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# The Apex Rule and Protecting Your Client's Management Team When Conducting Deposition Discovery

**Nathan Davis, Shane O'Connor and Ciera Gonzalez**

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## I. Introduction

The Federal Rules of Civil Procedure liberally enable parties to seek relevant information in discovery that may be helpful in the preparation and trial of a case. While the liberal scope of discovery permitted by the federals rules is helpful to parties when developing a case for trial, it also creates the potential for abuse. As explained by the United States Supreme Court, "rules designed to facilitate expeditious resolution of civil disputes have too often proved tools for harassment and delay."[1] As a result of this potential for abuse, the federal rules empower courts to protect litigants against unreasonable discovery:

> Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse.[2]

Discovery by way of depositions can be particularly burdensome, time-consuming and expensive. This paper discusses the scope of deposition discovery permitted by the Federal Rules of Civil Procedure, as well as the standards and procedures that govern motions for protective orders and motions to quash. This paper also discusses several specific discovery situations that often result in disputes or the need for court intervention, including depositions noticed and conducted under Rule 30(b)(6), apex depositions of high-level corporate executives, and depositions of corporate counsel. The ultimate goal of this paper is to offer practical tips and suggestions for protecting your client's management team from deposition discovery tactics that go beyond the reasonable limits prescribed by the Federal Rules of Civil Procedure.

## II. Scope Of Deposition Discovery Permitted By Rule 26 Of The Federal Rules Of Civil Procedure.

Considerations of both relevance and proportionality expressly govern the scope of deposition discovery in civil lawsuits. Pursuant to Rule 26(b)(1), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. . . ."[3] Relevance is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."[4] "Information within the scope of discovery need not be admissible in evidence to be discoverable."[5] In evaluating proportionality, courts consider "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[6]

1 *Herbert v. Lando*, 441 U.S. 153, 204 (1979).
2 *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984).
3 Fed. R. Civ. P. 26(b)(1).
4 *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).
5 Fed. R. Civ. P. 26(b)(1).
6 *Id.*

Rule 26(b)(2)(C) requires courts to "limit the frequency or extent of discovery" if a court determines that "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)."[7] This rule obligates courts "to consider the proportionality of all discovery and consider it in resolving discovery disputes."[8]

Rule 26(c)(1) details the standard governing motions seeking the entry of a protective order. Pursuant to this rule, courts "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ."[9] "The 'good cause' standard of Rule 26(c) is highly flexible, having been designed to accommodate all relevant interests as they arise."[10] "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required."[11] In this sense, the rule recognizes that the "trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery."[12] When appropriate to do so, district courts "should not hesitate to exercise appropriate control over the discovery process."[13]

"[T]he burden is upon [the party seeking the protective order] to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements."[14] Thus, a party seeking a protective order must show both "good cause and a specific need for the protection."[15] "The good cause standard of Fed. R. Civ. P. 26(c) is not met by the conclusory statements of the moving party."[16] Instead, the party seeking a protective order must show that the requested discovery "will result in a clearly defined and serious injury to that moving party."[17] "When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the scope of relevance as defined under Fed. R. Civ. P. 26(b)(1), or (2) is such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure."[18] Courts tend to "lean towards resolving doubt over relevance in favor of discovery."[19]

Consistent with the obligation to consider the proportionality of all discovery when resolving discovery disputes, courts generally "compare the hardship to the party against whom discovery is sought against the probative value of the information to the other party."[20] "Even if relevant, discovery is not permitted where no need is shown, or compliance would be unduly burdensome, or where harm to the person from whom discovery is sought outweighs the need of the person seeking discovery of the information."[21] While the party seeking protection bears the ultimate burden of persuasion, the party opposing a motion for protective order may "need to make its own showing of . . . the proportionality factors, including the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, and the importance of the discovery in resolving the issues. . . ."[22]

Rule 26(c)(1) vests district courts with broad discretion when ruling upon motions for protective orders, including "forbidding the disclosure or discovery."[23] However, "[p]rotective orders prohibiting depositions are rarely granted."[24] "Where

7 Fed. R. Civ. P. 26(b)(2)(C).
8 Fed. R. Civ. P. 26 Advisory Committee Notes to 2015 Amendment.
9 Fed. R. Civ. P. 26(c)(1).
10 *Rohrbough v. Harris*, 549 F.3d 1313, 1321 (10th Cir. 2008) (citation omitted).
11 *Seattle Times Co.*, 467 U.S. at 36.
12 *Id.* at 36.
13 *Herbert*, 441 U.S. at 177.
14 *In re Terra Int'l*, 134 F.3d 302, 306 (5th Cir. 1998) (citations omitted).
15 *Meisenheimer v. DAC Vision Inc.*, No. 3:19-cv-1422-M, 2019 WL 6619198, at *2 (N.D. Tex. Dec. 4, 2019).
16 *Aptive Env't, LLC v. Town of Castle Rock, CO*, No. 17-cv-01545-MSK-MJW, 2017 WL 11487108, at *1 (D. Colo. Dec. 11, 2017).
17 *Id.*
18 *Horizon Holdings, L.L.C. v. Genmar Holdings, Inc.*, 209 F.R.D. 208, 211 (D. Kan. 2002).
19 *Folger v. Medicalodges, Inc.*, No. 13-1203-MLB-KMH, 2013 WL 6244155, at *2 (D. Kan. Dec. 3, 2013).
20 *Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540, 555 (5th Cir. 2016).
21 *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1323 (Fed. Cir. 1990).
22 *Dennis v. U.S.*, No. 3:16-cv-3148-G-BN, 2017 WL 4778708, at *4 (N.D. Tex. Oct. 23, 2017).
23 Fed. R. Civ. P. 26(c)(1).
24 *Bucher v. Richardson Hosp. Auth.*, 160 F.R.D. 88, 92 (N.D. Tex. 1994).

a protective order would quash a deposition in its entirety, the moving party must show extraordinary circumstances that present a particular and compelling need for such relief."[25] But even in the absence of such extraordinary circumstances, the text of Rule 26(c)(1) arms courts with several options to permit discovery but, at the same time, lessen its burden or expense, including "(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; (C) prescribing a discovery method other than the one selected by the party seeking discovery; [and] (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters. . . ."[26]

## III. Scope Of Deposition Discovery Permitted By Rule 45 Of The Federal Rules Of Civil Procedure.

Rule 45 provides guidelines for subpoenaing a non-party to attend a deposition. Under this rule, a subpoena may be used to compel a person to attend a deposition within 100 miles of where the person resides, is employed, or regularly transacts business in person.[27] However, if the recipient of the subpoena is a party or party's officer, a subpoena may command that person to attend a deposition anywhere within the state where the person resides, is employed, or regularly transacts business in person.[28]

A non-party who receives a subpoena to testify at a deposition may seek a protective order from the court pursuant to Rule 26(c)(1). Rule 45(d)(3) also establishes standards and procedures that are specifically applicable to deposition discovery sought from non-parties using subpoenas. This rule provides that, "[o]n timely motion, the court for the district where compliance is required must quash or modify a subpoena that: (i) fails to allow a reasonable time to comply; (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c); (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden."[29]

Although Rule 45(d)(3) does not specifically list relevance as a basis for quashing a subpoena, courts have "long recognized that the scope of discovery under a subpoena is the same as the scope of discovery under Rule 26(b). . . ."[30] "A subpoena that seeks irrelevant, overly broad, or duplicative discovery causes undue burden, and the trial court may quash it on those bases."[31] "[R]elevance for purposes of the undue burden test is measured according to the standard of Federal Rule of Civil Procedure 26(b)(1)."[32] As explained *supra*, for purposes of discovery, relevance is construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case, and information within the scope of discovery need not be admissible in evidence to be discoverable.

A party seeking to quash or modify a deposition subpoena "has the burden of proof to demonstrate that compliance with the subpoena would be unreasonable and oppressive."[33] "The moving party opposing discovery must show how the requested discovery was overly broad, burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden."[34] "Whether a burdensome subpoena is reasonable must be determined according to the facts of the case, such as the party's need for the [information] and the nature and importance of the litigation."[35] Courts also may "consider the expense and inconvenience to the non-party."[36] "Whether a subpoena subjects a witness to undue burden generally raises a question of the subpoena's reasonableness, which requires a court to balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it. This balance of the subpoena's benefits and burdens calls upon the court to consider whether the information is necessary and unavailable from any other

25 *Klesch & Co. Ltd. v. Liberty Media Corp.*, 217 F.R.D. 517, 524 (D. Colo. 2003); *see also Van Den Eng v. Coleman Co.*, No. 05-MC-109-WEB-DWB, 2005 WL 3776352, at *2 (D. Kan. Oct. 21, 2005) ("Granting a protective order that totally prohibits a deposition is considered a drastic action that will not be taken absent extraordinary circumstances.").
26 Fed. R. Civ. P. 26(c).
27 Fed. R. Civ. P. 45(c)(1)(A).
28 Fed. R. Civ. P. 45(c)(1)(B)(i).
29 Fed. R. Civ. P. 45(d)(3).
30 *Martinelli v. Petland, Inc.*, No. 10-mc-407-RDR-2010 WL 3947526, at *3 (D. Kan. Oct. 7, 2010) (citations omitted).
31 *Gilbert v. Rare Moon Media, LLC*, No. 15-mc-217-CM, 2016 WL 141635, at *4 (D. Kan. Jan. 12, 2016) (citation omitted).
32 *MetroPCS v. Thomas*, 327 F.R.D. 600, 609 (N.D. Tex. 2018 ) (citation omitted).
33 *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004) (citation omitted).
34 *Andra Group, LP v. JDA Software Group, Inc.*, 312 F.R.D. 444, 449 (N.D. Tex. 2015).
35 *Wiwa*, 392 F.3d at 818.
36 *Id.*

source."[37]

## IV. Selecting And Preparing Corporate Witnesses For Rule 30(b)(6) Depositions.

One of the most common ways that parties obtain deposition discovery from a corporate party or non-party is by invoking the procedures in Rule 30(b)(6) for taking corporation representative depositions. This rule allows a party to "name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity."[38] Of course, "a corporation is a creature of legal fiction which can act only through its officers, directors, and other agents[.]"[39] In other words, "it is not literally possible to take the deposition of a corporation; instead . . . the information sought must be obtained from natural persons who can speak for the corporation."[40] Accordingly, once an organization receives a proper a Rule 30(b)(6) notice or Rule 45 deposition subpoena, that organization becomes obligated to "designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf[.]"[41]

Rule 30(b)(6) depositions can be a source of risk for corporate litigants. When the organization "produces an employee pursuant to a rule 30(b)(6) notice, it represents that the employee has the authority to speak on behalf of the corporation with respect to the areas within the notice of deposition."[42] That authority "extends not only to facts, but also to subjective beliefs and opinions" that the witness may offer on behalf of the corporation or organization during the deposition.[43] Ultimately, the designated individual "may bind the corporation on the noticed subjects."[44]

At a high-level, the mechanics of the rule are straightforward. First, the party seeking a deposition must serve the organization with a Rule 30(b)(6) notice of deposition. If the organization is a non-party, then a Rule 45 deposition subpoena is required. Importantly, the notice or subpoena must state "with reasonable particularity the matters for examination."[45] After notice or a subpoena has been properly served, "the serving party and the organization must confer in good faith about the matters for examination."[46] This conferral requirement is new and was added to the rule in 2020.[47] Following conferral, if there is no further objection to the matters for examination, the named organization must designate a witness "to testify on its behalf."[48] In situations where multiple matters for examination are specified, an organization may likewise designate multiple witnesses and assign certain topics to each.[49] Finally, at the deposition, the designee(s) must "testify about information known or reasonably available to the organization."[50]

Perhaps unsurprisingly, this process rarely plays out smoothly and often requires court intervention. Commonly, issues and disputes arise out of the specified "matters for examination." Problems and concerns here frequently include "overlong or ambiguously worded lists" of topics.[51] The relevance and proportionality requirements of Rule 26(b), addressed *supra*, apply to Rule 30(b)(6) topics, and defending attorneys should closely review all proposed topics for examination with this in mind. Any proposed topics that run afoul of those requirements are improper and should be objected to. Similarly, attorneys should be mindful that Rule 30(b)(6) requires that the proposed matters for examination be stated "with reasonable particularity."[52] Ambiguous or vague topics for examination can quickly lead to lines of questioning that neither the attorney nor the witness

37 *MetroPCS*, 327 F.R.D. at 609 (citations omitted).
38 Fed. R. Civ. P. 30(b)(6).
39 *MicroSignal Corp. v. Microsignal Corp.*, 147 Fed.Appx. 227, 231 (3rd Cir. 2005).
40 *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006).
41 Fed. R. Civ. P. 30(b)(6).
42 *Brazos River Auth.*, 469 F.3d at 433.
43 *Id.*
44 *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000).
45 Fed. R. Civ. P. 30(b)(6).
46 *Id.*
47 The U.S. Supreme Court Congressional Rules Package 2020, *available* at https://www.uscourts.gov/rules-policies/archives/packages-submitted/congressional-rules-package-2020.
48 Fed. R. Civ. P. 30(b)(6).
49 *Id.*
50 *Id.*
51 *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure, and the Federal Rules of Evidence*–2018, Advisory Committee's Note to Fed. R. Civ. P. 30(b)(6) (Aug. 15, 2018).
52 Fed. R. Civ. P. 30(b)(6).

are prepared to address. This situation is particularly dangerous because it can result in a Rule 30(b)(6) witness testifying on behalf of—and binding—an organization on questions or matters for which they are not adequately educated or prepared. Overly vague or ambiguous topics are thus also improper and should be objected to by the defending attorney.

However, exactly *how* counsel should raise an objection to a Rule 30(b)(6) is somewhat unclear. The rule does not offer a procedure or clear guidance for objecting to an improper Rule 30(b)(6) notice. There is hope that the new meet-and-confer requirement, added to the rule via a 2020 amendment, will assist with reducing the need for formal objections and encourage counsel to resolve disputes in an informal manner. Of course, the rule falls short of *requiring* counsel to resolve all disputes and only requires that the serving party and the noticed organization "confer in good faith[.]"[53] When those conferrals do not resolve disputes, organizations are often left with no remedy other than filing a motion to quash or motion for protective order. But even with these options, the burden remains on the organization to prove that those remedies are proper, as discussed *supra*.

Another similar issue that may arise is when, during the deposition, the deposing attorney asks questions that are outside the scope of the matters specified for examination in the Rule 30(b)(6) notice or subpoena. When this occurs, "the general deposition rules govern . . . so that relevant questions may be asked and no special protection is conferred on a deponent by virtue of the fact that the deposition was noticed under 30(b)(6)."[54] But if the organization's witness "does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party's problem."[55] Under this rule, the deponent must thus answer questions even if they have not been properly described in the Rule 30(b)(6) notice. But if deposing counsel's line of questioning does not satisfy the relevancy and proportionality requirements of Rule 26(b), the defending attorney may pause the deposition and seek a protective order.[56] Again, though, the burden remains on the organization to prove that a protective order is needed.

Given these complexities, it is imperative for the attorney defending the Rule 30(b)(6) deposition to work closely with the organization to select the best possible witnesses. The witness need not have personal knowledge of the matters for examination, but the organization is "obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation."[57] The temptation is often to designate an employee with little to no knowledge of the factual issues, and to provide that employee with little to no information for the deposition. This strategy is usually a mistake, however. For one thing, when "it becomes obvious that the deposition representative designated by the corporation is deficient, the corporation is obligated to provide a substitute."[58] In some cases, a failure to provide a knowledgeable witness has been considered a failure to appear for the deposition, which has resulted in sanctions.[59] In addition, witnesses who have no personal knowledge regarding the matters for examination often lose their nerve and doubt their own knowledge or answers. The better option is often to designate a long-term employee who is familiar with the general substance underlying the matters for examination. This type of designee will have a level of familiarity with the subject matter that allows for poise and confidence during the deposition. They also are more likely to challenge the deposing attorney for mischaracterizing, misrepresenting or simply misunderstanding a particular topic.

After selecting a witness or witnesses, counsel also should assist with thoroughly preparing the witness for the deposition. While a witness with prior personal knowledge is preferred for the reasons discussed, the organization's "duty to present and prepare a Rule 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved."[60] This means that the organization must "prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources."[61] Counsel should accordingly work with the designee to ensure familiarity with case facts, legal issues, and key documents. Not only is this required to satisfy the organization's duty, but a well-prepared and fully-informed witness likely will benefit the organization. Defending attorneys and organizations should take care to remember that the phrase "I don't know" is not a way to avoid questions at a Rule 30(b)(6) deposition—to the contrary,

53 *Id.*
54 *King v. Pratt & Whitney, a Div. of United Techs. Corp.*, 161 F.R.D. 475, 476 (S.D. Fla. 1995).
55 *Id.*
56 *See id.*
57 *U.S. v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996).
58 *Brazos River Auth.*, 469 F.3d at 433.
59 *See id.* at 433–434.
60 *Id.* at 433.
61 *Id.*

"I don't know . . . is itself an answer and the corporation will be bound by that answer."[62] A thoroughly prepared witness will avoid these types of pitfalls and will reduce the possibility of sanctions for failure to satisfy the organization's obligations under Rule 30(b)(6).

There is no doubt that Rule 30(b)(6) casts a heavy burden on a noticed organization. But with careful planning and preparation, tools are available to protect the organization. The process begins with a careful review of the "matters for examination" and asserting objections or seeking a protective order or motion to quash when necessary. And the defending attorney should work closely with the organization to select a witness that is knowledgeable and ensure that the witness is well-prepared for the deposition. While Rule 30(b)(6) depositions are sources of risk, they can also benefit the organization if handled professionally. After all, this is the organization's chance to tell its side of the story. A deposition that goes well for the organization often can lead to a speedy settlement or dispositive motion.

## V. Protecting "Apex" Witnesses From Unnecessary Depositions.

While corporate representative depositions noticed and taken pursuant to Rule 30(b)(6) are commonplace, the Rule 30(b)(6) procedure allows a corporation the right to select which officers, directors, managing agents, or other persons will testify on its behalf. Some litigants seek to bypass the Rule 30(b)(6) procedure by requesting the deposition of a specific high-level corporate executive, such as a chief executive officer, president, board member, founder, or the like. This practice is especially common in situations where only one side has high-level corporate executives to depose. These depositions are referred to as apex depositions. Because apex depositions present distinct challenges for high-level executives and their corporate employers, courts have established guidelines about how to protect apex witnesses from unwarranted discovery.

While subjecting high-level executives to deposition discovery creates a tremendous potential for abuse or harassment, there is no per se prohibition against deposing apex witnesses in federal lawsuits. In fact, "federal courts permit the depositions of high-level executives, sometimes referred to as apex executives, when conduct and knowledge at the highest levels of the corporation are relevant to the case."[63] "[T]he fact that an executive has a busy schedule cannot shield that witness from being deposed."[64]

However, "[u]nder the 'apex doctrine,' courts may provide some protection from depositions to high-level executives. . . ."[65] "The doctrine recognizes that depositions of high-level officers severely burdens those officers and the entities they represent, and that adversaries might use this severe burden to their unfair advantage."[66] Indeed, "[v]irtually 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."[67]

"The 'apex doctrine," rooted in Federal Rule of Civil Procedure 26, was developed as an aid in ensuring that the liberal rules of procedure for depositions are used only for their intended purpose and not as a litigation tactic to create undue leverage by harassing the opposition or inflating its discovery costs."[68] This doctrine provides courts with a means of balancing "the competing interests of allowing discovery and protecting the parties and deponents from undue burden."[69] Rule 26(c) provides the general framework for asking a court to prevent an apex deposition. This rule specifically empowers courts to forbid discovery, prescribe discovery methods other than the one selected by the party seeking the discovery, and to limit the scope of permissible inquiry during a deposition. Relying upon Rule 26(c), many courts have recognized that district courts have the "authority to prevent or alter apex depositions under the Federal Rules to avoid duplication,

62 *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 690 (S.D. Fla. 2012).

63 *Ross Neely Sys., Inc. v. Navistar, Inc.*, No. 3:13-cv-1587-M-BN, 2015 WL 12916401, at *1 (N.D. Tex. April 9, 2015) (allowing deposition of corporation's lead independent director because the director sent a letter that was relevant to a claim or defense, thus making the director's deposition reasonably calculated to lead to the discovery of admissible evidence).

64 *Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98, 102 (S.D.N.Y. 2001).

65 *Lawson v. Spirit Aero Sys., Inc.*, No. 18-1100-EFM-ADM, 2020 WL 1889016, at *4 (D. Kan. April 16, 2020) (quoting *Tierra Blanca Ranch High Country Youth Program v. Gonzales*, 329 F.R.D. 694, 696 (D.N.M. 2019)).

66 *U.S. ex rel. Galmines v. Novartis Pharm. Corp.*, No. 06-3213, 2015 WL 4973626, at *1 (E.D. Penn. Aug. 20, 2015).

67 *Celerity, Inc. v. Ultra Clean Hous., Inc.*, No. C05-04374 MMC (JL), 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007).

68 *Performance Sales & Mktg. LLC v. Lowes Cos., Inc.*, No. 5:07-CV-00140-RLV, 2012 WL 4061680, at *3-4 (W.D.N.C. Sept. 14, 2012).

69 *Bank of the Ozarks v. Capital Mortg. Corp.*, No. 4:12-mc-00021, 2012 WL 2930479, at *1 (E.D. Ark. July 18, 2012).

harassment, and burdensomeness."[70]

While courts have articulated somewhat different factors when describing the apex doctrine, to the extent they recognize it as a distinct doctrine at all, courts often "protect a high level corporate executive from the burdens of a deposition when any of the following circumstances exist: (1) the executive has no unique personal knowledge of the matter in dispute; (2) the information sought from the executive can be obtained from another witness; (3) the information sought from the executive can be obtained through an alternative discovery method; or (4) sitting for the deposition is a severe hardship for the executive in light of his obligations to his company."[71]

Other courts have noted that "motions for protective orders for Apex Officials are treated under the same standards as any other protective order, while taking into consideration special factors that may apply to such officials."[72] These courts tend to reject the notion that a special doctrine is needed to protect apex witnesses because Rule 26(c) already permits courts to protect all witnesses against annoyance, embarrassment, oppression, or undue burden or expense. Nonetheless, even "federal courts [that] say they do not employ an 'apex doctrine' to preclude the deposition of executives" often "have required that the 30(b)(6) deposition and/or the depositions of lower ranking employees with more direct knowledge of the relevant facts be taken first."[73]

As discussed *supra*, the burden normally is on the party seeking protection from discovery to establish good cause for a protective order. Some federal district courts have nonetheless required a party seeking to depose a high-level executive to first demonstrate that the apex witness has unique personal knowledge of the matters at issue.[74] "An executive has 'unique personal knowledge' only if he has information that cannot be had 'through interrogatories, deposition of a designated corporate spokesperson, or deposition testimony of other persons."[75] Regardless of who has the initial burden of production, "the ultimate burden of persuasion lies with the executive invoking the apex doctrine."[76] To satisfy this burden of persuasion, the executive invoking the apex doctrine must "demonstrate by evidence that he in fact has no unique personal knowledge or that there exists one of the other . . . circumstances under which requiring him to sit for a deposition is inappropriate."[77]

To satisfy the ultimate burden of persuasion, courts typically require an executive to support a motion for protection based on the apex doctrine with a detailed affidavit denying any unique personal knowledge of the matter in dispute and otherwise providing an evidentiary basis for a protective order.[78] As with all affidavits tendered in support of motions for a protective order, an affidavit tendered in support of a motion for a protective order based on the apex doctrine must

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70 *Sanchez v. Swift Transp. Co. of Ariz., L.L.C.*, No. PE: 15-CV-15, 2016 WL 10589438, at *3 (W.D. Tex. April 22, 2016); *see also Black Card, LLC v. VISA U.S.A., Inc.*, No. 15-CV-027-S, 2016 WL 7325665, at *3 (D. Wyo. Dec. 12, 2016) ("When lower-level employees possess the relevant and sufficient knowledge to the matter being litigated, depositions of high-level corporate executives may be duplicative, cumulative and burdensome.") (citation omitted).

71 *Naylor Farms, Inc. v. Anadarko OGC Co.*, No. 11-cv-01528-REB-KLM, 2011 WL 2535067, at *1 (D. Colo. June 27, 2011); *see also Asarco LLC v. Noranda Min., Inc..*, No. 2:12-CV-00527, 2015 WL 1924882, at *3 (D. Utah Apr. 28, 2015) (same).

72 *Van Den Eng v. Coleman Co.*, 2005 WL 3776352, at *2; *see also Raymond v. Spirit Aerosystems Holdings, Inc.*, No. 16-1282-JWB-GEB, 2021 WL 1238269, at *5 (D. Kan. April 2, 2021) (noting that the Tenth Circuit has not expressly adopted the apex doctrine and that district courts generally have applied Rule 26 factors for a protective order when considering motions under this doctrine, while sometimes acknowledging that special factors may apply).

73 *Wilco Marsh Buggies & Draglines, Inc. v. Weeks Marine, Inc.*, No. 20-3135, 2022 WL 742443, at *4 (E.D. La. Mar. 11, 2022) (collecting cases).

74 *Id.* at *5 (granting motion for protective order where there was no basis to conclude that the defendant's CEO or President could provide "uniquely relevant testimony"); *United Auto. Ins. v. Stucki & Rencher, LLC*, No. 2:15-cv-834 RJS, 2018 WL 1054361, at *2 (D. Utah Feb. 23, 2018 ) (denying defendant's motion to compel the deposition of plaintiff's CEO because defendant did not show the CEO had unique personal knowledge or that the information could not be obtained from another witness); *Harding v. Cty. of Dallas*, No. 3:15-CV-0131-D, 2016 WL 7426127, at *7 n.12 (N.D. Tex. Dec. 23, 2016) (explaining that federal courts typically require a party to demonstrate "exceptional or extraordinary circumstances" to depose a high-ranking official); *EchoStar Satellite, LLC v. Splash Media Partners, L.P.*, No. 07–cv–02611–PAB–BNB, 2009 WL 1328226, at *2 (D. Colo. May 11, 2009) ("Where, however, a party seeks to depose a high level executive removed from the daily subjects of the matter in litigation, the party seeking discovery must first demonstrate that the proposed deponent has 'unique personal knowledge' of the matters at issue.") (quoting *Baine v. Gen. Motors Corp.*, 141 F.R.D. 332, 334 (M.D. Ala. 1991)).

75 *Naylor Farms*, 2011 WL 2535067, at *3 (quoting Baine, 141 F.R.D. at 334); *see also Carter v. Att'y Liab. Prot. Soc.*, No. 08-CV-273-B, 2009 WL 10453674, at *2 (D. Wyo. Sept. 25, 2009) (same).

76 *Naylor Farms*, 2011 WL 2535067, at *2; *see also Reed v. Bennett*, 193 F.R.D. 689, 691 (D. Kan. 2000) ("The party seeking a protective order has the burden to demonstrate good cause.").

77 *Naylor Farms*, 2011 WL 2535067, at *2.

78 *See McMahon v. Presidential Airways, Inc.*, No. 6:05-cv-1002-Orl-28JGG, 2006 WL 5359797, at *2 (M.D. Fla. Jan. 18, 2006) ("A protective order precluding the deposition of a high-ranking executive officer will be granted where the officer possesses no unique knowledge regarding the underlying facts of the action and files a declaration stating his or her lack of knowledge").

constitute a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.[79] While "the mere denial of personal knowledge does not [necessarily] preclude the taking of [an apex] deposition,"[80] the failure to support a motion for protection under the apex doctrine with an affidavit typically is dispositive and is an oft-cited basis for denying an apex witness protection under Rule 26(c)(1).[81] Moreover, if a party designates an executive in its Rule 26(a)(1) disclosures or the executive otherwise inserts himself or herself in the litigation, such as by tendering affidavits in support of other motions, courts tend to resist affording protection under the apex doctrine.[82]

Courts generally have rejected motions to protect apex witnesses from being deposed when the executives are no longer serving the company in a high-level capacity. "One purpose cited for use of the Apex doctrine is to protect high-level officials from harassing discovery efforts that would hinder their corporate responsibilities."[83] Former high-level officials have no corporate responsibilities with which to interfere, thus making it difficult to demonstrate why they need to be protected from participating in the discovery process.[84]

Whether the deposition of an apex witness will be permitted in any given case depends on the particular facts of the case, the executive's knowledge of the matters in dispute, and the court's weighing of the Rule 26(b)(1) proportionality factors, especially the importance of the discovery and whether the burden or expense of the proposed discovery outweighs its likely benefit. The success of a motion for protective order under the apex doctrine likely will depend in large part upon the substance of affidavit the apex witness tenders in support of the motion for protective order and whether less burdensome forms of discovery are available. It is critical that the apex witness provide a detailed account of why he or she does not have unique personal knowledge of the matter in dispute. A conclusory or boilerplate affidavit will not suffice.

An illustrative case that demonstrates how to support a motion for protective order based on the apex doctrine is *Thomas v. Int'l Business Machines*. While the Tenth Circuit did not formally adopt or even discuss the apex doctrine in Thomas, the court applied traditional Rule 26 considerations to affirm the district court's entry of a protective order relieving IBM's chairman of the board of directors from having to comply with the plaintiff's deposition notice in an age discrimination lawsuit.[85] In doing so, the court highlighted that "IBM submitted an affidavit from [its chairman] in which he testified that he lacked personal knowledge of [the plaintiff] and was unaware of her age, her performance ranking, any work evaluations that she might have received, or that she even worked for IBM."[86] IBM's chairman also testified in his affidavit that the deposition would impose a severe hardship because he was required to attend previously scheduled meetings with IBM senior management in a different state on the date of his scheduled deposition.[87] The court further noted that "[n]othing in the record indicates that IBM did not make available for deposition [the plaintiff's] direct supervisors, who conducted the performance evaluations and ranking."[88]

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79 *Compare Thomas v. Int'l Bus. Mach.*, 48 F.3d 478, 483 (10th Cir. 1995) (affirming entry of protective order precluding deposition of IBM's chairman of the board of directors, in age discrimination lawsuit, in part, because executive submitted an affidavit stating he lacked personal knowledge of plaintiff and was unaware of her age, performance, work evaluations, or that she even worked for IBM) and *Evans v. Allstate Ins. Co.*, 216 F.R.D. 515, 519 (N.D. Okla. 2003) (granting protective order precluding depositions of executive officers where they filed affidavits disavowing any personal knowledge of the facts of the action) *with Ledbetter v. Int'l Assoc. of Machinists and Aerospace Workers*, No. 18-2546-DDC-GEB, 2020 WL 6868777, at *6 (D. Kan. Nov. 23, 2020) (denying defendant's motion to quash deposition notice of its president because "Defendants [did] not support this [motion] by outlining why [its president] would be unusually burdened by this deposition or how the information [defendant's president] appears to personally possess would be better gained from another source") and *City of Pontiac Gen. Employees' Ret. Sys. v. Wal-Mart, Inc.*, No. 5:12-cv-5162, at *2 (W.D. Ark. May 11, 2017) (finding Wal-Mart's general and conclusory assertion that deposing its president and CEO would create an undue burden did not establish good cause for a protective order).

80 *Raymond*, 2021 WL 1238269, at *6.

81 *See, e.g., Rotstain v. Trustmark Nat'l Bank*, No. 3:09-CV-2384-N-BQ, 2020 WL 12968651, at *7 (N.D. Tex. Mar. 10, 2020) (noting that plaintiff "did not provide an affidavit from [the former high-ranking official] attesting to his purported lack of knowledge, and therefore cannot carry its burden for the Court to either quash the subpoena or issue a protective order").

82 *See, e.g., Cvent Inc. v. Rainfocus*, No. 2:17-cv-00230-RJS-DBP, 2020 WL 6827714, at *2 (D. Utah Nov. 20, 2020) (denying motion for protective order to prevent deposition of defendant's CEO, in part, because defendant identified its CEO in its initial disclosures, thus demonstrating a willingness to have him testify); *Aptive Env't*, 2017 WL 11487108, at *2 (denying motion for protective order to prevent the deposition of plaintiff's CEO under the apex doctrine, in part, because plaintiff's CEO previously had personally involved himself in the case by filing affidavits stating that he had personal knowledge of relevant facts).

83 *Van Den Eng*, 2005 WL 3776352, at *2.

84 *See id.*

85 48 F.3d 478, 483 (10th Cir. 1995).

86 *Id.*

87 *Id.*

88 *Id.*

While the contents of the apex executive's affidavit in *Thomas* were particular to the facts of that case, some best practices can be discerned from the Tenth Circuit's analysis:

1. It likely will not suffice for the apex executive to state, in a conclusory fashion, that he or she has no unique personal knowledge of the matter in dispute. A better practice is to explain *why* the apex executive lacks any relevant personal knowledge, such as because the matter in question lies outside of the executive's normal job duties.
2. The apex executive should do more than simply explain why he or she does not have any unique personal knowledge. The apex executive also should identify non-apex witnesses who have relevant personal knowledge and explain why those witnesses are the more appropriate witness to testify about the matter in question. Even better, the corporation should bolster the contents of the apex executive's affidavit by tendering complimentary affidavits from non-apex witnesses explaining why they are the more appropriate witnesses to sit for a deposition.
3. To the extent other forms of discovery could be used to discover the desired information, such as written discovery, a Rule 30(b)(6) deposition or even a deposition by written questions, the apex executive should identify those alternative methods of discovery that likely would satisfy the need for discovery so that the court is informed of less-burdensome alternatives that may satisfy the need for discovery. Doing so often at least postpones the need for an apex witness to sit for a deposition and often precludes apex depositions altogether.
4. The apex executive should articulate why sitting for the deposition would be a hardship in light of the executive's existing obligations the company, focusing on specific obligations that the executive would have to forego or delay performing if he or she had to prepare and sit for a deposition. If there is reason to believe the apex executive's deposition has been requested as a means of harassment or to obtain undue leverage in the litigation, that too ought to be spelled out in the affidavit.

Although the liberal scope of discovery allowed by Rule 26 gives district courts considerable discretion when deciding whether to allow an apex deposition, following these best practices will increase the likelihood that a court will utilize Rule 26(c) to protect an apex witness from having to sit for a deposition when the apex witness lacks unique personal knowledge and other forms of discovery could satisfy the need the for discovery.

## VI. Special Considerations And Privilege Issues When Corporate Counsel Is The Deponent.

Depositions of corporate witnesses can become even trickier when a party seeks to depose a company's corporate counsel. Corporate counsel can be an attractive target for deposition discovery because they are often involved in important company decisions, are typically knowledgeable regarding the subject matter of litigation, routinely author significant legal documents affecting the rights of parties, and are usually engaged in investigating matters that result in litigation. Much like the situation with apex depositions, this discovery practice can create a serious potential for abuse or harassment. But unlike apex depositions, a corporate counsel deposition involves unique issues of privilege. Thus, to both protect the attorney-client relationship and respect the adversarial nature of proceedings, courts pay special attention to requests to depose corporate counsel.

Although nothing in the Federal Rules of Civil Procedure explicitly protects corporate counsel from being deposed,[89] courts generally are reluctant to permit the deposition of corporate counsel. As one district court explained, a "party shouldn't be able to use a deposition to sucker-punch the other side's quarterback or listen in on the other side's huddle."[90] Despite this reluctance, "[i]n recent years, the boundaries of discovery have steadily expanded, and it appears that the practice of taking the deposition of opposing counsel has become an increasingly popular vehicle of discovery."[91] Even as discovery rules continue to broaden, courts generally "view the increased practice of taking opposing counsel's deposition as a negative

89 *See Am. Cas. Co. of Reading, Pa. v. Krieger*, 160 F.R.D. 582, 585 (S.D. Cal. 1995).
90 *Cascone v. Niles Home for Children*, 897 F. Supp. 1263, 1267 (W.D. Mo. 1995).
91 *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986

development in the area of litigation, and one that should be employed only in limited circumstances."[92]

Nevertheless, parties increasingly seek depositions of corporate counsel, which likely corresponds with corporate counsel increasingly assuming business-related roles or tasks within the corporation. In response, many jurisdictions have adopted *Shelton v. American Motors Corp.*'s burden-shifting protections.[93] In *Shelton*, the plaintiffs served a deposition notice on the defendant's in-house litigation attorney assigned to the case.[94] The district court denied defendant's motion for a protective order.[95] At the deposition, plaintiff's counsel specifically asked the defendant's in-house counsel about the existence of documents pertaining to an allegedly defective product, and the in-house counsel refused to answer, citing attorney-client privilege and the work-product doctrine.[96] The district court subsequently determined that the in-house counsel improperly refused to answer the deposition questions and entered a default judgment against the defendant as a consequence.[97]

On appeal, the Eighth Circuit Court of Appeals established a three-prong test to determine the circumstances in which corporate counsel may be deposed.[98] Under this three-prong *Shelton* test, corporate counsel can only be deposed when "the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel, (2) the information sought is relevant and non-privileged, and (3) the information is crucial to the preparation of the case."[99] Thus, despite the liberal discovery rules, the *Shelton* test shifts the burden to a party seeking to depose corporate counsel to show that the three prongs have been met. Absent a showing of any of the three prongs, a party's attempt to depose the opposing party's corporate counsel will be denied. Although the *Shelton* test refers to "opposing trial counsel," the case specifically dealt with a party's attempt to obtain discovery from corporate counsel, and courts have routinely applied the *Shelton* test to attempts to depose in-house counsel.[100]

While most jurisdictions follow *Shelton*, some have declined to use the *Shelton* test and instead have adopted a "flexible approach." The flexible approach looks to determine whether a proposed deposition would impose an inappropriate burden or hardship on the responding party.[101] This approach seeks to respect the broad discovery permitted by Rule 26. Courts applying this flexible approach tend to require that the party opposing the discovery carry the burden of showing that making its corporate counsel sit for a deposition would exceed the scope of discovery permitted by Rule 26.[102] Additionally, courts that apply this flexible approach often require that corporate counsel appear at the deposition and object on a question-by-question basis.[103]

Regardless of which jurisdiction you are in, when a party attempts to depose your client's corporate counsel, the corporation should first seek a protective order quashing the notice of deposition or subpoena or, at a minimum, limiting the scope of permissible inquiry. If the *Shelton* test is applicable, the party that issued the deposition notice or subpoena will need to meet its burden of showing why the three-prong *Shelton* test is satisfied. If the flexible approach applies, the corporation will need to carry the burden of showing that the requested deposition exceeds the scope discovery permitted by Rule 26. Simply claiming that providing testimony will violate the attorney-client privilege, without more, is typically insufficient to gain protection from a court. Rather, corporate counsel must be able to show that the anticipated testimony will reveal confidential communications and, therefore, presents a serious

92 *Id.*
93 *Id.*
94 *Id. at 1325.*
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.* at 1327.
99 *Id.*
100 *See, e.g., Bybee Farms LLC v. Snake River Sugar Co.*, 2008 WL 820186, 7 (E.D. Wash. 2008) ("*Shelton* applies to depositions of inhouse counsel as well as to opposing trial counsel"); *Caterpillar Inc. v. Friedemann*, 164 F.R.D. 76, 77 (D. Or. 1995) (granting motion to quash subpoena to senior in-house attorney because defendant failed to meet *Shelton* test); *In re Sause Bros. Ocean Towing*, 144 F.R.D. 111, 116–17 (D. Or. 1991) (holding that defendant failed to demonstrate good cause to take deposition of Canada's inside counsel (Canadian Department of Justice) where defendant failed to show any elements of *Shelton* test); *Theissen v. General Electric Capital Corp.*, 267 F.3d 1095, 1112 (10th Cir. 2001) (upholding trial court's decision to refuse to allow deposition of defendant's corporate counsel on grounds that first two requirements of *Shelton* rule were not shown); *see also Willer v. Las Vegas Valley Water Dist.*, 176 F.3d 486 (9th Cir.1999) (finding that district court properly issued protective order precluding plaintiff from deposing defendant's general counsel because plaintiff failed to meet *Shelton* test, where party neither attempted to depose other individuals nor utilized other avenues of discovery).
101 *See, e.g., In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 72 (2d Cir. 2003).
102 *U.S. v. Philip Morris Inc.*, 209 F.R.D. 13, 19 (D.D.C. 2002).
103 *Kirtos v. Nationwide Ins. Co.*, 2008 WL 564875, at *3 (Ohio Ct. App. 2008).

danger of invading protections afforded by the attorney-client privilege. In the event that corporate counsel is ultimately ordered to testify at a deposition, corporate counsel and the attorney defending the deposition should be prepared to object on a question-by-question basis about why certain questions seek information that is privileged or protected by the work-product doctrine.[104]

Whether filing a motion to quash, seeking a protective order, or objecting to questions in a deposition, the biggest issue tends to be whether corporate counsel can show that the communications sought to be protected were made to or from corporate counsel for the purpose of rendering legal advice to the corporation. This can be difficult in today's corporate environment, where corporate lawyers often render business advice just as much as legal advice.[105] The more that corporate counsel engages in the business side of the corporation, the greater the likelihood that corporate counsel will be exposed to detailed questioning during a deposition.[106] For example, in *Moser v. Navistar Int'l Corp.*, the court denied a protective order where in-house counsel's affidavit "explicitly [stated] that [counsel] provides business advice" to the corporation, thus prompting the court to hold that counsel was "more akin to a business advisor."[107]

Thus, it is critical to be prepared with specific facts showing why important communications are, in fact, privileged because they were made for the specific purpose of seeking or providing legal advice, not general business advice.[108] To help avoid issues when seeking a protective order, corporate counsel should take certain steps when providing written legal advice to the company, such as making affirmative statements on memoranda and communications that the information is being provided for purposes of rendering legal advice,[109] and stamping communications and memoranda as "privileged and confidential."[110] Corporate counsel also should be careful about who is copied on important communications because including non-employees, such as consultants or customers, on communications may constitute a waiver of the attorney-client privilege.

When it comes to asserting protection through the work-product doctrine, corporate counsel must be able to show that the materials were prepared "in anticipation of litigation."[111] But "[t]he protection of the work product doctrine is qualified, not absolute, and may be overcome by a showing by the party seeking discovery that the information is essential to that party's case and is not readily obtainable by other means."[112] Further, "[t]he protection of the work product doctrine is greater for materials which represent an attorney's mental processes and strategies than it is for materials which simply provide factual information about the case."[113] Most courts deem documents as prepared in anticipation of litigation and, therefore protected from disclosure, if "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared because of the prospect of litigation."[114] A document prepared because of the prospect of litigation "does not lose protection under this formulation merely because it is created in order to assist with a business decision."[115] Protection under the work product doctrine does not extend, however, to "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation."[116]

As a general practice, corporate counsel should be careful to separate communications related to legal matters from those relating to business. Although courts have not delineated specific guidelines, corporate counsel should generally

104 *See U.S. v. Nobles*, 422 U.S. 225, 238 (1975) (The work-product doctrine protects from discovery documents and tangible things "prepared by an attorney 'acting for his client in anticipation of litigation.'") (quoting *Hickman v. Taylor*, 422 U.S. 329, 495, 508 (1947)).

105 *See Leonen v. Johns-Manville*, 135 F.R.D. 94, 98-99 (D.N.J. 1990) (stating that the rule's "application is difficult, since in the corporate community, legal advice is often intertwined with and difficult to distinguish from business advice.")

106 *See In re Sealed Case*, 737 F.2d 94 (D.C. Cir. 1984) (holding that where corporate counsel was also the company's vice president and had certain responsibilities outside the lawyer sphere, the company can only protect corporate counsel's advice on a clear showing that it was given in corporate counsel's professional legal capacity).

107 *Moser*, 2019 WL 76348, at *6. *See also*

108 *See Upjohn Co. v. U.S.*, 449 U.S. 383, 394-95 (1981).

109 *See Malco Mfg. Co. v. Elco Corp.*, 45 F.R.D. 24 (D. Minn. 1986).

110 *See In re Air Crash Disaster*, 133 F.R.D. 515 (N.D. Ill. 1990).

111 *See Hickman*, 329 U.S. 495 (1947); F.R.C.P. 26(b)(3).

112 Fed. R. Civ. P. 26(b)(3).

113 *Id.*

114 Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 *Fed. Prac. & Proc.* § 2024, at 343 (1994). *See also In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir.1979); *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir.1992); *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1118–19 (7th Cir.1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.); *Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 586 n. 42 (D.C.Cir.1987).

115 *U.S. v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)

116 *Id.*

(1) designate requests for legal advice and responses as such, (2) distribute legal communications only on a "need to know" basis and label as "legal" whenever possible, (3) expressly designate documents prepared with respect to pending or anticipated litigation as such, (4) avoid mixing legal and nonlegal matters in communication, and (5) emphasize and maintain a record of the legal aspects of any communications.

## VII. Conclusion.

The Federal Rules of Civil Procedure liberally enable parties to seek relevant information in discovery that may be helpful in the preparation and trial of a case. At the same time, the liberal scope of discovery permitted by the federals rules also creates the potential for abuse and the corresponding need for courts to be able to protect litigants from unreasonable discovery. The need for protection often is greatest with respect to discovery by way of depositions because such discovery frequently is burdensome, time-consuming and expensive. Knowing the scope of deposition discovery permitted by the Federal Rules of Civil Procedure, as well as the standards and procedures that govern motions for protective orders and motions to quash, are critical to protecting your client's management team from deposition discovery tactics that go beyond the reasonable limits prescribed by the Federal Rules of Civil Procedure.