THE UNWARRANTED WEIGHT OF A "PAPER BARRIER":† A PROPOSAL TO AX THE APEX DOCTRINE

> *[I]f Mr. Iacocca has any information, albeit inadmissible as evidence* reasonably *calculated to lead to the discovery of admissible evidence, he must be required to reveal the same. His prestigious position is an unimpressive paper barrier shielding him from the judicial process . . . . [But] [t]he fact remains 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.*[1]

Lee Iacocca is one of the most recognizable CEOs in the world, linked with both Chrysler's successful revival and the Ford Pinto's unenviable infamy. In *Mulvey v. Chrysler Corp.*,[2] the plaintiffs alleged that a car accident in which they were injured was caused by a design defect in a 1975 Dodge van.[3] The *Mulvey* plaintiffs claimed that Mr. Iacocca, who at the time of the suit served as Chairman of the Chrysler Board, "in his published biography . . . made certain damaging statements relevant to [Chrysler Corporation's] liability, and the plaintiffs should now be given the right to explore [Mr. Iacocca's] knowledge which underl[ied] said statements."[4] The court, remarking that "discovery ha[d] become an abusive tool in the hands of certain attorneys,"[5] barred the plaintiffs from taking Mr. Iacocca's oral deposition.[6]

The *Mulvey* court's concern—that Mr. Iaccocca's "prestigious position" rendered him vulnerable "to unwarranted harassment and abuse" by enterprising plaintiffs[7]—was shared by other courts keen to protect high-ranking corporate officers from discovery abuse.[8] Today, some federal courts limit the depositions of high-ranking corporate officers by

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† Mulvey v. Chrysler Corp., 106 F.R.D. 364, 366 (D.R.I. 1985), *cited in* Scott A. Mager & Elaine J. LaFlamme, *At the "Apex" of the Problem . . . Stopping the Abuse of Requests for Depositions of High-Ranking Executives*, OF COUNSEL, May 2004, at 12, 14 *and* Adam M. Moskowitz, *Deposing "Apex" Officials in Florida: Shooting Straight for the Top*, FLA. B.J., Dec. 1998, at 10, 14.

1. Mulvey v. Chrysler Corp., 106 F.R.D. 364, 366 (D.R.I. 1985).
2. *Id*.
3. *Id*. at 365.
4. *Id*.
5. *Id*.
6. *Id*. at 365–66.
7. *Id*. at 366.
8. *See infra* text accompanying notes 11–45.

applying the apex doctrine,[9] although they "stop well short of establishing a rigid rule applicable in all cases."[10] The apex doctrine is a heightened protection framework courts use to "protect[] high-level corporate officials from deposition unless (1) the executive has unique or special knowledge of the facts at issue and (2) other less burdensome avenues for obtaining the information sought have been exhausted."[11] As a result, courts applying the doctrine may bar the depositions of high-ranking corporate officers when the party seeking the deposition has not yet deposed lower-level employees or has failed to provide sufficient evidence that the apex officer possesses "unique" knowledge.[12]

This Note examines the variety of ways federal courts have approached apex deponents and the apex doctrine. Part I dissects the relevant Federal Rules of Civil Procedure and summarizes the considerations embedded in apex depositions decisions. Part II reviews cases in which courts have applied the apex doctrine. Part III examines cases in which courts declined to apply the apex doctrine. Part IV analyzes the range of decisions and

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9. *See infra* notes 80–105 and accompanying text. Although this Note will focus on the approaches federal courts have taken to apex depositions, a number of states also apply a form of the apex doctrine. Perhaps the most famous state case is *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995), which provided a strong articulation of the apex doctrine:

> When a party seeks to depose a corporate president or other high level corporate official and that official (or the corporation) files a motion for protective order to prohibit the deposition accompanied by the official's affidavit denying any knowledge of relevant facts, the trial court should first determine whether the party seeking the deposition has arguably shown that the official has any unique or superior personal knowledge of discoverable information. If the party seeking the deposition cannot show that the official has any unique or superior personal knowledge of discoverable information, the trial court should grant the motion for protective order and first require the party seeking the deposition to attempt to obtain the discovery through less intrusive methods.

Id. at 128. For a discussion of the Texas approach to apex depositions, see generally Jennifer Wiers, Note, In re Alcatel—*Just Another Weapon for Discovery Reform*, 53 BAYLOR L. REV. 269 (2001) (examining the Texas standard in depth). *See also* A. Erin Dwyer et al., *Texas Civil Procedure*, 52 SMU L. REV. 1485, 1498–99 (1999) ("In recent years the Texas courts have grown protective of high-ranking corporate officials . . . ."); David K. Bissinger, *Depositions of Attorneys in Texas*, 64 TEX. B.J. 247 (2001) (noting the apex doctrine and arguing that it should be extended to attorney depositions in Texas).

10. *In re* Bridgestone/Firestone, Inc., 205 F.R.D. 535, 536 (S.D. Ind. 2002) (noting a trend in cases cited by the defendant).

11. Wal-Mart Stores, Inc. v. Vidalakis, No. 5:07-MC-00039-RTD, 2007 WL 4591569, at *1 (W.D. Ark. Dec. 28, 2007) (citing Van Den Eng v. Coleman Co., No. 05-MC-109-WEB-DWB, at *2 (D. Kan. Dec. 14, 2005)).

12. *See infra* text accompanying notes 64–105. The apex doctrine is typically invoked when one of two motions is filed: either the deponent files a motion for protective order or, if the apex officer has refused to appear, the party seeking the deposition files a motion to compel the officer's deposition. The nature of the motion does not change the court's analysis or the application of the doctrine. For a discussion of the federal rules governing these motions, see *infra* notes 13–36 and accompanying text.

argues that as applied to corporate officers, the apex doctrine creates the appearance of preferential treatment and unnecessarily complicates the protective order analysis. Finally, Parts V and VI propose that federal courts abandon the application of the apex doctrine to corporate deponents.

I. THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FRAMEWORK OF THE APEX DOCTRINE

A. The Applicable Rules

The Federal Rules of Civil Procedure govern civil discovery, including depositions.[13] "The Federal Rules set very liberal limits on the scope of discovery,"[14] and "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."[15] Further, "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[16] Under Rule 30, "[a] party may . . . depose any person, including a party, without leave of court."[17] Although no Rule explicitly addresses apex depositions, the Commentary to Rule 30[18] offers some guidance:

> High-ranking corporate executives and government officials are not excused from being deposed simply because of their positions. However, courts are cautious to protect these individuals from harassment and to avoid disruption to the organization. In deciding

13. *See* FED. R. CIV. P. 26 ("Duty to Disclose; General Provisions Governing Discovery"); FED. R. CIV. P. 30 ("Depositions by Oral Examination").

14. Burns v. Bank of Am., No. 03 Civ. 1685(RMB)(JCF), 2007 WL 1589437, at *3 (S.D.N.Y. June 4, 2007).

15. FED. R. CIV. P. 26(b)(1).

16. *Id*.

17. *Id*. at 30(a)(1). Following the quoted text, the rule continues, "except as provided in Rule 30(a)(2)." *Id*. Rule 30(a)(2)(A) states that "[a] party must obtain leave of court . . . if the parties have not stipulated to the deposition" and one of the following conditions exists:

> (i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;
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> (ii) the deponent has already been deposed in the case; or
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> (iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time . . . .

Id. at 30(a)(2)(A). Finally, Rule 30(a)(2)(B) requires leave of the court "if the deponent is confined in prison." *Id*. at 30(a)(2)(B).

18. FED. RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY r.30 (Steven S. Gensler 2012).

> whether the deposition of a high-ranking executive is appropriate (so called "apex" depositions), courts will consider: (1) the likelihood that the executive possesses relevant and unique information; (2) whether the deposing party has attempted to depose lower-level executives first; and (3) whether the deposing party has completed document discovery. If it is shown that the high-ranking executive or official might have discoverable information, the court may allow the deposition to proceed despite the fact that the person denies having such information or claims to be too busy. The court can also place conditions on the deposition in order to protect against burden or harassment.[19]

Whatever guidance might be intended, however, the Commentary offers only inconsistent statements and unclear standards. For instance, it contrarily refers both to "unique information" and "discoverable information" as the knowledge standard courts should use to evaluate apex depositions.[20] But the Commentary's inscrutability is beside the point, because in no case discussed in this Note did the court rely heavily or even partially on the Commentary.[21]

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19. *Id.* (footnote omitted). The apex doctrine originally applied only to high-ranking government officers. "Despite the rule's genesis and traditional application in the context of protecting heads of [government] agencies from deposition, some courts have applied it to limit depositions of high-ranking corporate officers." Mansourian v. Bd. of Regents of the Univ. of Cal. at Davis, No. CIV S-03-2591 FCD EFB, 2007 U.S. Dist. LEXIS 95428, at *4-5 (E.D. Cal. Dec. 21, 2007); *see also* Oklahoma *ex rel.* Edmondson v. Tyson Foods, Inc., No. 05-CV-329-GKF-SAJ, 2007 U.S. Dist. LEXIS 13369, at *12 (N.D. Okla. Feb. 26, 2007) (noting that for the purposes of protective orders, high-ranking government officials and corporate officials "are similarly treated"); Celerity, Inc. v. Ultra Clean Holding, Inc., No. C 05-4374 MMC (JL), 2007 U.S. Dist. LEXIS 8295, at *10 (N.D. Cal. Jan. 24, 2007) (finding the distinction between corporate and government apex officers "meaningless"); Murray v. Cnty. of Suffolk, 212 F.R.D. 108, 109 (E.D.N.Y. 2002) ("The same reasoning applies to high government officials [as to corporate officers]."). Legal commentators in favor of the apex doctrine, such as Adam M. Moskowitz, stress that the "same policy concerns exist when any apex official is noticed for deposition." Moskowitz, *supra* note †, at 10. Other courts have held that government officials and high-ranking corporate officers are not similarly situated. When a party seeking a protective order for a corporate apex deponent cited cases where government officials had been granted protective orders, one court observed that "[t]his line of cases, nevertheless, has no bearing on this case since Mr. Al-Mishari admits that he is not, and never has been, a . . . government official." Kuwait Airways Corp. v. Am. Sec. Bank, N.A., Civ. A. No. 86-2542, 1987 WL 11994 at *3 (D.D.C. May 26, 1987). The Commentary to Rule 30 addresses corporate and governmental apex officers together, but the commentary is not clear whether the same considerations apply to both groups. *See* FED. RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY, *supra* note 18, r.30. The Commentary states that "courts are cautious to protect" both corporate and government officers; however, when outlining the three factors courts should consider before an apex deposition, the Commentary refers only to "high-ranking executive[s]" and not to government officials. *See id.*; *supra* text accompanying notes 18–19.

20. *See* FED. RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY, *supra* note 18, r.30.

21. In fact, I found no federal court decisions that even referred to the Commentary in connection

B. Resisting a Deposition

Parties resist a deposition request by moving for a protective order. Under Rule 26(c)(1), "[a] party or any person from whom discovery is sought may move for a protective order in the court where the action is pending."[22] It is within the court's discretion to, "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[23] The "good cause" standard is high, as the Federal Rules of Civil Procedure favor an open and liberal discovery process.[24] In the context of an apex deposition, three forms of protective orders[25] are pertinent: first, the judge may bar the deposition completely;[26] second, the judge may require the deposition to take place in a certain location or at a certain time;[27] third, the judge may limit the scope of the deposition to specific topics.[28] Additionally, "the court may alter . . . the length of depositions under Rule 30."[29] Finally, Rule 26(b)(2) mandates the following:

> [T]he court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
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> (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;
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> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
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> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in

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with an apex deposition.

22. FED. R. CIV. P. 26(c)(1).

23. *Id*.

24. *See, e.g.*, Minter v. Wells Fargo Bank, N.A., 258 F.R.D. 118, 125 (D. Md. 2009) ("[T]he standard for issuance of a protective order is high.").

25. A protective order can take a variety of other forms. *See* FED. R. CIV. P. 26(c)(1)(A)–(H).

26. *Id*. at 26(c)(1)(A) ("forbidding the disclosure or discovery").

27. *Id*. at 26(c)(1)(B) ("specifying terms, including time and place, for the disclosure or discovery").

28. *Id*. at 26(c)(1)(D) ("forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters").

29. *Id*. at 26(b)(2)(A). Notably, this provision—allowing a court to limit the length of a deposition—lies outside of a protective order. That is, a court does not need to issue a protective order, but may independently limit the "frequency or extent" of a deposition. *Compare id*. at 26(c) ("Protective Orders"), *with id*. at 26(b)(2) ("Limitations on Frequency and Extent").

> controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.[30]

If an apex deponent refuses to appear, the party seeking the deposition may file a Rule 37 motion to compel the deposition.[31] Under Rule 37, "[o]n notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery."[32] However, apex deponents are usually quick to file protective orders rather than wait for the other party to file a motion to compel.[33]

Should either a protective order or a motion to compel be granted, "the court must . . . require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees,"[34] unless (1) the motion was filed before a good faith attempt to obtain the deposition, (2) the refusal was "substantially justified," or (3) "other circumstances make an award of expenses unjust."[35] "If the motion [to compel] is denied, the court may issue any protective order authorized under Rule 26(c) and must . . . require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion," unless "the motion was substantially justified or other circumstances make an award of expenses unjust."[36]

Whereas Rule 26(c)(1) imposes on the party seeking to prevent the deposition the burden to show "good cause" why the deposition should not be had,[37] the apex doctrine shifts the evidentiary burden to the party seeking the deposition.[38] Instead of applying the standard of Rule 26(c)(1),

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30. *Id*. at 26(b)(2)(C)(i)–(iii).

31. *See id*. at 37(a)(1).

32. *Id*. Further, "[t]he motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." *Id*.

33. *See, e.g.*, Chick-Fil-A, Inc. v. CFT Dev., LLC, No. 5:07-cv-501-Oc-10GRJ, 2009 U.S. Dist. LEXIS 34496, at *2-3 n.1 (M.D. Fla. Apr. 3, 2009) ("Typically, where . . . a party resists producing an 'apex' witness for deposition, the correct procedural mechanism is to file a motion for a protective order, rather than refusing to produce the witness and thus forcing the party seeking to conduct the deposition to file a motion to compel.").

34. FED. R. CIV. P. 37(a)(5)(A). "Rule 37(a)(5) applies to the award of expenses" on motions for protective orders. *Id*. at 26(c)(3).

35. *Id*. at 37(a)(5)(A)(i)–(iii).

36. *Id*. at 37(a)(5)(B).

37. *See id*. 26(c)(1).

38. *See, e.g.*, Mansourian v. Bd. of Regents of the Univ. of Cal. at Davis, No. CIV S-03-2591 FCD EFB, 2007 U.S. Dist. LEXIS 95428, at *7 (E.D. Cal. Dec. 21, 2007) ("This approach shifts the

courts applying the apex doctrine require the party seeking the deposition to (1) show that the putative deponent possesses "unique or superior" and often "first hand" relevant knowledge and (2) demonstrate it has pursued all other "less burdensome" means of acquiring that knowledge (such as interrogatories and depositions of less prestigious witnesses).[39]

Generally, courts adopt a combination of three rationales to justify application of the apex doctrine.[40] First, apex officers are very busy.[41] Second, when the company is very large, apex officers are often removed from the day-to-day business of the company and lack personal knowledge relevant to individual employee or tort claims.[42] Finally, the prestige, power, and visibility of executive positions make apex officers easy targets for harassment and discovery abuse.[43] These arguments have

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burden from the party seeking the protective order to the deposing party, and requires the party to establish the deponent's personal knowledge regarding material issues and that such information is unavailable from a 'less intrusive' source." (citation omitted)).

39. *See infra* notes 64–105 and accompanying text.

40. For a strong argument in favor of applying the apex doctrine, see Scott A. Mager, *Curtailing Deposition Abuses of Senior Corporate Executives*, JUDGES' J., Winter 2006, at 30.

41. *See, e.g.*, Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979) (affirming district court's grant of protective order based in part on "defendant's reasonable assertions that Dr. Hubbard was extremely busy"); Raml v. Creighton Univ., No. 8:08CV419, 2009 U.S. Dist. LEXIS 101199, at *7-8 (D. Neb. Oct. 15, 2009) (granting a partial protective order limiting deposition time, in part, in recognition of apex deponent's busy schedule); Simon v. ProNational Ins. Co., No. 07-60757-CIV-COHN/SELTZER, 2007 U.S. Dist. LEXIS 96320, at *3 (S.D. Fla. Dec. 13, 2007) ("Starnes further avers that his schedule 'is extremely busy given [his] numerous responsibilities as Chief Executive Officer of ProAssurance.'" (alteration in original) (citation omitted)); *cf.* Minter v. Wells Fargo Bank, N.A., 258 F.R.D. 118, 126 (D. Md. 2009) (holding a putative deponent was no longer entitled to apex doctrine protection because "he [was] no longer a busy corporate executive, but work[ed] a limited schedule").

42. *See, e.g.*, Cotracom Commodity Trading Co., v. Seaboard Corp., No. CIV.A. 97-2391-GTV., 2000 WL 796142, at *1 (D. Kan. June 14, 2000) ("Plaintiffs claim these two men have no responsibility for the day-to-day operations . . . ."). In fact, a putative deponent's lack of personal knowledge is perhaps the most debated issue in these cases. *See, e.g.*, Chick-Fil-A, Inc. v. CFT Dev., LLC, No. 5:07-cv-501-Oc-10GRJ, 2009 U.S. Dist. LEXIS 34496, at *4 (M.D. Fla. Apr. 3, 2009) (noting that courts use a heightened standard for apex officials in part "because the CEO . . . is not familiar with the day to day operations of a business"); Roman v. Cumberland Ins. Grp., No. 07-CV-1201, 2007 U.S. Dist. LEXIS 96775, at *3 n.1 (E.D. Pa. Oct. 26, 2007) ("[D]efendants have produced sworn testimony that their executives have no direct knowledge of plaintiff's claim . . . ."); Porter v. Eli Lily & Co., No. 1:06-CV-1297-JOF, 2007 U.S. Dist. LEXIS 40282 (N.D. Ga. June 1, 2007) ("[A] plaintiff must show that the executive would have personal knowledge of the events in question . . . .").

43. *See, e.g.*, Ray v. Bluehippo Funding, LLC, No. C-06-1807 JSW (EMC), 2008 U.S. Dist. LEXIS 92821, at *6 (N.D. Cal. Nov. 6, 2008) ("[T]he purpose behind the apex doctrine is to prevent harassment of a high-level corporate official where he or she has little or no knowledge."); *Mansourian*, 2007 U.S. Dist. LEXIS 95428, at *10 ("[T]here [wa]s no indication that the deposition [wa]s sought for an improper purpose such as harassment or oppression."); Burns v. Bank of Am., No. 03 Civ. 1685(RMB)(JCF), 2007 WL 1589437, at *4 (S.D.N.Y. June 4, 2007) (denying motion to compel an apex deposition in part because "the likelihood of harassment is significant"); Treppel v. Biovail Corp., No. 03 Civ. 3002 PKLJCF, 2006 WL 468314, at *1 (S.D.N.Y. Feb. 28. 2006) ("[P]ermitting unlimited access to corporate executives could disrupt their businesses and create a tool

persuaded many courts that the deposition of a corporate apex officer is an extremely intrusive, inefficient, and burdensome form of discovery and that apex officers require more protection than non-apex deponents.[44] Some warn that "court[s] should be alert to see that the liberal deposition procedure provided in the Federal Rules is used only for the purpose for which it is intended and is not used as a litigation tactic to harass the other side or cause it wasteful expense."[45]

Lastly, because the trial court is afforded broad discretion to control the discovery process, an appellate court is unlikely to overturn a ruling on a protective order.[46]

C. The Application of the Doctrine: Considerations to Keep in Mind

Among courts that utilize the apex doctrine, several considerations consistently underlie their decisions. Darby Dickerson identified four "critical questions" courts consider when applying the apex doctrine.[47]

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for harassment." (citing Armstrong Cork Co. v. Niagra Mowhawk Power Corp., 16 F.R.D. 389, 390 (S.D.N.Y. 1954)); *In re* Bridgestone/Firestone, Inc., 205 F.R.D. 535, 536 (S.D. Ind. 2002) (finding the magistrate judge gave "due deference" to the apex officer's "need to be protected from abusive deposition tactics").

44. *See, e.g.*, Gauthier v. Union Pac. R.R. Co., No. 1:07-CV-12 (TH/KFG), 2008 U.S. Dist. LEXIS 47199, at *10 (E.D. Tex. June 18, 2008) ("[D]eposing the executives at issue would surely be inconvenient to both the Defendant and the individuals."); *Simon*, 2007 U.S. Dist. LEXIS 96320, at *3 ("[C]ourts frequently restrict efforts to depose senior executives where the party seeking the deposition can obtain the same information through a less intrusive means . . . ." (citation omitted) (internal quotation marks omitted)); WebSideStory, Inc. v. NetRatings, Inc., No. 06cv408 WQH(AJB), 2007 U.S. Dist. LEXIS 20481, at *7 (S.D. Cal. Mar. 22, 2007) ("When determining whether to allow an apex deposition, courts often consider . . . whether the party seeking the deposition has exhausted other less intrusive discovery methods, such as interrogatories and depositions of lower level employees."); Celerity, Inc. v. Ultra Clean Holding, Inc., No. C 05-4374 MMC (JL), 2007 U.S. Dist. LEXIS 8295, at *9 (N.D. Cal. Jan. 24, 2007) ("[A] protective order . . . may merely postpone [depositions] until and if UCT can demonstrate that other less intrusive discovery methods, such as interrogatories and depositions of Celerity's lower level employees, are inadequate.").

45. Armstrong Cork Co. v. Niagra Mohawk Power Corp., 16 F.R.D. 389, 390–91 (S.D.N.Y. 1954), *cited in* Treppel v. Biovail Corp., No. 03 Civ. 3002 PKL JCF, 2006 WL 468314, at *1 (S.D.N.Y. Feb. 28, 2006).

46. *See, e.g.*, *Salter*, 593 F.2d at 652. In *Salter*, the trial court refused to allow the plaintiff to depose Upjohn's president on three separate occasions. *Id.* at 650. On appeal, the Fifth Circuit affirmed the protective order, stressing the "broad discretion" of the trial judge "in controlling the timing of discovery." *Id.* at 651 (citing Scroggins v. Air Cargo, Inc., 534 F.2d 1124 (5th Cir. 1976)). Under the abuse of discretion standard, the Fifth Circuit left intact the trial court's decision to "postpone or prevent" the apex deposition. *Id.*

47. A. Darby Dickerson, *Deposition Dilemmas: Vexatious Scheduling and Errata Sheets*, 12 GEO. J. LEGAL ETHICS 1, 41 (1998) ("[T]he critical questions are: (1) whether the official has personal knowledge about the subject-matter of the case, (2) whether less intrusive or alternative discovery will yield the same information, (3) whether the official's knowledge is merely duplicative of that possessed by others, and (4) whether the noticing party has an improper motive in attempting to depose the top official."). While Dickerson was correct in identifying considerations (2) and (4), the

Although her four-pronged approach provides a strong framework, her four considerations are better revised into the following four questions:

1. *Does the Putative Deponent Fall Within the Definition of an "Apex Officer"?*

Occasionally, the contested issue is not whether apex doctrine protection is available generally, but whether a particular individual counts as an "apex officer."[48] Where a putative deponent was an apex officer during the period relevant to the suit but has since retired, resigned, or taken a non-apex position, courts often refuse to grant protection.[49] Conversely, where a putative deponent was not an apex officer during the relevant period, but is now a busy executive, courts often grant protection.[50] Therefore, in order to request protection under the apex doctrine, the putative deponent must either have been a high-ranking officer during the relevant period or must be a high-ranking officer at the time the motion is made.[51]

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other two considerations necessitate substantial revision. First, this Note collapses Dickerson's considerations (1) and (3) and restates the knowledge inquiry more broadly to include courts that do not apply the apex doctrine. Courts that do not apply the apex doctrine are less concerned about whether the deponent's knowledge is "personal" or "duplicative," focusing instead on whether the deponent's knowledge is "relevant." *See infra* notes 111–51 and accompanying text. Second, Dickerson's consideration (2) is better stated, "Has the party seeking the deposition attempted to acquire the information it seeks through the apex deposition by less intrusive means?"—which is the formulation used by this Note. While Dickerson is correct that courts do consider less intrusive means of discovery, her formulation implies that courts examine those less intrusive means to determine if they will in fact yield the requested information. As this Note points out, however, courts do not necessarily determine at the time they consider the protective order whether less intrusive means will provide the requested information, but simply require the party seeking the apex deposition to try those less intrusive methods before taking the apex deposition. *See infra* text accompanying notes 71, 75–76. Third, Dickerson neglects to include the question, "Does the putative deponent fall within the definition of an 'apex officer'?" The caselaw suggests that this question is an important first step for courts. *See infra* notes 48–51 and accompanying text.

48. *See, e.g.*, Minter v. Wells Fargo Bank, N.A., 258 F.R.D. 118, 125–27 (D. Md. 2009).

49. *See, e.g.*, Van Den Eng v. Coleman Co., Inc., No. 05-MC-109-WEB-DWB, 2005 U.S. Dist. LEXIS 40720 (D. Kan. Oct. 21, 2005). The *Van Den Eng* defendant moved for a protective order barring the deposition of its former CEO under the apex doctrine. *Id.* at *3-4. That the putative deponent was no longer a high-ranking executive "militat[ed] against the application of the Apex doctrine in this case." *Id.* at *7; *see also Minter*, 258 F.R.D. at 126 ("Preliminarily, Mr. Foster has asserted that he is no longer a busy corporate executive, but works a limited schedule. A deposition would seemingly not interfere with any of his corporate responsibilities.").

50. *See, e.g.*, Porter v. Eli Lily & Co., No. 1:06-CV-1297-JOF, 2007 U.S. Dist. LEXIS 40282, at *9 (N.D. Ga. June 1, 2007) ("The court disagrees that because the events in question occurred twenty years ago when Mr. Taurel was not the Chief Executive Officer of Eli Lilly & Company that he is not entitled now to consideration as an 'apex' deposition.")

51. *See supra* notes 48–50.

2. What Does the Putative Deponent Know?

All courts agree that a party seeking an apex deposition must show that the putative deponent has, at minimum, information relevant to the case. Indeed, the Federal Rules of Civil Procedure limit discovery to information "relevant to any party's claim or defense."[52] "[T]he test under *Rule 26* 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."[53] Courts that do not apply the apex doctrine apply the Rule 26 test.[54] In contrast, the test used by courts that apply the apex doctrine asks whether the putative deponent had "*unique or superior* knowledge of [the] discoverable information."[55] Because motions are necessarily argued before the deposition has been taken and thus before a putative deponent's knowledge has been officially interrogated,[56] courts must rely on outside sources, such as the depositions of other employees or the putative deponent's prior public statements,[57] to determine the putative deponent's knowledge.

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52. FED. R. CIV. P. 26(b)(1).

53. Miles v. Wal-Mart Stores, Inc., No. 06-5162, 2007 U.S. Dist. LEXIS 57895, at *6 (W.D. Ark. Aug. 7, 2007) (second emphasis added).

54. *See infra* notes 118–26 and accompanying text.

55. Chick-Fil-A, Inc. v. CFT Dev., LLC, No. 5:07-cv-501-Oc-10GRJ, 2009 U.S. Dist. LEXIS 34496, at *4 (M.D. Fla. Apr. 3, 2009) (emphasis added) (citations omitted). *Compare infra* notes 80–92 and accompanying text (applying the "unique" knowledge standard required under the apex doctrine), *with infra* notes 118–26 and accompanying text (applying the "relevant" knowledge standard required by Rule 26).

56. *Cf.* Nolte v. CIGNA Corp., No. 07-2046, 2010 U.S. Dist. LEXIS 92194, at *8 (C.D. Ill. Aug. 5, 2010) ("The defendants' contention that Hanway has no unique knowledge and that his testimony would be duplicative and cumulative is based on nothing more than their say-so. The parties are in the best position to make that determination *after* Hanway is deposed.")

57. The putative deponent's prior public statements are sometimes used as evidence of his familiarity with relevant facts. Whether prior public statements showing a deponent's familiarity with relevant facts weigh in favor of taking the deposition or in favor of barring the deposition depends on the court's interpretation of the "unique knowledge" standard. In *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118 (D. Md. 2009), the court denied a protective order for putative deponent Mr. Foster in part because "plaintiffs ha[d] submitted media reports, apparently based on interviews with Mr. Foster, that [indicated] he had a much more active role in the creation of the October memorandum that [sic] the pinched role set out in his affidavit." *Id*. at 126; *see also* Mansourian v. Bd. of Regents of the Univ. of Cal. at Davis, No. CIV S-03-2591 FCD EFB, 2007 U.S. Dist. LEXIS 95428, at *9 (E.D. Cal. Dec. 21, 2007) (noting that "plaintiffs point[ed] to Chancellor Vanderhoef's testimony before a senate committee" to establish his relevant personal knowledge). Conversely, in *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979), the Fifth Circuit appeared to imply that if the putative deponent's public statement contained "substantially the same information" that the party sought to obtain through the deposition, those statements weighed in favor of granting the protective order. *See id*. at 651. The court observed the following:

3. Has the Party Seeking the Apex Deposition Attempted to Acquire the Information It Seeks by Less Intrusive Means?

Courts applying the apex doctrine often rely on the failure of the party seeking the deposition to pursue "less burdensome" methods of discovery as a basis for granting a protective order.[58] If a court determines that the party has not exhausted all other avenues of discovery—that is, attempted to acquire the information it seeks from all sources other than the apex officer—it may bar the apex deposition with the contingency that, if the information could not be acquired through those other avenues, it will reconsider the protective order.[59]

4. Was the Deposition Notice Issued in Order to Harass, Inconvenience, Unduly Burden, or Annoy the Apex Deponent?

Even though a principal rationale for the apex doctrine is concern that apex officers are especially vulnerable to harassment,[60] decisions made under the apex doctrine do not usually turn on whether the deposition was noticed for the purpose of harassment.[61] Because the apex doctrine shifts

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> [P]laintiff had the testimony Dr. Hubbard had given to the Senate Committee, which contained substantially the same information plaintiff wished to obtain from Dr. Hubbard in the deposition. Plaintiff was also scheduled to take the depositions of those employees who Upjohn indicated had the most direct knowledge of the relevant facts. It was therefore very likely that, after taking the other employees' depositions, plaintiff would be satisfied and abandon her requests to depose Dr. Hubbard, unless . . . those other employees did not "have more personal knowledge" of the facts or their testimony was inconsistent with the Senate testimony of Dr. Hubbard.

Id. at 651.

58. *See, e.g.*, Abarca v. Merck & Co., 1:07cv0388 OWW DLB, 2009 U.S. Dist. LEXIS 71300, at *30-31 (E.D. Cal. July 31, 2009) ("[T]he limited number of depositions completed at this stage fail to demonstrate that the information Plaintiffs seek . . . cannot be obtained through other, less burdensome means. . . . Accordingly, good cause exists at this time to issue a protective order. . . ."); Baine v. Gen. Motors Corp., 141 F.R.D. 332, 335 (M.D. Ala. 1991) ("The court finds that deposing Mr. Mertz at this time would be oppressive, inconvenient, and burdensome inasmuch as it has not been established that the information necessary cannot be had from Mr. Sinke, other of the distributees of the Mertz memorandum, interrogatories, or the corporate deposition.").

59. *See, e.g.*, Gauthier v. Union Pac. R.R. Co., No. 1:07-CV-12 (TH/KFG), 2008 U.S. Dist. LEXIS 47199, at *14 (E.D. Tex. June 18, 2008) ("[T]he Court finds it proper to quash the depositions of the . . . executives at this time. . . . The issue may be revisited again, if warranted, and the Plaintiffs are able to show that they cannot obtain the necessary information through other means of discovery."); Celerity, Inc. v. Ultra Clean Holding, Inc., No. C 05-4374 MMC (JL), 2007 U.S. Dist. LEXIS 8295, at *14-15 (N.D. Cal. Jan. 24, 2007) ("Celerity's motion for protective order is granted, pending the taking of less intrusive methods of discovery, including interrogatories and depositions of lower-level Celerity employees.").

60. *See supra* note 43.

61. Indeed, in none of the decisions discussed in detail in the text of this Note did the court find evidence of an intent to harass, annoy, or unduly burden on behalf of the party seeking to take the

the burden to the party seeking the deposition,[62] a court that follows the doctrine rarely requires specific evidence of harassment or undue burden from the putative deponent. However, if a court refuses to grant protection, it will often note the lack of evidence that the deposition notice was issued to harass, annoy, or inconvenience.[63]

These questions are not methodically applied or even routinely acknowledged by courts; however, they provide a conceptual framework for considering and evaluating the application of the apex doctrine by federal courts.

II. THE HEIGHT OF PROTECTION: COURTS INVOKING THE APEX DOCTRINE

In the following cases, the courts applied the apex doctrine.[64] Whether a court applies the apex doctrine is not necessarily outcome-determinative—just because a court employs the doctrine does not necessarily mean the deposition will be barred.[65] Nevertheless, application of the doctrine does necessitate a substantial analytical adjustment, shifting the burden to the party seeking the deposition, requiring an elevated showing of knowledge, reducing the standard for pleading "good cause," and engendering a preference for barring the deposition where there are any unexplored or alternative options.[66]

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deposition. One reason might be that where there is direct evidence of such intent, the apex doctrine is not invoked, because courts can bar the deposition under Rule 26; it is also possible that there are simply very few cases where a party notices an apex deposition for purpose of harassment. *See infra* text accompanying note 172.

62. *See supra* note 38.

63. *See, e.g.*, Mansourian v. Bd. of Regents of the Univ. of Cal. at Davis, No. CIV S-03-2591 FCD EFB, 2007 U.S. Dist. LEXIS 95428, at *10 (E.D. Cal. Dec. 21, 2007) (denying protection and noting "there is no indication that the deposition is sought for an improper purpose such as harassment or oppression"); Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., 203 F.R.D. 98, 105 (S.D.N.Y. 2001) (denying protection and noting "there is no indication that the plaintiff is using these depositions merely for harassment").

64. A court does not always refer directly to the apex doctrine by name. However, for the purposes of this Note, a decision is considered to have applied the apex doctrine (1) when a court shifts the evidentiary burden on a protective order to the party seeking the deposition, (2) requires that party to show the putative deponent possesses "unique or superior" or "direct" knowledge, (3) investigates whether "less intrusive" means of acquiring the information at issue have been exhausted, or (4) requires little of the moving party beyond statements that the putative deponent is an apex officer and lacks "unique or superior" knowledge.

65. *See, e.g.*, *infra* text accompanying notes 93–105.

66. *Compare infra* notes 68–105 and accompanying text, *with infra* notes 111–51 and accompanying text.

A. Celerity, Inc. v. Ultra Clean Holding, Inc.: *Shifting the "Good Cause" Burden*

The *Celerity, Inc. v. Ultra Clean Holding, Inc.*,[67] plaintiff brought a suit for patent infringement against the defendant.[68] After the defendant noticed the depositions of David Shimmon and John Murphy, two of the plaintiff's executives, the plaintiff moved for protective orders barring both depositions under the apex doctrine.[69] The court found that the *Celerity* defendant had failed to show Mr. Shimmon and Mr. Murphy possessed unique personal knowledge and had not adequately pursued "less intrusive" means by which it might acquire the information it sought from Mr. Shimmon and Mr. Murphy.[70] Accordingly, the court barred both depositions pending the results of "less intrusive" discovery.[71]

The *Celerity* court held that the party seeking the deposition, not the party seeking protection, had the "burden to justify these apex depositions."[72] It devoted little analysis to the putative deponents' responsibility to show good cause.[73] Instead, the *Celerity* court adopted the argument that as high-ranking corporate officers, Mr. Shimmon and Mr. Murphy were "subject to the requirements for taking an 'apex' deposition,"[74] and therefore the duty rested on the *Celerity* defendant to make a showing of "unique" knowledge and pursue less intrusive means before taking their depositions.[75]

By requiring "less intrusive" means of discovery before allowing an apex deposition but never identifying what facts rendered Mr. Shimmon's and Mr. Murphy's depositions "intrusive," the *Celerity* court implied that apex depositions were by definition intrusive; certainly, the court required

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67. Celerity, Inc. v. Ultra Clean Holding, Inc., No. C 05-4374 MMC (JL), 2007 U.S. Dist. LEXIS 8295 (N.D. Cal. Jan. 24, 2007).

68. *See id*. at *2-3.

69. *See id*. at *3-5.

70. *See id*. at *10.

71. *See id*. at *14-15.

72. *Id*. at *13.

73. Interestingly, at least one practitioner article actually used the term "good cause" to describe the responsibility of the party *seeking the deposition* on a motion for a protective order rather than to describe the movant's burden. *See* Heidi M. Staudemaier & Corey D. Babington, *Effectively Defending High-Level Corporate Officials*, ARIZ. ATT'Y, July/Aug. 2001, at 12, 14 ("The court further explained that if the plaintiff can make a *good cause* showing 'that the high-level official possesses necessary information to the case,' and after less intrusive methods of discovery are exhausted . . . , 'the trial court may then lift the protective order and allow the deposition to proceed.'" (emphasis added) (quoting Liberty Mut. Ins. Co. v. Superior Court of Cal., 13 Cal. Rptr. 2d 363, 367 (Ct. App. 1992)).

74. *Celerity*, 2007 U.S. Dist. LEXIS 8295, at *4.

75. *Id*. at *10, *13-15.

no specific delineations of undue burden.[76] The court noted, "Celerity's counsel has confirmed that Shimmon and Murphy are available for deposition."[77] This further indicated that its decision did not rest on a showing of particular hardship, since apparently neither officer was too busy to be deposed. Under the *Celerity* approach, the fact that the putative deponent was an apex officer either relieved him of his duty to show good cause or was sufficient evidence standing alone to provide "good cause."[78] The *Celerity* court characterized the defendant's burden as needing to provide evidence "that would require the Court to deny a protective order preventing the depositions of Shimmon and Murphy."[79]

B. Baine v. General Motors Corp.: *The Meaning of "Unique Knowledge"*

In *Baine v. General Motors Corp.*,[80] the court applied the apex doctrine to a corporate officer who possessed first-hand knowledge of the facts at issue in the case.[81] The *Baine* plaintiffs sought to depose Edward H. Mertz, one of the defendant corporation's vice presidents,[82] and the defendant filed a motion for a protective order to quash the deposition notice.[83] The court granted the defendant's motion, "providing that the notice to take the deposition testimony of Mr. Mertz be vacated without

76. *Cf. id*. at *14-15 (granting Celerity's motion for a protective order "pending the taking of less intrusive methods of discovery").

77. *Id*. at *6.

78. It is clear from the opinion that both Mr. Shimmon and Mr. Murphy were available to attend depositions had the court not issued protective orders. *See id*. at *6. The court apparently accepted their executive status as a per se showing that the depositions would be burdensome. *Cf.* *8, *10, *13-15. Moreover, there was no suggestion that the deposition notices were issued for the purpose of harassment, annoyance, or inconvenience. Indeed, the words "annoyance" and "inconvenience" do not appear in the opinion; the word "harass" appears only once where the court noted that "[v]irtually every court that has addressed deposition notices directed at an official at the highest level . . . has observed that such discovery creates a tremendous potential for abuse or harassment." *Id*. at *8 (citing Mulvey v. Chrysler Corp., 106 F.R.D. 364 (D.R.I. 1985)).

79. *Id*. at *14.

80. Baine v. Gen. Motors Corp., 141 F.R.D. 332 (M.D. Ala. 1991).

81. *See id*. at 333.

82. *Id*. The plaintiffs also sought to depose eighteen individuals who had received copies of a memorandum prepared by Mr. Mertz. *Id*. The court considered those notices separately and held, "The court cannot see the necessity of disrupting the productive hours of fully 18 people to query them about a memorandum they received 15 years ago when much of their recollection and informed opinion could only be cumulative." *Id*. at 336. Reasoning that to allow all eighteen depositions "would be burdensome to defendants, expensive, inconvenient and duplicative without any gain to plaintiffs' legitimate discovery needs," the court permitted only three of the requested eighteen depositions to proceed. *Id*.

83. *Id*. at 333.

prejudice to the plaintiffs' right to take it subsequently should the alternative discovery devices discussed [by the court] prove inadequate."[84]

The *Baine* plaintiffs alleged that a design defect in the restraint system of a vehicle manufactured by the *Baine* defendant contributed to the death of plaintiffs' decedent.[85] In 1976, when Mr. Mertz was an engineer and not an executive,[86] he authored a memorandum[87] "that described his observations of the performance of a 1978 prototype vehicle's restraint system. . . . based on his experience of having driven the car for several days."[88] Although General Motors did not deny Mr. Mertz had written the memorandum and personally examined the restraint system, the court found "that deposing Mr. Mertz at this time would be oppressive, inconvenient, and burdensome inasmuch as it has not been established that the information necessary cannot be had" from other sources,[89] and "[i]t has also not been demonstrated that Mr. Mertz has any superior or unique personal knowledge of the restraint system."[90] The court stressed the plaintiffs' deposition notice was "not barred but merely postponed subject to proof of [its] necessity."[91] Nothing in the *Baine* opinion indicated the plaintiffs intended to harass, inconvenience, or annoy Mr. Mertz.[92]

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84. *Id*. at 335–36. Specifically, the court required that the plaintiffs "propound the necessary interrogatories[,] . . . take the corporate deposition[,] . . . [and depose] distributees of the Mertz memorandum who are still employed by General Motors, and who are lower in the corporate hierarchy than Mr. Mertz . . . before any subsequent notice to depose Mr. Mertz is given." *Id*. at 336.

85. *See id*. at 333. The plaintiffs alleged that a "comfort feature" of the restraint system was defective. *Id*.

86. Although more than a decade had passed since the publication of the memorandum, the court did not reference the age of the memorandum in its discussion of Mr. Mertz's proposed deposition. *See id*. at 334–36. The court did refer to the fifteen-year gap in its discussion of the proposed depositions of the eighteen recipients of the memorandum, but noted only that those eighteen depositions would be cumulative. *See supra* note 82 and accompanying text.

87. The court noted that "[a]t the time the memorandum was prepared, Mr. Mertz was daily involved in General Motors' engineering activities." *Baine*, 141 F.R.D. at 334.

88. *Id*. at 333. It is not clear from the court's order whether the plaintiffs had access to the memorandum itself, or whether witness recollections were the only means of discovering the contents of the memorandum.

89. *Id*. at 335. General Motors did not allege what specific harm, inconvenience, or burden would stem from Mr. Mertz's deposition; rather, the court apparently accepted that the deposition of an apex officer is by definition "oppressive, inconvenient, and burdensome" and did not require General Motors to provide additional grounds establishing "good cause" for the protective order. For a discussion of "good cause" under the apex doctrine, see *supra* notes 73–78 and accompanying text.

90. *Baine*, 141 F.R.D. at 335.

91. *Id*. at 336. The court made this statement in reference to the noticed depositions of the eighteen recipients of the memorandum, but the full sentence reads, "Just as with the deposition of Mr. Mertz, the court wishes to make it crystal clear that depositions are not barred but merely postponed subject to proof of their necessity." *Id*. Thus, the court clearly intended the statement to apply to Mr. Mertz's deposition as well as to the eighteen additional depositions.

92. *Id*. at 335–36. The court did not find harassment at all; indeed, the court issued the protective order "out of concern less for the potential for harassment than for the possibility of duplication,

C. Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.: *Satisfying the Doctrine*

Although this part has so far examined decisions barring depositions, it is important to note that the apex doctrine does not always operate as a ban on all apex depositions.[93] In *Six West Retail Acquisition, Inc. v. Sony Theatre Management Corp.*,[94] the plaintiff sued to recover damages allegedly caused by the defendant's breach of fiduciary duty, among other claims.[95] The plaintiff sought to depose Nobuyuki Idei, the defendant's CEO.[96] Applying the apex doctrine but finding the *Six West* plaintiff had produced sufficient evidence of Idei's "unique knowledge," the court permitted the deposition to proceed.[97]

The *Six West* court stated "Unless it can be demonstrated that a corporate official has 'some unique knowledge' of the issues in the case, 'it may be appropriate to preclude a redundant deposition of [this] highly-placed executive' while allowing other witnesses with the same knowledge to be questioned."[98] In this case, although "Idei may not have had any inkling of the specific day-to-day management decisions which resulted in the plaintiff's injuries,"[99] there was "evidence sufficient for this Court to infer that Mr. Idei has some unique knowledge on a number of relevant issues."[100] That evidence rendered the defendant's argument that Mr. Idei lacked personal knowledge "unpersuasive."[101]

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inconvenience, and burdensomeness." *Id*. at 335.

93. For other decisions applying the apex doctrine but allowing the deposition to proceed, see Ray v. Bluehippo Funding, LLC, No. C-06-1807 JSW (EMC), 2008 U.S. Dist. LEXIS 92821, at *7-8 (N.D. Cal. Nov. 6, 2008) ("Since Mr. Rensin appears to have substantial personal knowledge of relevant facts and his deposition would impose no business hardship, the apex doctrine should be liberally applied, if at all, in favor or permitting the deposition. . . . the apex doctrine is not a bar here."), and Grand River Dam Auth. v. BNSF Ry. Co., No. 06-CV-033-TCK-SAJ, 2007 U.S. Dist. LEXIS 8974, at *4 (N.D. Okla. Feb. 7, 2007) ("The Court concludes that Mr. Rose has unique personal knowledge relevant to the issues in this case.").

94. Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., 203 F.R.D. 98 (S.D.N.Y. 2001).

95. *Id*. at 99.

96. *Id*. at 102. The plaintiff's motion to compel also included the depositions of apex officers Howard Stringer and Tadasu Kawai. *See id*. at 106. The court granted the motion to compel with respect to all three apex officers. *Id*. 108. This Note focuses on Mr. Idei's deposition because the *Six West* court devoted the most analysis to Mr. Idei's deposition. *See id*. at 102–08.

97. *Id*. at 106, 108.

98. *Id*. at 102 (alteration in original) (quoting Consol. Rail Corp. v. Primary Indus. Corp., No. 92 Civ. 4927, 1993 WL 364471, at *1 (S.D.N.Y. Sept. 10, 1993)).

99. *Id*. at 104.

100. *Id*. at 106. The *Six West* plaintiff claimed that the *Six West* defendant had engaged in antitrust and anticompetitive practices, including "block-booking," which is "an unlawful practice through which film distributors condition the license or sale of their more desirable movies on the acceptance

Additionally, the *Six West* court noted the plaintiff "has taken depositions of many lower level . . . officials . . . . [and] there is no indication that the plaintiff is using [Idei's] deposition[] merely for harassment."[102] In combination, the "ample evidence of Mr. Idei's hands-on involvement,"[103] the quantity of less burdensome discovery already completed, and the lack of evidence of harassment led the *Six West* court to permit Idei's deposition.[104] The court placed no restrictions on the deposition other than requiring the plaintiff to take the deposition in Mr. Idei's "district of residence."[105]

III. LACKING "EXTRAORDINARY CIRCUMSTANCES":[106] COURTS THAT REFUSE TO APPLY THE DOCTRINE

Some courts have declined to apply the apex doctrine. Courts in this camp hold that on a motion for a protective order, the party seeking protection carries the burden to show "good cause" why the deposition should be prohibited.[107] These courts require a less strenuous showing of a putative deponent's knowledge and generally begin their analysis with the presumption that the deposition should go forward unless the putative deponent meets a high "good cause" standard.[108] However, these courts also make use of their powers under the Federal Rules to limit the duration and subject matter of depositions when necessary to protect apex deponents.[109]

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of unwanted or inferior films." *Id*. at 101. The court found that Idei "had been well-informed about the general structure of Sony's film distribution policies, and that he also had *some* unique knowledge about the company's alleged block-booking practices in the United States, particularly in New York." *Id*. at 104.

101. *Id*. at 106.

102. *Id*. at 105.

103. *Id*. at 104.

104. *See id*. at 108.

105. *Id*. at 107 ("There is a general presumption that 'a defendant's deposition will be held in the district of his residence'" (citation omitted)). Mr. Idei was a resident of Japan. *Id*. at 108.

106. Lexington Ins. Co. v. Sentry Select Ins. Co., No. 1:08-cv-1539 LJO GSA, 2009 U.S. Dist. LEXIS 122184, at *8 (E.D. Cal. 2009) ("A court should not prohibit a relevant deposition 'absent extraordinary circumstances' . . . ." (quoting Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979))).

107. *See infra* note 138 and accompanying text.

108. *See infra* text accompanying notes 111–16.

109. *See infra* text accompanying notes 128–35.

A. Grateful Dead Productions v. Sagan: *Requiring a "Good Cause" Showing from the Putative Deponent*

In *Grateful Dead Productions v. Sagan*,[110] the plaintiffs filed a motion for a protective order to bar the depositions of two of their apex officers.[111] Noting that a protective order requires a "strong showing" of undue burden, the *Grateful Dead* court pointed out that beyond "conclusory assertions about having 'busy' schedules, [plaintiffs] state no *specific facts* from which the court could conclude that it will be unduly burdensome for them to appear for their depositions."[112] Moreover, "protection from 'apex' depositions is not appropriate where, as here, there is a factual dispute as to whether the deponent has first-hand knowledge of relevant facts."[113]

Although cognizant of the potential for harassment and discovery abuse to which apex deponents are vulnerable, the court held that "where a corporate officer may have *any* first hand knowledge of relevant facts, the deposition should be allowed."[114] The court stressed that in this case, the plaintiffs failed to raise *any* specific facts to support "good cause" for a protective order, much less sufficient facts to overcome the defendant's evidence that the putative deponents possessed relevant knowledge.[115] "Absent at least *some* actual showing of undue burden, there is no legal authority for requiring Defendants to use purportedly less burdensome means of obtaining the discovery before allowing 'apex' depositions," and the court allowed the depositions to proceed immediately.[116] The court pointedly noted, "if [the putative deponents] have as little relevant knowledge as they claim they have, the depositions will likely be quite short."[117]

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110. Grateful Dead Prods. v. William E. Sagan, No.: C 06-7727 (JW) PVT, 2007 U.S. Dist. LEXIS 56810 (N.D. Cal. July 25, 2007).

111. *See id*. at *3.

112. *Id*. at *6-7 (citation omitted). The putative deponents claimed they lacked relevant knowledge. *See id*. at *7 & *7 n.4.

113. *Id*. at *7.

114. *Id*. at *8 n.5 (emphasis in original). The *Grateful Dead* court, like a number of other courts, also cited the right of an opposing party to test a deponent's averred lack of relevant knowledge. *See id*. (citing Amherst Leasing Corp. v. Emhart Corp., 65 F.R.D. 121, 122 (D. Conn. 1974), and Travelers Rental Co., 116 F.R.D. 140, 143 (D. Mass. 1987)).

115. *Id*. at *7-8 & n.5.

116. *Id*. at *7 (citing FED. R. CIV. P. 26(c)).

117. *Id*. at *7 n.4.

B. First National Mortgage Co. v. Federal Realty Investment Trust: *The "Relevant Knowledge" Standard*

In *First National Mortgage Co. v. Federal Realty Investment Trust*,[118] the court denied a motion for a protective order barring the deposition of Donald Wood, the defendant's CEO.[119] The *First National* defendant argued that as an "apex deponent," Mr. Wood was entitled to a protective order unless the plaintiff could show that Mr. Wood possessed "unique personal knowledge."[120] The *First National* plaintiff claimed Mr. Wood had attended several meetings during which discussions relevant to the dispute took place.[121] The *First National* defendant alleged any information Mr. Wood had acquired could be discovered from other sources, including from others who had been present at those meetings.[122] The *First National* court stated:

> It may be true that, "courts are sometimes willing to protect high-level corporate officers from depositions when the officer has no *first hand* knowledge of the facts of the case or where the officer's testimony would be *repetitive*." The mere fact, however, that other witnesses may be able to testify as to what occurred at a particular

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118. First Nat'l Mortg. Co. v. Fed. Realty Inv. Trust, No. C 03-02013 RMW (RS), 2007 WL 4170548 (N.D. Cal. Nov. 19, 2007). In the *First National* defendant's Reply in Support of Motion for Protective Order re Depositions of Donald C. Wood, Dawn Becker, & Nate Fishkin, First Nat'l Mortg. Co. v. Fed. Realty Inv. Trust., No. C 03-02013 RMW (RS), 2007 WL 4835901 (N.D. Cal. Oct. 3, 2007), the defendant claimed that the plaintiff noticed Mr. Wood's deposition for the purpose of harassment, alleging that "given the lack of merit in noticing the depositions of Mr. Wood and Ms. Becker in the first instance, [the plaintiff's] blatant disregard of the discovery rules, and its continued attempt to leverage the improper deposition notices . . . [the plaintiff] demonstrates a clear intent simply to harass Federal Realty." *Id*. at 15. However, the defendant devoted but one sentence to its harassment claim, and the word "harass" does not appear anywhere in the court's decision. Therefore, the court's decision likely turned on knowledge, not on harassment.

119. *See First Natl.*, 2007 WL 4170548, at *1-3.

120. *Id*. at *2. The *First National* defendant relied, among others, on *Websidestory, Inc. v. Netratings, Inc.*, No. 06cv408 WQH(AJB), 2007 WL 1120567 (S.D. Cal. Apr. 6, 2007) to support its proposition that the proper standard for granting a protective order to an apex deponent was whether the deponent possessed unique personal knowledge. *See* Reply in Support of Motion for Protective Order re Depositions of Donald C. Wood, Dawn Becker, & Nate Fishkin, *supra* note 118, at 3.

121. *See* Reply in Support of Motion for Protective Order re Depositions of Donald C. Wood, Dawn Becker, & Nate Fishkin, *supra* note 118, at 6–8.

122. Notice of Motion and Motion for Protective Order Re Depositions of Donald C. Wood, Dawn Becker, & Nate Fishkin at 10, Fed. Nat'l Mortg. Co. v. Fed. Realty Inv. Trust, No. C 03-02013 BMW (RS), 2007 WL 2886172 (N.D. Cal. Aug. 26, 2007). The *First National* plaintiff pointed out that Wood had not submitted a sworn affidavit attesting that he possessed no relevant knowledge. Plaintiff First National Mortgage Co.'s Memorandum in Opposition to Defendant's Motion for Protective Order re Depositions of Donald Wood, Dawn Becker, & Nate Fishkin at 11, Fed. Nat'l Mortg. Co. v. Fed. Realty Inv. Trust, No. C 03-02013 BMW (RS), 2007 WL 6955262 (N.D. Cal. Nov. 19, 2007)).

> time or place does not mean that a high-level corporate officer's testimony would be "repetitive." Indeed, it is not uncommon for different witnesses to an event to have differing recollections of what occurred.[123]

Although "[c]ourts generally do refuse to allow the immediate deposition of high-level 'apex deponent' executives, *before* the testimony of lower level employees," in this case "depositions of lower-level employees suggest[ed] that Wood may have [had] at least *some* relevant personal knowledge."[124] Therefore, although "the deposition may be short . . . [the defendant] has not established a basis for precluding the deposition entirely.[125] The court allowed Mr. Wood's deposition to proceed, but limited it to three and a half hours.[126]

C. Raml v. Creighton University: *Satisfying Rule 26*

In *Raml v. Creighton University*,[127] the court applied the flexible tools of Rule 26(b) to guard against abuse without barring a deposition.[128] The court denied a motion for a protective order for Rev. John Schlegel, S.J., the president of the defendant university.[129] The court ruled Fr. Schlegel was "likely to possess information that is relevant to the parties' claims

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123. *First Natl.*, 2007 WL 4170548, at *2 (alterations in original) (quoting First United Methodist Church of San Jose v. Atl. Mut. Ins. Co., No. C-95-2243 DLJ, 1995 WL 566026, at *2 (N.D. Cal. Sept. 19, 1995). In *Speadmark, Inc. v. Federated Dep't Stores, Inc.*, 176 F.R.D. 116 (S.D.N.Y. 1997), the defendant applied a contradictory definition of "repetitive knowledge," arguing that its apex officer was entitled to a protective order because even though he had participated in contract negotiations relevant to the case, another officer had also been present at the negotiations and offered "the least intrusive means of obtaining the information plaintiff seeks." *Id*. at 118.

124. *First Natl.*, 2007 WL 4170548, at *2. It is not apparent whether the court adopted "unique personal knowledge" as the standard for an apex deposition. The court did note that "First National takes no issue with Federal's characterization of the law as requiring 'unique personal knowledge' before the deposition of a high level corporate officer may be had, but insists that the record shows Wood has such knowledge." *Id*. However, the court emphasized, "Wood may have at least *some* relevant personal knowledge," avoiding use of the word "unique." *Id*.

125. *Id*.

126. *Id*. at *3. At the hearing, the First National plaintiff sought to depose Wood for "up to 5 or 6 hours, in light of Federal's refusal to agree to meet and confer proposals for shorter depositions." *Id*. However, because the *First National* plaintiff had originally scheduled only three hours for Wood's deposition, the court limited Wood's deposition to three and a half hours. *See id*.

127. Raml v. Creighton Univ., No. 8:08CV419, 2009 U.S. Dist. LEXIS 101199 (D. Neb. Oct. 15, 2009).

128. *Id*. For a discussion of the applicable Federal Rules, see *supra* notes 13–37 and accompanying text.

129. *Id*. at *1. The *Raml* defendant "request[ed] that this 'apex deposition' be prohibited due to Fr. Schlegel's congested schedule and his lack of personal knowledge of facts relevant to this lawsuit. In the alternative, [the defendant] ask[ed] that the deposition be postponed until plaintiff demonstrate[d] that he [wa]s unable to obtain all relevant information from other witnesses." *Id*. at *3.

and defenses and . . . . [t]he plaintiff is entitled to test Fr. Schlegel's professed lack of knowledge."[130]

However, the court set both time and subject matter limits on Fr. Schlegel's deposition.[131] The court expressly "admonished [the plaintiff] to strictly limit his subjects of inquiry to facts relevant to resolving the legal issues presented in this case."[132] For one, the plaintiff was "forbidden to interrogate Fr. Schlegel about his religious beliefs."[133] Additionally, in recognition of "Fr. Schlegel's congested schedule,"[134] the court ruled that "his deposition shall be limited to two hours."[135] Making use of its discovery powers under Rule 26(b) without granting a protective order under Rule 26(c), the court balanced the plaintiff's right to information against the apex deponent's right to be free from undue burden.

D. Staton Holdings, Inc. v. Russell Athletic, Inc.: *The Doctrine as an Abuse of Discretion*

In *Staton Holdings, Inc. v. Russell Athletic, Inc.* (*Staton Holdings II*),[136] the district court vacated a magistrate judge's order that quashed the deposition of John Holland, the president of Russell Athletic, Inc.[137] The district court ruled "[t]he magistrate judge *abused his discretion* by requiring . . . a threshold showing that Holland had knowledge of facts likely to lead to the discovery of admissible evidence. . . . [because] the burden of establishing entitlement to quashal and a protective order is on the movant."[138]

Originally, the magistrate judge had ruled that "[a]s the party seeking to depose Holland, plaintiff must show that the deposition 'appears

130. *Id*. at *7.
131. *See id*. at *7-8.
132. *Id*. at *7.
133. *Id*. at *7-8. The court also noted plaintiff's wish "to depose Fr. Schlegel on the topic of Fr. Schlegel's injuries suffered in a biking accident and 'why his personal injury and admitted impatience and distractions should be different than the Plaintiff's.'" *Id*. at *7 (citation omitted). The court ruled, "The plaintiff may not depose Fr. Schlegel on this topic, as it is not relevant to the parties' claims and defenses." *Id*.
134. *Id*. at *3.
135. *Id*. at *8.
136. Staton Holdings, Inc. v. Russell Athletic, Inc. (*Staton Holdings II*), No. 3:09-CV-0419-D, 2010 U.S. Dist. LEXIS 34251 (N.D. Tex. Apr. 7, 2010). Neither the magistrate judge's order nor the district court's order gives much description of the facts of the case. The district court simply noted that "[i]n this lawsuit, Staton contends, in pertinent part, that Russell breached its contract to accept returns of goods by failing to reimburse fully a 2008 return." *Id.* at *2.
137. *Id*. at *1-2, *7-8.
138. *Id*. at *7-8 (emphasis added).

reasonably calculated to lead to the discovery of admissible evidence.'"[139] Moreover, "[e]ven if plaintiff makes such a showing, the court may issue an order to protect Holland from 'annoyance, embarrassment, oppression, or undue burden or expense[.]'"[140] The magistrate judge concluded that the "plaintiff has failed to make the required threshold showing that Holland has knowledge of facts likely to lead to the discovery of admissible evidence."[141] Mr. Holland himself denied involvement in relevant events.[142] In the opinion of the magistrate judge, the statement of another witness that he had "assume[d]" Mr. Holland was involved "[wa]s insufficient to show that Holland's deposition is likely to lead to the discovery of admissible evidence."[143] The magistrate judge quashed "[t]he Deposition Notice of John Holland . . . in its entirety."[144]

On appeal, the district court vacated the magistrate judge's order and the "motion to quash and motion for protective order of defendant Russell Brands, LLC . . . [were] re-referred to the magistrate judge for further proceedings."[145] The district court noted the defendant's arguments that "the deposition [of Mr. Holland] was unduly burdensome because Holland was a high-ranking officer, [and] had no knowledge of the disputed transaction," and it further noted the magistrate judge's finding that "Holland had no knowledge of the transaction in question."[146] The district

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139. Staton Holdings, Inc. v. Russell Athletic, Inc. (*Staton Holdings I*), No. 3-09-CV-0419-D, 2010 U.S. Dist. LEXIS 4071, at *2 (N.D. Tex. Jan. 19, 2010), *vacated*, 2010 U.S. Dist. LEXIS 34251 (N.D. Tex. Apr. 7, 2010) (quoting Spiegelberg Mfg., Inc. v. Hancock, No. 3-07-CV-1314-G, 2007 U.S. Dist. LEXIS 88987, 2007 WL 4258246, at *1 (N.D. Tex. Dec. 3, 2007). The court noted:

> Plaintiff counters with three reasons why Holland's deposition is necessary: (1) Tony Iannuzzi, the Russell employee who made the decision to refuse or 'turn back ' [sic] the return of merchandise requested by plaintiff, answered directly to Holland; (2) Holland had to approve any returns by plaintiff; and (3) Holland approved a return of merchandise by plaintiff in December 2008.

Id. at *1-2.

140. *Id*. at *2-3 (quoting FED. R. CIV. P. 26(c)(1)).

141. *Id*. at *3. Specifically, the court held that "[n]ot only was Holland not involved in the decision to refuse or 'turn back' the second return of merchandise, but he has not dealt with anyone at Staton Holdings regarding sales issues in the last five years." *Id*.

142. *See id*. at *3. The court quoted from Holland's affidavit: "I approved Staton's first submitted return in December 2008. . . . I was not involved in the decision to turn back or refuse the second . . . . To my knowledge, I did not learn about it until Russell learned it had been sued by Staton." *Id*.

143. *Id*. at *4. That witness stated, "Well, you know, I heard from Tony that John Holland was the one that approved the first return. So I can only assume that John Holland was going to be saying yea or nay on the second part of it[.]" *Id*. at *4 (alteration in original).

144. *Id*. at *4-5. It therefore appeared that the magistrate judge did not leave the door open to plaintiff to reissue the deposition notice should plaintiff be able to prove the necessity of Holland's deposition in the future.

145. Staton Holdings, Inc. v. Russell Athletic, Inc. (*Staton Holdings II*), No. 3:09-CV-0419-D, 2010 U.S. Dist. LEXIS 34251, at *1-2 (N.D. Tex. Apr. 7, 2010).

146. *Id*. at *3.

court nonetheless ruled that "[i]n deciding Russell's motion, the magistrate judge improperly placed on Staton the burden of establishing that Holland had knowledge of facts likely to lead to the discovery of admissible evidence,"[147] which "placed the initial burden on Staton rather than on Russell."[148] The district court concluded "it is entirely possible that the magistrate judge will reach the same or a similar result after considering Russell's motion under the correct burden regimen."[149] Upon reconsideration under the "correct burden regimen,"[150] the magistrate judge allowed the *Staton* plaintiff to depose Mr. Holland on limited lines of inquiry for a period of forty-five minutes.[151]

IV. THE CONSEQUENCES OF THE APEX DOCTRINE

Among practitioners, support for the apex doctrine has thoroughly drowned out opposition.[152] Many commentators raised the alarm about abuse of corporate officials, including Scott A. Mager and Elaine J. LaFlamme, who declared, "It is time for corporations to stand up to the *abusive prostitution* of the discovery process."[153] They lamented "the

147. *Id*. at *5.

148. *Id*. at *6. Applying the apex doctrine, one state appellate court reached precisely the opposite decision. *See* Liberty Mut. Ins. Co. v. Superior Court, 13 Cal. Rptr. 2d 363, 365 (Ct. App. 1992) ("We conclude it amounts to an abuse of discretion to withhold a protective order when a plaintiff seeks to depose a corporate president, or corporate officer at the apex of the corporate hierarchy, absent a reasonable indication of the officer's personal knowledge of the case and absent exhaustion of less intrusive discovery methods."), *quoted in* Scott A. Mager, *Curtailing Deposition Abuses of Senior Corporate Executives*, JUDGES' J., Winter 2006, at 30, 33 n.18. The divergent results in *Staton Holdings* and *Liberty Mutual* further demonstrate how much of a difference the apex doctrine can make.

149. *Staton Holdings II*, 2010 U.S. Dist. LEXIS 34251, at *8.

150. *Id*.

151. Order on Defendant Russell Brand, LLC's Motion to Quash and Motion for Protective Order, Staton Holdings, Inc. v. Russell Athletic, Inc., 3:09-CV-04019-D (N.D. Tex. Apr. 28, 2010). ECF No. 58.

152. The slant in scholarship might be explained by the affiliations of the authors: nearly every bar journal article advocating or explaining the apex doctrine has been written by a corporate defense attorney or for the use of corporate defense attorneys. *See infra* notes 153–55 and accompanying text; *see also* Moskowitz, *supra* note †; Charles F. Preuss & Erika C. Collins, *How to Avoid, Control or Limit Depositions of Top Executives*, 63 DEF. COUNS. J. 213 (1996); Staudemaier & Babington, *supra* note 73; Mager & LaFlamme, *infra* note 153.

153. Scott A. Mager & Elaine J. LaFlamme, *At the "Apex" of the Problem: Stopping the Abuse of Requests for Depositions of High Ranking "Apex" Executives*, Trial Advoc. Q., Summer 2004, at 19, 21 (emphasis added). In their call to arms for corporate defense attorneys, Mr. Mager and Ms. LaFlamme argue passionately that attorneys attempting to shield putative deponents such as Chrysler chairman Lee Iacocca (whose involvement in *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D.R.I. 1985), provided the introduction to this Note) should "*push a court* to make a specific determination that the necessary information cannot be obtained from other intermediate-level employees or less intrusive means of discovery" and "[s]tand up to this kind of conduct." *Id*. (emphasis added).

whimsical, harassing and unjustified setting of depositions of high ranking corporate executives."[154] Adam Moskowitz similarly (though less ardently) argued that "courts should take into account the official's 'prestige of position'" when evaluating apex deposition notices.[155] They emphasized the intense vulnerability of apex officers, the elevated value of their time, and the underhanded motives of opposing counsel.

Instead of simply compensating for an apex deponent's vulnerability, however, the apex doctrine can induce some courts to erect a virtually insurmountable barrier to an apex deposition regardless of the particulars in a given case. The *Baine* court created just such a barrier. If Mr. Merck's authorship of the memorandum and first-hand examination of the restraint system failed to meet the "unique or superior knowledge" standard,[156] it is difficult to imagine what additional evidence would have convinced the *Baine* court that Mr. Merck's deposition was justified. Every *Baine* party agreed Mr. Mertz possessed knowledge relevant to the plaintiff's claim.[157] Since Mr. Mertz wrote the memorandum and personally evaluated the restraint system, it is difficult to understand why the court ruled Mr. Mertz's knowledge was neither "unique" nor "superior" to the knowledge of the eighteen recipients who did not author the memorandum and who did not personally evaluate the restraint system.[158] With so extraordinary a standard, the court's claim that it was leaving the door open to renotice the deposition in the future[159] appears unwitting at best.

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154. Mager & LaFlamme, *supra* note 153, at 19.

155. Moskowitz, *supra* note †, at 14.

156. *See* Baine v. Gen. Motors Corp., 141 F.R.D. 332, 335 (M.D. Ala. 1991). The *Baine* court did not define "unique knowledge."

157. Indeed, implicit in both General Motors' and the court's arguments was that Mr. Mertz *did* possess relevant knowledge; by alleging that a recipient of the memorandum could be properly deposed and could provide the same information as Mr. Mertz, they conceded the relevance of Mr. Mertz's testimony. *See id.* at 333–35.

158. *Cf. id.* at 335. The court noted Mr. Mertz did not have "any superior or unique personal knowledge of the restraint system *or* of the accident which led to the plaintiffs' decedent's death." *Id.* (emphasis added). Certainly, the plaintiff did not show Mr. Mertz was familiar with the accident at issue, but since General Motors proposed that the plaintiffs could acquire the necessary information about the restraint system by deposing three of the eighteen recipients of the memorandum, it does not appear that the court would have required Mr. Mertz to have "superior or unique" knowledge of both the restraint system *and* the accident at issue.

159. *See id.* at 336. The trial court's order summarizes General Motor's arguments by noting that "Defendant argues . . . that deposing Mr. Mertz would be burdensome, inconvenient, duplicative, and premature," *id.* at 333, and that the plaintiffs should depose a few of the memorandum's recipients and the corporate representative and "at least wait to see what that generates before demanding Mertz's deposition," *id.* at 334. The court offered no particulars as to what burden or inconvenience Mr. Mertz's deposition would impose.

Similarly, the *Celerity* court focused on whether Mr. Murphy and Mr. Shimmon possessed the "firsthand and non-repetitive knowledge" it required to overcome the deponents' motion for a protective order, not on the "good cause" Rule 26 requires in order to issue a protective order.[160] The court and both parties apparently agreed Mr. Murphy and Mr. Shimmon possessed relevant knowledge;[161] the parties agreed neither man was too busy to be deposed.[162] But the court ruled the party seeking the deposition had failed to show the "essential component" of the apex doctrine—the party failed "to show that this personal knowledge, if Shimmon has it, is 'unique.'"[163] Without a deposition, it would be nearly impossible for the *Celerity* plaintiff to identify with specificity Shimmon's "unique" knowledge, especially since the court did not explain what kind of knowledge would satisfy its "uniqueness" standard.

The *Baine* and *Celerity* cases highlight the difficulties of identifying exactly what kind of knowledge qualifies as "unique" knowledge. By invoking the apex doctrine, the *Baine* and *Celerity* courts were forced to try and mold the definition of a term for which the Federal Rules of Civil Procedure provided slim guidance. Straining as they were to find a solid legal anchor for the doctrine, it is little wonder no clear vision of the "unique" knowledge standard emerged from either decision.

Conversely, by confining their analyses to the test laid out in the Federal Rules, the *First National* and *Raml* courts navigated much smoother waters. In both cases, the analysis was straightforward—legal tests were transparent. The *First National* court found Mr. "Wood may have at least *some* relevant personal knowledge[;]"[164] therefore, the defendant "has not established a basis for precluding the deposition entirely."[165] The *Raml* court ruled Fr. Schlegel was "likely to possess information that is relevant to the parties' claims and defenses and . . . . [therefore,] [t]he plaintiff is entitled to test Fr. Schlegel's professed lack of

160. *See* Celerity, Inc. v. Ultra Clean Holding, Inc., No. C 05-4374 MMC (JL), 2007 U.S. Dist. LEXIS 8295, at *14 (N.D. Cal. Jan. 24, 2007).

161. *See id*. at *5. The court noted Celerity's argument that there were "lower level employees with *more* intimate knowledge" who had not yet been deposed, *id*. (emphasis added), implying that Mr. Murphy and Shimmon did have some level of knowledge. Celerity also argued that "the second-hand knowledge that Murphy and Shimmon *do possess* is almost by definition repetitive." *Id*. at *6 (emphasis added).

162. *See id*. at *6.

163. *Id*. at *10.

164. First Natl. Mortg. Co. v. Fed. Realty Inv. Trust, No. C 03-02013 RMW (RS), 2007 WL 4170548 (N.D. Cal. Nov. 19, 2007), at *2 (emphasis in original). *See also supra* note 124.

165. *Id*. at *2.

knowledge."[166] Without the confusion of the apex doctrine, the analysis was uncomplicated. Furthermore, as *Raml* demonstrated, courts possess myriad protection mechanisms to safeguard a deponent from harassment without resorting to a total bar.

Finally, it is worth noting that at least in some cases, it is to the corporate litigant's benefit to allow apex depositions to proceed. As Heidi M. Staudenmaier and Corey D. Babington pointed out, "making your executive available for a deposition may increase the likelihood that your adversary will do the same."[167] Moreover, "[a] high-ranking corporate official who is able to deliver a polished presentation and exude a confident manner may persuade opposing counsel to seek a quick settlement in the case."[168] Invoking the apex doctrine may not always be to the putative deponent's advantage.

The problem with the apex doctrine is not the underlying premise that apex depositions are potential tools for harassment. Rather, the doctrine improperly shifts the courts' focus away from the promotion of efficient and fair discovery practices to the prevention of apex depositions. This shift radically alters the standard prescribed by discovery rules.[169] Courts adopting the apex doctrine take terms like "repetitive" and "unique" to extremes, leading them to grant protective orders for apex officers who possess relevant, discoverable, and first-hand information and for whom a deposition poses no more than the usual inconvenience.[170] The goal of the apex doctrine is to ensure apex deponents are not harassed or used as leverage. But over-zealous protectionism risks depriving litigants of information to which they are entitled.

V. A PROPOSAL TO ELIMINATE THE APEX DOCTRINE

Certainly, "[c]ompanies' executives are responsible for running businesses, and they can't do that effectively if they are giving depositions in every lawsuit."[171] But a court's concern for business operations must not outweigh its duty to ensure fair discovery that will enable litigants to pursue their claims. Federal courts should cease application of the apex

166. Raml v. Creighton Univ., No. 8:08CV419, 2009 U.S. Dist. LEXIS 101199, at *7 (D. Neb. Oct. 15, 2009).
167. Staudemaier & Babington, *supra* note 73, at 12.
168. *Id.* at 16.
169. *Compare supra* notes Part II, *with supra* Part III.
170. *See supra* Part II.B.
171. Preuss & Collins, *supra* note 152, at 213.

doctrine to corporate officers and rely instead on the built-in protections of the Federal Rules of Civil Procedure.

Simply because the *possibility* of harassment exists does not mean that harassment *actually* exists. Courts should not assume harassment exists just because the putative deponent is an apex officer, nor assume that an apex deposition is by definition an undue burden. Courts must require the party seeking the protective order to make a specific showing of good cause. Where there is evidence of harassment or undue burden, putative deponents do not need the extra protection of the apex doctrine—they are already protected by the Federal Rules of Civil Procedure.[172]

If the apex officer has *no* relevant information, Rule 26 already bars her deposition.[173] If an apex deponent lacks personal knowledge of the events at issue, courts may require the deposition of a corporate representative under Rule 30(b)(6) before allowing the deposition of an apex officer.[174] By requiring the deposition of a Rule 30(b)(6) corporate designee, courts can prevent apex depositions that are noticed simply to acquire "information known or reasonably available," such as general information regarding company policies or "big picture" perspectives on company strategy. Moreover, even without resorting to a protective order,[175] it is within the trial court's discretion to limit the length or subject matter of a deposition,[176] and courts should freely apply those limits to apex deponents. These tools allow courts to balance the goals of liberal and efficient discovery with the need to protect all deponents, apex or otherwise.

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172. *See* FED. R. CIV. P. 26, *discussed in supra* notes 22–30 and accompanying text.

173. Recall that Rule 26 limits the scope of discovery to information "that is relevant to any party's claim or defense," FED. R. CIV. P. 26(b)(1), and provides that the trial court "must limit the frequency or extent of discovery," *id*. at 26(b)(2)(C), where, among other conditions, the information can be obtained from a "less burdensome" source, *id*. at 26(b)(2)(C)(i), or where "the burden or expense of the proposed discovery outweighs its likely benefit," *id.* at 26(b)(2)(C)(iii). Given this flexible language, courts have no need for the superfluous "unique or superior knowledge" standard or "less burdensome means" prerequisite when considering the propriety of an apex deposition.

174. *Cf. id*. at 30(b)(6) ("In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. . . . The persons designated must testify about information known or reasonably available to the organization.").

175. *See generally id*. at 26(c) ("Protective Orders.").

176. *See id*. at 26(b)(2)(A) ("By order, the court may alter . . . the length of depositions under Rule 30.").

VI. SWANSONG ON THE APEX DOCTRINE

The fervent defense of the apex doctrine leads one to wonder whether some silent revolution took place rendering corporate top-dogs the underdogs in civil litigation. All depositions are burdensome to the deponents; probably all deponents find depositions annoying. But the apex doctrine singles out high-ranking corporate officials for preferential treatment. No other group receives the extreme deference of a burden-shifting approach. Relieving apex deponents of any duty to show good cause for a protective order is unjustifiable. By identifying corporate officers as "singularly unique and important,"[177] federal courts risk creating the impression that those individuals escape the onus of modern litigation solely by virtue of their corporate pedigree.

I am changing my name to Chrysler
I am going down to Washington, D.C.
I will tell some power broker
What they did for Iacocca
Will be perfectly acceptable to me.[178]

Amalia L. Lam[*]

177. Mulvey v. Chrysler Corp., 106 F.R.D. 364, 366 (D.R.I. 1985).

178. TOM PAXTON, *I am Changing My Name to Chrysler*, *on* LIVE AT MCCABE'S GUITAR SHOP (Shout! Factory, LLC 2006).

* J.D. (2012), Washington University School of Law; B.A. (2009), Carleton College. Many thanks to my parents, particularly to my father, for pointing out Mr. Iacocca, explaining the least painful way to write a law review note, and providing wise counsel in general.