Apex Witnesses Claim They Are Too Big to Depose

HON. IAIN D. JOHNSTON

The author is a magistrate judge with the U.S. District Court for the Northern District of Illinois, Rockford.

Consider three potential deponents. The first is a single parent who works two part-time, entry-level jobs and attends an online university so he can obtain his bachelor's degree; he may have seen some of the alleged unwelcome behavior in a sexual harassment case. The second is the chief executive officer of a corporation doing about $20 million a year in business; he may have heard alleged racial slurs by co-employees of a plaintiff in a hostile environment suit. The third is the police chief for a mid-sized city; she may have been told about ethnic slurs used by police officers who—along with the city—are defendants in a profiling case brought by a resident.

Of these three potential deponents, the most likely to be deposed is the single parent. The other two may be able to avoid the inconvenience of a deposition. The chief executive officer may be able to prevent his deposition because of the apex doctrine. The police chief may be able to do the same because of a related doctrine: the high-ranking government official's "privilege." The single parent probably would ask why he is so lucky. This article attempts to answer that question.

Litigation Disputes

Nearly all litigators and judges know that only a tiny fraction of federal civil cases go to trial. They know that the real—and sometimes most uncivil and vicious—battleground in federal civil litigation is discovery, including depositions.

Deposition disputes are common. Lawyers fight about attorney shenanigans during depositions, battle about the location of depositions, and have cage matches about who can be physically present during a deposition. Rarely do witnesses seek and enjoy being deposed. On the contrary, for most witnesses, depositions are annoying and time-consuming, and they interfere with a myriad of other matters the witness would rather be doing.

Moreover, litigation is still an adversarial process, regardless of some efforts to make it less so. Facts are the weapons in that process. A fact unknown to an opponent is one fewer danger about which to be concerned. Accordingly, preventing an opponent from taking a deposition can be a huge victory—a victory that prevents possible harmful facts from being disclosed and that makes the witness, who may be a client, happy.

At the risk of sounding overly cynical, one way to prevent a deposition is to assert that the deponent is too important; namely, that the deponent is at the highest echelon—the apex—of an organization. And if the deposition relates to the deponent's employment, this argument may be successful. But if the deposition relates to the deponent's personal actions, then even the president of the United States cannot escape a deposition. *See Clinton v. Jones*, 520 U.S. 681 (1997).

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The Limits on Depositions

Among other things, the Federal Rules of Civil Procedure provide presumptive limits on the number and length of depositions. However, except for incarcerated persons and witnesses who would exceed the limit, the rules do not address which particular witnesses can be deposed. In fact, federal courts rarely prevent a litigant from taking a deposition. The philosophy of the rules allows litigants broad discovery to develop the prosecution and defense of their cases. "Broad" isn't "unlimited," though. Indeed, Rule 26(b)(2)(C)(iii) explicitly recognizes that discovery should be proportionate to the case.

Many federal courts recognize the apex doctrine to limit a party's ability to depose a witness. But some have refused to adopt a specific test for apex witnesses. Instead, they have relied on Rule 26 to determine whether these witnesses should be deposed. *See, e.g.*, *Serrano v. Cintas Corp.*, 699 F.3d 884, 901 (6th Cir. 2012).

Under the apex doctrine, federal courts can prevent the deposition of a witness at the top of the organizational structure who has no unique, firsthand knowledge of the facts at issue, or when the party seeking the deposition has failed to exhaust other less intrusive discovery methods. *See Powertech Tech. v. Tessera, Inc.*, 2013 U.S. Dist. LEXIS 105275, at *4 (N.D. Cal. 2013). It is unclear whether the witness's knowledge needs to be both personal and unique. *See HCP Laguna Creek CA, LP v. Sunrise Senior Living Mgmt., Inc.*, 2010 U.S. Dist. LEXIS 21500, at *13 (M.D. Tenn. 2010). The doctrine presumes that depositions of apex witnesses are intended to abuse, harass, or force settlements. *See Groupion, LLC v. Groupon, Inc.*, 2012 U.S. Dist. LEXIS 12684, at *6 (N.D. Cal. 2012). Moreover, the doctrine presumes that these witnesses are so busy—"crazy busy" in today's

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vernacular—that they should not be bothered with a deposition absent extraordinary circumstances. *Minter v. Wells Fargo Bank*, 258 F.R.D. 118, 126 (D. Md. 2009).

Similarly, absent exceptional circumstances, high-ranking government officials may be able to escape deposition. *See In re Fed. Deposit Ins. Corp.*, 58 F.3d 1055, 1060 (5th Cir. 1995). Unless the official has unique, firsthand knowledge related to a claim or defense, or the necessary information cannot be obtained through other less burdensome or intrusive means, the courts are inclined to preclude the deposition. *See Lederman v. N.Y.C. Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013). As with the apex doctrine, the rationale is that these witnesses have greater duties and time constraints than other witnesses. The single parent working multiple jobs while attending classes might disagree. But certain high-ranking government officials are rightly concerned that if courts afforded them no protections, they would spend a disproportionate amount of time tending to litigation. *Id.*

Although some courts articulate the tests differently, for practical purposes, courts apply the apex doctrine and the high-ranking government official privilege in the same way. Indeed, courts have now begun to use the term "apex" for not only private executives but also high-ranking government officials. *See, e.g.*, *Chevron Corp. v. Donzinger*, 2013 U.S. Dist. LEXIS 65335, at *6 (S.D.N.Y. 2013); *City of Fort Lauderdale v. Scott*, 2012 U.S. Dist. LEXIS 34719, at *5 n.4 (S.D. Fla. 2012).

The apex doctrine does not apply to Rule 30(b)(6) depositions. *Ingersoll v. Farmland Foods, Inc.*, 2011 U.S. Dist. LEXIS 31872, at *22 (W.D. Miss. 2011). That should not be surprising. Under Rule 30(b)(6), the responding party is entitled to choose which witnesses will appear to answer questions regarding the subject matters identified in the notice. Accordingly, the responding party simply needs to produce a witness of its choosing—not necessarily an apex witness—to answer the questions.

Recurring Issues

Regardless of the label attached to the witness, recurring issues arise when an apex deponent seeks judicial protection. The first is whether the person in question is, in fact, an apex witness. In other words, how high up the food chain does the witness need to be to have the privilege of being excused from a deposition? The case law on this issue is sparse. Fans of *Shark Week* know that (1) sharks are predators, (2) the great white shark is an "apex predator," but (3) not all sharks are apex predators. Likewise, some executive officers and government officials will be at the apex of the organization, but others will not.

Courts decide the issue based on the unique facts in each case. Some chief executive officers and government officials are obviously apex witnesses. Steve Jobs was certainly at the apex of Apple. *See, e.g.*, *Affinity Labs of Texas v. Apple, Inc.*, 2011 U.S. Dist. LEXIS 53649 (N.D. Cal. 2011). And Arnold Schwarzenegger was at the apex of California government. *See, e.g., Thomas v. Cate*, 715 F. Supp. 2d 1012, 1049 (E.D. Cal. 2010). Those examples are easy.

Apex witnesses need not be rock stars, however. Mayors, police chiefs, and city managers can qualify too. *See Bogan v. City of Bos.*, 489 F.3d 417, 423 (1st Cir. 2007). Courts have considered job duties, tables of organization, and reporting structures in making the determination. *See Bolden v. FEMA*, 2008 U.S. Dist. LEXIS 2640, at *10 (E.D. La. 2008). Although not addressed by case law, the size of the organization might be an appropriate factor to consider. The chief executive officer of a tiny limited liability company or the village president of Forestville, Michigan—with a population of 136 at last count—might not receive protection under the doctrine.

> When it comes to determining which party bears the burden on the issue of deposing apex witnesses, decisions are all over the place.

But trying to discern the principle behind the decisions is more easily said than done. In fact, once the courts get beyond the obvious situations, an "I-know-it-when-I-see-it" test appears to be at work.

The opponent of the apex deposition should file a motion for a protective order under Rule 26(c) in sufficient time for the court to rule on that motion before the scheduled deposition. *See Chick-Fil-A, Inc. v. CFT Dev., LLC*, 2009 U.S. Dist. LEXIS 34496, at *2 n.1 (M.D. Fla. 2009). A little good faith and common sense goes a long way in presenting and resolving the issue. Of course, the proponent must provide reasonable notice of the deposition. The opponent should promptly notify the proponent of its objection and, importantly, the real reason behind it. A concocted cornucopia of reasons why the deposition cannot proceed as scheduled is unlikely to work. Feigned schedule conflicts are all too transparent, and simply failing to appear for the deposition is certainly not an option. The proponent should reciprocate

that honesty by not demanding that the deposition occur as scheduled. Instead, the proponent should agree to a brief stay while the parties try to resolve their differences or seek judicial intervention. If the proponent refuses to reasonably postpone the deposition so that the opponent can timely file a motion for a protective order, then the opponent should immediately file a motion to stay the deposition.

The opponent of the apex deposition should not play chicken with the proponent and wait to see if it files a motion to compel. Most judges are familiar with the discovery game of chicken, where each side waits for the other to make the first move. Judges do not cotton to that game or appreciate parties delaying a case because one didn't want to flinch first. They prefer attorneys to make a good-faith effort to resolve the dispute and then move in sufficient time to allow the parties to meet the discovery cutoff date.

Rulings on Burden

Because the opponent of the deposition has the onus of moving for a protective order, one would think that it is obvious which party bears the burden: A party seeking a protective order bears the burden of showing good cause why the protective order should be granted. But when it comes to determining which party bears the burden on the issue of deposing apex witnesses, decisions are all over the place. Some simply apply Rule 26(c) and require the movant to show good cause. *See, e.g.*, *Powertech Tech., Inc. v. Tessera, Inc.*, 2013 U.S. Dist. LEXIS 105275, at *5 (N.D. Cal. 2013). Other courts place the burden on the proponent of the deposition. *See, e.g.*, *Groupion, LLC v. Groupon, Inc.*, 2012 U.S. Dist. LEXIS 12684, at *6 (N.D. Cal. 2012). Still other courts use various burden-shifting procedures. *See Spadaro v. City of Miramar*, 2012 U.S. Dist. LEXIS 117925, at *6–7 (S.D. Fla. 2012); *Naylor Farms, Inc. v. Anadarko OGC Co.*, 2011 U.S. Dist. LEXIS 68940, at *4–8 (D. Colo. 2011).

Courts often look to burdens of proof as tiebreakers for close calls, and a legal conclusion often depends on where the analysis started. Consequently, the determination of which party bears the burden may tip the balance for apex witnesses.

Judges consider many types of evidence in determining whether a deposition of an apex witness should proceed. Initial disclosures under Rule 26(a)(1), for example, can be very useful, though not dispositive. If a party listed a witness within its control as an individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, it is only reasonable that the witness—even an apex witness—should be deposed. *See WebSideStory, Inc. v. NetRatings, Inc.*, 2007 U.S. Dist. LEXIS 20481, at *11–15 (S.D. Cal. 2007). Conversely, the failure of the deposition proponent to identify the apex witness under Rule 26(a)(1) can be important. *See, e.g.*, *Cannon v. Burge*, 2007 U.S. Dist. LEXIS 60788, at *9–10 (N.D. Ill. 2007). But simply listing an apex witness under Rule 26(a)(1) as a means of bootstrapping a party's attempt to depose him or her is unlikely to persuade a court. In addition, courts will consider whether, in response to an interrogatory, either side identifies an apex witness as a person with knowledge of facts relating to the litigation. *See, e.g.*, *Moore v. Weinstein Co.*, 2011 U.S. Dist. LEXIS 75046, at *3 (M.D. Tenn. 2011).

Courts often consider affidavits in determining whether to permit the deposition of an apex. Two types of affidavits are common: the "take-one-for-the-team" affidavit and the "know-nothing" affidavit. In the "take-one-for-the-team" affidavit, an underling of the apex witness will swear that he or she has the most knowledge of the relevant facts, made all the key decisions, and knows that the apex witness was not involved in the dispute in any manner. Similarly, in a "know-nothing" affidavit, the apex witness will swear that he or she has no relevant information and no knowledge of any facts relating to the litigation. Although the better practice is to submit an affidavit of the apex witness, such a submission is not required. *See City of Fort Lauderdale v. Scott*, 2012 U.S. Dist. LEXIS 34719, at *5 n.4 (S.D. Fla. 2012). Sometimes, these affidavits work, *see, e.g.*, *Degenhart v. Arthur State Bank*, 2011 U.S. Dist. LEXIS 92295, at *8–9 (S.D. Ga. 2011), and sometimes they don't—even when the court has serious reservations about the propriety of the deposition. *See Holman v. ICN Pharms., Inc.*, 1999 U.S. Dist. LEXIS 20017, at *3–4 (S.D.N.Y. 1999). Strangely, "know-nothing" affidavits often are accompanied by the apex witness's affirmation simultaneously swearing that he or she is extremely busy handling the important affairs of the organization. As a consequence, the apex witnesses often appear to be what the Beach Boys sang about in "Busy Doin' Nothin'."

The Weight of Busyness

Courts differ on the weight to be afforded a witness's busyness and the concomitant burden that a deposition would place on the witness and organization. They frequently give the apex witness's self-described busyness little weight. *See, e.g.*, *Dauth v. Convenience Retailers, LLC*, 2013 U.S. Dist. LEXIS 113532, at *4 (N.D. Cal. 2013). They give even less weight when the assertion is not supported by an affidavit. *See Sanstrom v. Rosa*, 1996 U.S. Dist. LEXIS 11923, at *12–13 (S.D.N.Y. 1996). And busyness can be temporary: When the witness is no longer busy, a key aspect of the doctrine's rationale disappears. *See United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 327 (D.N.J. 2009). Nevertheless, courts will sometimes protect even former apex witnesses, although corporate executives who have retired or are no longer busy are less likely to be protected than former government officials. *Compare Bose Corp. v. Able Planet, Inc.*,

2012 U.S. Dist. LEXIS 155383, at *3 (D. Colo. 2012), *and Minter v. Wells Fargo Bank*, 258 F.R.D. 118, 126 (D. Md. 2009), *with Sargent v. City of Seattle*, 2013 U.S. Dist. LEXIS 65356, at *8 n.2 (W.D. Wash. 2013), *and City of Fort Lauderdale v. Scott*, 2012 U.S. Dist. LEXIS 34719, at *10–11 (S.D. Fla. 2012).

The reluctance to place too much weight on the busyness of the deponent makes sense. Although some chief executive officers' belief in their importance can be life-sustaining, who among us isn't busy these days? *See Grandiose Delusion of Own Self-Importance Only Thing Keeping CEO Alive, Doctors Say*, The Onion, June 27, 2013; Tim Kreider, *The "Busy" Trap*, N.Y., Times, June 30, 2012. In fact, the hypothetical single parent could make a compelling argument that he is busier than the hypothetical chief executive officer or police chief.

Although courts consider busyness, rank in the organization, and the burden of the proposed deposition, the key consideration is the witness's knowledge of relevant facts. *Sensient Colors*, 649 F. Supp. 2d at 322. Generally, a witness's bald statements that he or she knows nothing relevant can be tested in a deposition, regardless of the witness's status. Some cases allowing apex depositions rely on this general principle. In contrast, other courts have found that an apex witness's knowledge of relevant facts is required, but alone is not sufficient, to force the deposition. *See id.* at 323.

In deciding whether to allow an apex deposition, a court will consider whether the deposition proponent used or can use other discovery devices to obtain the needed information. For example, courts will frequently ask whether the deposition proponent took a Rule 30(b)(6) deposition on the subject matter. If no Rule 30(b)(6) deposition was taken, courts can and do order the apex deposition proponent to take one of these instead. *See WebSideStory, Inc. v. NetRatings, Inc.*, 2007 U.S. Dist. LEXIS 20481, at *17 (S.D. Cal. 2007). Moreover, instead of the apex deposition, courts can permit additional interrogatories or written depositions. If a substitute can save the time of and burden on an apex witness, the court may require the substitute instead of the deposition.

Courts are disinclined to bar depositions, however. Accordingly, they often allow apex depositions but impose certain restrictions. For example, courts will limit the length and scope of the deposition to particular topics or require it be held at a time and location more convenient to the witness and organization. *See, e.g.*, *Hardin v. Wal-Mart Stores, Inc.*, 2011 U.S. Dist. LEXIS 147446, at *9 (E.D. Cal. 2011); *Holman v. ICN Pharms., Inc.*, 1999 U.S. Dist. LEXIS 20017, at *4–5 (S.D.N.Y. 1999). Moreover, courts often require other depositions, particularly those of lower-level employees, to proceed before the apex deposition. *See, e.g.*, *Affinity Labs of Texas v. Apple, Inc.*, 2011 U.S. Dist. LEXIS 53649, at *18 (N.D. Cal. 2011). That way, the court can later reconsider whether the apex deposition is necessary.

As a general rule, courts provide nonparties greater protection from discovery than parties, and that is especially true for apex depositions. *See, e.g.*, *HCP Laguna Creek CA, LP v. Sunrise Senior Living Mgmt., Inc.*, 2010 U.S. Dist. LEXIS 21500, at *8–9 (M.D. Tenn. 2010). Accordingly, a nonparty apex witness seeking to quash a deposition subpoena is more likely to succeed.

Deposition Proponent's Strategy

Regardless of the specifics, some principles of advocacy cut across all cases. Timeliness is always important, for example. Having conducted a reasonable investigation into the facts and law at the outset of the case, a proponent should immediately raise the need to depose an apex witness. The proponent should raise the issue with the opposing party at the initial discovery conference under Rule 26(f)(2), identify the issue in the discovery plan under Rule 26(f)(3), and flag the issue for the judge during the Rule 16(b) scheduling conference. Most judges like predictability in discovery. Surprising a judge with an apex deposition issue toward the close of or—worse yet—after the discovery cutoff is not the best practice. Indeed, a judge may deny the sought-after deposition simply because the motion is untimely. *See, e.g.*, *Haviland v. Catholic Health Initiatives–Iowa*, 692 F. Supp. 2d 1040, 1044 (S.D. Iowa 2010); *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 331, 332 (N.D. Ill. 2005).

But before filing the motion, the proponent should weigh the costs in seeking an apex deposition. Sometimes they're worthless. For example, former Chicago Mayor Richard M. Daley was the target of many subpoenas and notices of deposition, resulting in much litigation. But even when "Da Mare" was deposed, he often had a bout of amnesia. In his deposition relating to Millennium Park, for example, former Mayor Daley responded to questions with an "I don't recall" answer more than 100 times. Indeed, at one point in the deposition, he testified "I don't know what I knew." Transcript of Deposition of Richard M. Daley, *City of Chi. v. Chi. Park Dist.*, No. 11 CH 41075 (Aug. 29, 2013), *available at* www.scribd.com/doc/177690879/Daley-Deposition.

As always, backing up your argument with facts and logic will help. At the very least, the proponent should articulate to the court the particular subject matter or matters of the proposed deposition, why the proponent believes that the apex witness has personal knowledge of the facts, the proponent's efforts to obtain the facts elsewhere or through other methods, and why those efforts have been unsuccessful. For example, the proponent should show the judge that it served interrogatories seeking the information regarding the subject matter but that the answers were incomplete—despite the dictates of Rule 33(b)(3) and good-faith efforts to obtain full responses under Rule 37(a)(1).

Evidentiary facts—as opposed to speculation or bald contentions—should support those arguments. For example, the proponent should provide the judge with other discovery, such as deposition transcripts or verified documents, establishing

that the apex witness participated in a key discussion, communication, or event relevant to the subject matter. Similarly, the proponent should provide deposition transcripts of witnesses who testified that they would defer to the apex deponent for a fuller explanation of a decision or event. Theoretically, that phenomenon should not occur in a Rule 30(b)(6) deposition. But if a Rule 30(b)(6) witness were to provide that type of testimony, the transcript would be very valuable indeed. *See, e.g.*, *Paice LLC v. Toyota Motor Corp.*, 2009 U.S. Dist. LEXIS 131021 (E.D. Tex. 2009). Obviously, Rule 26(a)(1) disclosures from the opponent that identify the apex witness as an "individual likely to have discoverable information" would be particularly persuasive. And at least one court has found that simply by filing the lawsuit, the plaintiff opened the door to having its management officials deposed. *See Jones Co. Homes, LLC v. Laborers Int'l Union*, 2010 U.S. Dist. LEXIS 136911, at *10 (E.D. Mich. 2010).

Finally, the proponent should show good faith, not only in attempting to reach a resolution of the issue under Rule 37(a)(1), but also in offering reasonable accommodations to the other side. For example, the proponent should notify the judge that it offered to limit the deposition to X hours, take the deposition at a location more convenient for the apex witness (though not required to do so by rule), or limit the subject matters of the deposition.

The Deposition Opponent's Strategy

The opponent of an apex deposition should likewise timely, properly, and fully present the issue to the court. In fact, timeliness can be as important for the opponent of the apex deposition as it is for the proponent. Upon receipt of a deposition notice or subpoena, the opponent's counsel should promptly confer with the witness to determine whether opposing the deposition is appropriate or necessary. If, after consultation, the witness seeks protection from the deposition, the opponent should immediately initiate and hold a Rule 26(c)(1) conference with the proponent. If that fails to produce an agreement, then, assuming the judge does not have an informal discovery dispute procedure, the opponent should quickly file a motion for a protective order under Rule 26(c).

Again, providing the judge with a reasoned argument is imperative. The opponent should explain why the apex deposition is unnecessary, harassing, or unduly burdensome, or is being used for an ulterior purpose. If appropriate, the opponent should explain why the proposed subject matter of the apex deposition is not relevant. But because of the expansive definition of "relevance" for discovery purposes, the opponent should not place too much hope in that argument.

The opponent of the apex deposition also should support its arguments with evidentiary material, including affidavits and deposition transcripts. Although not absolutely required by case law, the witness should submit an affidavit showing the undue burden caused by the proposed deposition, the witness's time commitments, and the witness's lack of knowledge of the subject matter. It is important that the opponent offer more than mere contentions and assertions. Instead of simply asserting that the apex deponent "knows nothing" about the subject matter, the affidavit should explain why the witness does not have knowledge of the subject matter—for example, explaining that the key decision was delegated to another person per standard operating procedures. Along the same lines, instead of simply asserting that the apex witness is busy, the affidavit should explain the details of the witness's schedule through the remainder of the discovery period. In the proper circumstance, the opponent also can provide the affidavit of a person who knows more about the subject matter, explaining that person's involvement and the lack of involvement of the apex witness. And if the proponent has inquired about the subject matter in other depositions, the opponent should provide copies of those transcripts to show that the proponent already has exhausted the subject matter with these other witnesses.

Apex witnesses can sometimes avoid deposition altogether.

Just like the proponent, the opponent of the apex deposition should show the judge its good-faith effort to resolve the issue. Accordingly, the opponent should provide the judge with evidence that it offered alternatives to the apex deposition, such as answering additional interrogatories, providing a Rule 30(b)(6) deposition on the subject matter, or providing a deposition on written questions under Rule 31.

Litigants can depose witnesses who may possess relevant information. But apex witnesses can sometimes avoid deposition altogether—or at least be subjected to limited intrusions on their time and schedules.

To return to where we began, all three of our hypothetical deponents may possess relevant information, and all might well be deposed. But if they try to avoid their depositions, the chief executive officer and police chief are more likely to succeed than the busy single parent. After a timely and well-supported motion, the court will decide. This article is intended to help with that process, even if it provides little comfort or consolation to those, like the single parent, who look up from the bottom rather than down from the apex. ■