



“TOP-DOG”
DEPOSITIONS
THE HURDLES TO OVERCOME

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High-level executives are frequently sought to be deposed because of their unique corporate roles for, inter alia, policy making, corporate governance and implementing policy compliance and corrective actions. On a tactical basis, the executive deposition is pursued so that your adversary's "figurehead" directly feels the "hot buttons" of your case, real-time, without layers of filtering and spin. "Top-dog" depositions, commonly called "apex depositions," cover a wide range of executives, including CEOs, presidents and other senior management positions.

Whether seeking or resisting a "top-dog" deposition, the stakes are often high and the battle is hotly contested on multiple hurdles:

1. *Whether the high-level executive deposition serves to only embarrass, annoy and exacerbate litigation, without yielding sufficiently significant discoverable information that could not be obtained by way of less intrusive means*
2. *Whether the high-level executive holds unique or superior personal knowledge over others on relevant issues*
3. *Whether the information sought from the high-level executive could alternatively be pursued through depositions of lower-level individuals in the corporate hierarchy*
4. *Whether less intrusive measures, like written discovery requests, would be sufficient*

A. CASE LAW INSIGHTS

Federal courts generally address whether a high-level corporate executive should be deposed in the protective order context. To obtain a protective order under Fed.R.Civ.P.26(c), the movant must show "good cause." This generally requires a tailored affidavit, attesting to the executive's lack of personal knowledge. To counter, the party seeking the deposition should

proffer that the executive's relevant personal knowledge is unique or superior to others and/or that lower level employees cannot provide the same type of information. Pointing to documents where the executive participated in relevant discussions, meetings or decisions is key. Courts have often held that a party must first seek information sought from a high-level executive deposition through less intrusive discovery methods, such as interrogatories, document requests and other less burdensome employee depositions. Only by showing those responses are inadequate or the executive has a unique role in the underlying events, can the deposition proceed.

1. APEX DEPOSITIONS BLOCKED

In *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D.R.I. 1985), the court prohibited the deposition of Chrysler's chairman, Lee Iacocca, in a product liability suit alleging defectively designed fuel systems. The court found that plaintiff had not yet tried to obtain information through written discovery, but acknowledged that if the answers were insufficient, plaintiff could seek Mr. Iacocca's deposition.

The trial court's entry of a protective order blocking the deposition of I.B.M.'s chairman of the board of directors was upheld in *Thomas v. I.B.M.*, 48 F.3d 478 (10th Cir. 1995). In this age discrimination case, the court considered the chairman's affidavit that he did not know the plaintiff was an employee, plaintiff's age, the employee evaluations, or the employee's performance ranking.

2. APEX DEPOSITIONS ALLOWED

On the other hand, high-level executive depositions have proceeded where the party seeking a protective order fails to meet its "burden of proof" and/or if the court determines that the executive holds unique relevant information. In *Wauchop v. Domino's Pizza, Inc.*,

143 F.R.D. 199, 202 (N.D. Ind. 1992), the C.E.O. of Domino's Pizza was required to be deposed after evidence was presented of the C.E.O.'s direct involvement in implementing relevant corporate policies. In *Travelers Rental Co., Inc. v. Ford Motor Co.*, 116 F.R.D. 1424 (D. Mass. 1987), the court similarly permitted the deposition of Ford's president and three executives after evidence showed the four officers possessed relevant knowledge.

B. STRATEGIC INSIGHTS

Plainly, a "top-dog" executive deposition affords both sides the opportunity for a key decision-maker to experience first-hand the merits of the adverse party's case and to personally present a counter-punch to the jabs being asserted. In seeking to depose a high-level executive, your counsel must be positioned to overcome the big hurdles, outlined above. Only after doing so are you able to take on the "top-dog." Once there, it is a rare opportunity for your counsel to show the merits of your case and the passion that you bring to bear- eyeball-to-eyeball!

On the other hand, if you are forced to present a high-level executive, your counsel should consider using this as an opportunity to show that your corporate client is not an anonymous, impersonal entity, but rather an organization premised on ethical corporate values, sound policies/procedures and comprised of dedicated, caring employees. This can only be accomplished by ensuring that the executive appreciates what's at stake and devotes adequate time to prepare for the deposition. After all, an executive who fails to do well at the deposition gives your opponent motivation to become entrenched in its settlement positions and case merits. Accordingly, your "top-dog" deponent should be properly prepared to be confident in his or her testimony, mindful of the case issues and themes and able to testify honestly and effectively.