. Stafford, No. 07 Civ. 803, 2008 WL 64710, at *1 (S.D. Ohio Jan. 3, 2008); *Bouchard*, 2007 WL 2728666, at *4.

[8] *See In re* Cont'l Airlines, Inc., 305 S.W.3d 849, 852 (Tex. App. 2010).

[9] *See* Staton Holdings, Inc. v. Russell Athletic, Inc., No. 09 Civ. 0419, 2010 WL 1372479, at *2-3 (N.D. Tex. Apr. 7, 2010); *Gauthier*, 2008 WL 2467016, at *3.

[10] *See Gauthier*, 2008 WL 2467016, at *4 n.2 (finding "no federal cases within the Fifth Circuit actually applying the Texas standard for the apex doctrine").

[11] *See* federal cases cited *supra* note 6.

[12] *Compare* Mansourian v. Bd. of Regents of Univ. of Cal. at Davis, No. 03 Civ. 2591, 2007 WL 4557104, at *3 & n.2 (E.D. Cal. Nov. 21, 2007) (deciding not to apply the apex doctrine burden-shifting approach because no Ninth Circuit or Supreme Court precedent requires that result, however, noting that the burden-shifting approach could be applied under certain circumstances) *with* Abarca v. Merck & Co., No. 07 Civ. 0388, 2009 WL 2390583, at *4 (E.D. Cal. Aug. 3, 2009) (finding that "the burden-shifting approach provides guidance to this Court").

[13] 106 F.R.D. 364 (D.R.I. 1985).

[14] *See, e.g.*, Berning v. UAW Local 2209, 242 F.R.D. 510, 513-14 (N.D. Ind. 2007); Wal-Mart Stores, Inc. v. Vidalakis, No. 07-MC-00039, 2007 WL 4591569, at *2 (W.D. Ark. Dec. 28, 2007).

[15] *Mulvey*, 106 F.R.D. at 366.

[16] *See Berning*, 242 F.R.D. at 513-14 ("Gettelfinger, in his position as the President of the International UAW [overseeing more than 600 staff members in a union with over 1.3 million members], is particularly vulnerable to unwarranted harassment and abuse that [plaintiff's] deposition may produce, and he has a right to be protected from such harassment."); *Cont'l Airlines*, 305

S.W.3d at 859; Stelor Prods., Inc. v. Google, Inc., No. 05 Civ. 80387, 2008 WL 4218107, at *4-5 (S.D. Fla. Sept. 15, 2008) (Google founders); Kelley v. Microsoft Corp., No. C07-0475, 2008 WL 5000278, at *1-2 (W.D. Wash. Nov. 21, 2008) (recognizing Microsoft's CEO as an apex deponent, yet denying his motion for protective order).

[17] Courts often bar the depositions of high-ranking government officials under the *Morgan* doctrine, a doctrine similar to the apex doctrine. *See, e.g.*, United States v. Sensient Colors, Inc., 649 F. Supp.2d 309, 316-18 (D.N.J. 2009) (applying the *Morgan* doctrine to bar the deposition of a former Administrator of the EPA).

[18] *See* Dart Indus., Inc. v. Acor, No. 06 Civ. 1864, 2008 WL 1995105, at *1 (M.D. Fla. May 7, 2008) ("no question" that the Secretary, Chief Legal Officer and Executive Vice-President of Tupperware was a "high-ranking executive officer"); Burns v. Bank of Am., No. 03 Civ. 1685, 2007 WL 1589437, at *3 (S.D.N.Y. June 4, 2007) (general counsel); Parmer v. Wells Fargo & Co., No. 07 Civ. 02061, 2009 WL 1392081, at *1-4 (D. Colo. May 15, 2009) (executive vice president); Roman v. Cumberland Ins. Group, No. 07 Civ. 1201, 2007 WL 4893479, at *1 (E.D. Pa. Oct. 26, 2007) (company president, vice president, and board of directors); Raml v. Creighton Univ., No. 08 Civ. 419, 2009 WL 3335929, at *1-3 (D. Neb. Oct. 15, 2009) (Creighton University President); Mansourian v. Bd. of Regents of Univ. of Cal. at Davis, No. 03 Civ. 2591, 2007 WL 4557104, at *1-2 & n.2 (E.D. Cal. Nov. 21, 2007) (Chancellor of the University of California at Davis); Bouchard v. N.Y. Archdiocese, No. 04 Civ. 9978, 2007 WL 2728666, at *3-4 (S.D.N.Y. Sept. 19, 2007) (relying on cases involving corporate executives to partially grant a protective order for Cardinal Egan), *aff'd*, 2007 WL 4563492 (S.D.N.Y. Dec. 18, 2007).

[19] Kelly v. Provident Life & Accident Ins. Co., 695 F. Supp.2d 149, 157 (D. Vt. 2010) (denying insurance company's motion for a protective order for its regional vice president of claims).

[20] Lexington Ins. Co. v. Sentry Select Ins. Co., No. 08 Civ. 1539, 2009 WL 4885173, at *7 (E.D. Cal. Dec. 17, 2009).

[21] Rodriguez v. SLM Corp., No. 07 Civ. 1866, 2010 WL 1286989, at *1-3 (D. Conn. Mar. 26, 2010) ("The standards that govern depositions of corporate executives apply with equal force to former executives.").

[22] *Id.*

[23] No. 06 Civ. 408, 2007 WL 1120567, at *3 (S.D. Cal. Apr. 6, 2007).

[24] *Id.*

[25] *See* Prosonic Corp. v. Stafford, No. 07 Civ. 803, 2008 WL 64710, at *1-2 (S.D. Ohio Jan. 3, 2008) (due to defendant's lack of factual detail, the court was unable to determine whether the district manager was sufficiently high-ranking to be "subject to more exacting scrutiny by the Court than a garden-variety request to take a deposition").

[26] Wal-Mart Stores, Inc. v. Vidalakis, No. 07-MC-00039, 2007 WL 4591569, at *1 (W.D. Ark. Dec. 28, 2007); *see also* Abarca v. Merck & Co., No. 07 Civ. 0388, 2009 WL 2390583, at *5 (E.D. Cal. Aug. 3, 2009) (granting protective order because "there is no indication that [Merck's CEO] has unique, non-cumulative knowledge simply because his name appears on three documents, particularly where one is an unsigned draft, one is not addressed to or from him and another is an apparently unrelated e-mail string addressed to [him] and other individuals"); Alliance Indus., Inc. v. Longyear Holdings, Inc., No. 08 Civ. 490S, 2010 WL 4323071, at *4 (W.D.N.Y. Mar. 19, 2010) (granting protective order for CEO and explaining that "'Apex' depositions are disfavored in th[e Second] Circuit 'unless [the executives] have personal knowledge of relevant facts or some unique knowledge that is relevant to the action'" (citation omitted)).

[27] *See In re* BP Prod. N. Am., Inc., 244 S.W.3d 840, 842 n.2 (Tex. 2008).

[28] *See In re* Cont'l Airlines, Inc., 305 S.W.3d 849, 858 (Tex. App. 2010).
[29] *Id.* at 851.
[30] *Id.* at 858.
[31] *Id.* at 858-59.
[32] A Rule 30(b)(6) witness is chosen by a company to testify on behalf of the company, rather than in the witness's individual capacity.
[33] *See Cont'l Airlines*, 305 S.W.3d at 858-59.
[34] *Id.* at 859.
[35] Alberto v. Toyota Motor Corp., No. 296824, 2010 WL 3057755, slip op. at 8 (Mich. Ct. App. Aug. 5, 2010).
[36] *Id.*
[37] *Id.* at 6.
[38] *Id.* at 5; *see also* Echostar Satellite, LLC v. Splash Media Partners, L.P., No. 07 Civ. 02611, 2009 WL 1328226, at *2 (D. Colo. May 11, 2009) (noting that "'highly-placed executives are not immune from discovery'" (citation omitted)); Otsuka Pharm. Co. v. Apotex Corp., No. 07 Civ. 1000, 2008 WL 4424812, at *5 (D.N.J. Sept. 25, 2008) ("[M]ultiple jurisdictions recognize that there is not a protective blanket that prohibits discovery from highly-placed executives.").
[39] *See, e.g.*, Ray v. BlueHippo, No. 06 Civ. 1807, 2008 WL 4830747, at *2 (N.D. Cal. Nov. 6, 2008) (finding that the CEO had "personal knowledge, which is not surprising given that BlueHippo is a relatively small company, not a large national corporation").
[40] *See, e.g.*, Wal-Mart Stores, Inc. v. Vidalakis, No. 07-MC-00039, 2007 WL 4591569, at *1-2 (W.D. Ark. Dec. 28, 2007) (distinguishing Wal-Mart real estate managers from top-level apex officers and finding that the managers may have unique and necessary information concerning the real estate contracts at issue).
[41] *See, e.g.*, Anthropologie, Inc. v. Forever 21, Inc., No. 07 Civ. 7873, 2009 WL 723158, at *1 (S.D.N.Y. Mar. 11, 2009); *Ray*, 2008 WL 4830747, at *1.
[42] *See* Conti v. Am. Axle & Mfg., 326 F. App'x 900, 901-02 (6th Cir. 2009).
[43] *Id.* at 904.
[44] *Id.* at 906.
[45] *Id.* at 905-06.
[46] *Id.* at 907.
[47] Mills v. Wal-Mart Stores, Inc., No. 06 Civ. 5162, 2007 WL 2298249, at *1 (W.D. Ark. Aug. 7, 2007).
[48] *Id.* at *2; *see also* Johnson v. Jung, 242 F.R.D. 481, 483 (N.D. Ill. 2007) (denying protective order for CEO despite her claims that she lacked personal involvement because she likely had relevant knowledge of issues in the case).
[49] *Mills*, 2007 WL 2298249, at *2.
[50] *See, e.g.*, Gauthier v. Union Pac. R.R. Co., No. 07 Civ. 12, 2008 WL 2467016, at *4 (E.D. Tex. June 18, 2008) (quashing the depositions of the Union Pacific executives, but warning that the deposition requests may be revisited if plaintiffs show they were unable to obtain the necessary information through less burdensome means of discovery); *see also* Mehmet v. PayPal, Inc., No. 08 Civ. 1961, 2009 WL 921637, at *3 (N.D. Cal. Apr. 3, 2009); Reif v. CNA, 248 F.R.D. 448, 455 (E.D. Pa. 2008).
[51] Bouchard v. N.Y. Archdiocese, No. 04 Civ. 9978, 2007 WL 2728666, at *4 (S.D.N.Y. Sept. 19, 2007), *aff'd*, 2007 WL 4563492 (S.D.N.Y. Dec. 18, 2007).
[52] *See, e.g.*, Elvig v. Nintendo of Am., Inc., No. 08 Civ. 02616, 2009 WL 2399930, at *3 (D. Colo. July 31, 2009) (interrogatories or written deposition questions under Federal Rule of Civil Procedure 31); Craig & Landreth, Inc. v. Mazda Motor of Am., Inc., No. 07 Civ. 134, 2009 WL 103650, at *2 (S.D. Ind. Jan. 12, 2009) (interrogatories); *Bouchard*, 2007 WL 2728666, at *5 (permitting plaintiff to serve 25 deposition questions in lieu of an oral deposition).
[53] Alexander v. Johns Manville, Inc., No. 09 Civ. 0518, 2010 WL 597984, at *1 (S.D. Ind. Feb. 17, 2010) (providing the option to depose manager by telephone); Kirk v. Shaw Envtl., Inc., No. 09 Civ. 1405, 2010 WL 447264, at

*4 n.3 (N.D. Ohio Feb. 3, 2010) (video conferencing possible, presumably if both parties agree); *In re* Jarvar, Nos. 04-62762-7 & 09-00028, 2009 WL 5247491, at *4 n.5 (Bankr. D. Mont. Dec. 28, 2009) (video conferencing permitted if both parties agree).

[54] Crest Infiniti II, LP v. Swinton, 174 P.3d 996, 1003 n.16 (Okla. 2007).

[55] *See, e.g.*, Mformation Techs., Inc. v. Research In Motion, Ltd., No. 08 Civ. 04990, 2010 WL 3154355, at *2 (N.D. Cal. Aug. 9, 2010) (1 hour); *Kirk*, 2010 WL 447264, at *4 (90 minutes); Raml v. Creighton Univ., No. 08 Civ. 419, 2009 WL 3335929, at *3 (D. Neb. Oct. 15, 2009) (2 hours); DR Sys., Inc. v. Eastman Kodak Co., No. 08 Civ. 669, 2009 WL 2973008, at *7 (S.D. Cal. Sept. 14, 2009) (3 hours); Kelley v. Microsoft Corp., No. C07-0475, 2008 WL 5000278, at *2 (W.D. Wash. Nov. 21, 2008) (3 hours); *In re* Land, No. 100796/08, 2009 WL 241728, at *5 (N.Y. Sup. Ct. N.Y. County Jan. 6, 2009) (2 hours).

[56] *See, e.g.*, *Raml*, 2009 WL 3335929, at *3; Meharg v. I-Flow Corp., No. 08 Civ. 0184, 2009 WL 1404603, at *3 (S.D. Ind. May 15, 2009); *Kelley*, 2008 WL 5000278, at *2; *In re* Land, 2009 WL 241728, at *5.

[57] Minter v. Wells Fargo Bank, N.A., 258 F.R.D. 118, 127 (D. Md. 2009) (citation omitted) (emphasis added by the *Minter* court).

[58] *Id.* at 127-28.

[59] *Id.* at 128.

[60] *See In re* BP Prod. N. Am., Inc., 244 S.W.3d 840, 848 (Tex. 2008).

[61] Due to the sheer number of state, county, and local courts, only the local rules for federal courts were reviewed.

[62] Deposition Guidelines, *available at* http://www.ksd.uscourts.gov/guidelines/depoguidelines.pdf.

[63] *See, e.g.*, *In re* Seroquel Prods. Liab. Litig., No. 6:06-md-1769 (M.D. Fla.), Case Management Order No. 3, filed Apr. 13, 2007; *In re* Propulsid Prods. Liab. Litig., MDL No. 1355 (E.D. La.), Pretrial Order No. 7, filed Dec. 7, 2000. The language in both of these orders is practically identical to the language in the above-mentioned local rules for the Eastern District of New York., District of Wyoming, and the District of Kansas's Deposition Guidelines.