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You Want Me to Go Where for My Deposition?

A road map for responding to an adversary's attempt to depose high-ranking executives in far-off locales

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With fewer cases moving to trial, depositions have become the key to civil litigation. Depositions are routinely used by counsel to exert pressure on a party by attempting to depose high-level executives in inconvenient locations, sometimes thousands of miles and many time zones away, in an attempt to gain a strategic advantage over a party and move towards a potential settlement. This article provides an overview of relevant federal law and provides pointers in dealing with the potential for high-level executives to be deposed in far-off locales.

Legal Background and the Lack of a General Rule or "Presumption"

Federal Rule 30(b)(1) states, "a party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address." The "default rule," therefore, is that the noticing party "may set the place for the deposition of another party wherever he or she wishes subject to the power of the court to grant a protective order under Rule 26(c)(1)(B) designating a different place." Charles Allen Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, Federal Practice and Procedure § 2112 (3d ed. 2012). Pursuant to Rule 26(c), a party seeking protection from a deposition notice must establish that good cause exists for the court to change the location of the deposition. *Campbell v. Detert,* 2013 U.S. Dist. LEXIS 45981, at *37 (D.N.J. Mar. 28, 2013). Rule 26(c) provides district courts with "wide discretion to limit discovery to prevent annoyance, embarrassment, oppression, or undue burden or expense." *Scooter Store, Inc. v. Spinlife.com, LLC,* 2011 U.S. Dist. LEXIS 57283, at *4 (S.D. Ohio May 25, 2011) (internal citations omitted).

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While the "default rule" provides that the noticing party may set the time and place of the deposition, this rule is juxtaposed with the "presumption" that the deposition of a corporation's agents and officers should ordinarily be taken at the company's principal place of business. *Cadent Ltd. v. 3M Unitek Corp.,* 232 F.R.D. 625, 628 (C.D. Cal. 2005). However, this "presumption" has been questioned and described by one court as actually being "the antithesis of a presumption." *New Medium Techs, LLC v. Barco N.V.,* 2007 U.S. Dist. LEXIS 32223, at *20-21 (N.D. Ill. Apr. 30, 2007); *see El Camino Resources Ltd. v. Huntington Nat'l Bank,* 2008 U.S. Dist. LEXIS 52688, at *10-11 (W.D. Mich. June 20, 2008) ("t]he breadth of the court's discretion in specifying the time and place of any deposition has led other courts to characterize the purported presumption as a kind of general rule that facilitates determination when other relevant factors do not favor one side over the other. . . .") (internal citations omitted).

Courts will often look to a number of factors in assessing a Rule 26 motion for a protective order regarding the place of a deposition. While these factors may vary slightly by circuit, most courts review at least "three factors of the cost, convenience and litigation efficiency of the designated location." *Scooter Store,* U.S. Dist. LEXIS 57283, at *4. Other jurisdictions might also consider the location of counsel for the parties in the forum district, the number of corporate representatives a party is seeking to depose, whether the persons sought to be deposed often engage in business travel, as well as the equities with regard to the nature of the claims and the parties' relationship. *Cadent Ltd.,* 232 F.R.D. at 628-29.

Depositions Involving International Travel

It is clear that courts will endeavor to protect the rights of foreign citizens, but that does not mean that a district court will grant a motion for a protective order based upon generalized assertions that it would be unduly burdensome and costly to conduct the deposition at the noticed location. The cases make clear that a party seeking a protective order must establish good cause, and good cause is not established simply by arguing that it would be burdensome to travel to a foreign country and/or because the deponent is a busy executive. *See Motion Games, LLC v. Nintendo Co.,* 2014 U.S. Dist. LEXIS 147853, at *13 (E.D. Tex. Oct. 16, 2014) (ordering deposition of defendant's witnesses in Japan because plaintiff failed to establish peculiar or extraordinary circumstances sufficient for the court to "depart from the general rule that corporate representative witnesses should be deposed in or near the corporation's principal place of business."); *Invensas Corp. v. Renesas Elecs. Corp.,* 2012 U.S. Dist. LEXIS 92455, at *10 (D. Del. June 27, 2012) (denying defendant's request for depositions to be taken in Japan instead of Delaware where defendant made "the general assertion that it would be burdensome for its employees to travel to the United States for corporate depositions.").

Still, numerous courts have required depositions of foreign defendants to be taken in the United States, instead of at defendant's principal place of business overseas. *Custom Form Mfg., Inc. v. Omron Corp.,* 2000 U.S. Dist. LEXIS 13483, at *3 (N.D. Ind. September 12, 2000) ("[w]hen a foreign corporation is doing business in the United States, is subject to the court's jurisdiction, and has freely taken advantage

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of our federal rules of discovery, exceptions to the general rule on the location of depositions are often made."); *New Medium Technologies LLC v. Barco N.V.,* 242 F.R.D. 460, 469 (N.D. Ill. 2007) (requiring corporate deponent to travel from Japan to Chicago and noting that "[h]ighly placed executives are not immune from discovery, and the fact that an executive has a busy schedule cannot shield him or her from being deposed.") (internal citations omitted); *see also SEC v. Banc de Binary,* 2014 U.S. Dist. LEXIS 34373, at *28-29 (D. Nev. Mar. 14, 2014).

Play Nice and Cooperate

While the concept of cooperating with your adversary may seem contrary to the notion of acting as a zealous advocate, courts expect parties to work together to minimize the need for the parties to seek judicial resolution. Many of the cases discussed in this article have looked to "litigation efficiency" in determining that a deposition should be held in the forum where the litigation is pending. This is often because of the high likelihood for the court to resolve discovery disputes that might arise during the deposition. *See Campbell,* 2013 U.S. Dist. LEXIS 45981, at *38 ("considering the large number of discovery disputes that have developed thus far in this litigation, there is a high likelihood that disputes will arise during the depositions that may require resolution by the Court."); *New Medium,* 242 F.R.D. at 467 ("an antecedent history of contentiousness is sufficient, but not a necessary basis on which to require a deposition in a locale where judicial supervision will be available."). In *New Medium,* the court further explained "[o]bviously, conducting depositions in Japan, over a dozen time zones away and on the other side of the International Dateline, would severely compromise – to put it mildly – the court's ability to intervene should problems arise." 242 F.R.D. at 467.

Litigants should "play nice" and cooperate with an adversary and comply with any meet and confer requirements before filing a motion for a protective order to protect busy executives from international or significant travel. Before filing a motion for a protective order, counsel should attempt to find a middle ground such as: (1) conducting a deposition via written questions pursuant to Rule 31; (2) agreeing upon a neutral site at a location halfway between the two proposed sites; and/or (3) conducting the deposition via telephone or videoconference. These recommendations may not be ideal based upon the facts of the case, but litigants will be well-served to have explored alternative options with opposing counsel before seeking judicial assistance. This is especially true in light of the possibility that the parties will seek judicial assistance only to have the court reach a middle ground for the parties. *See Branimir Catipovic v. Turley,* 2013 U.S. Dist. LEXIS 56800, at *30 (N.D. Iowa April 19, 2013) (ordering parties to conduct videoconference despite opposition by movant).

Be Specific

Courts appreciate brevity and specificity when seeking a protective order from a court to protect a deponent from potentially burdensome travel. The cases make clear that generalized assertions as to the alleged expense or undue burden of holding a deposition in a far-off locale will not satisfy the movant's burden. *See Campbell,* 2013 U.S. Dist. LEXIS 45981, at *37 ("Defendants have not provided the Court with any evidence regarding the alleged expense or undue burden . . ."); *Invensas Corp.,* 2012 U.S. Dist. LEXIS 92455, at *10 ("Renesas makes the general assertion that it would be burdensome for its employees to travel to the United States for corporate depositions, but has not made a particularized showing as to how this would be the case."); *Ristevski v. S&P Carrier, Ltd.,* 2010 U.S. Dist. LEXIS 40741, at *6-7 (N.D. Ill. Apr. 26, 2010) (denying motion for a protective order for deposition to be held in Canada instead of Chicago because conclusory affidavit did not establish undue hardship or financial burden).

Accordingly, when seeking a protective order or opposing one, litigants should be specific, highlighting the cost of travel, the hurdles that must be overcome if the deposition will be taken on foreign soil (including procedural requirements of compliance with the Hague Convention), whether the deponent regularly travels for business and/or to the location proposed in the notice of deposition, and/or information demonstrating the impact of an executive being away from the office for several days and ensuing undue hardship or financial burden.

Is the Noticing Party Seeking an Apex Deposition?

Depending upon the circumstances of the litigation, counsel should consider whether seeking a protective order based upon the argument that the adversary is seeking an "apex deposition" is an option. It is well settled that depositions of high-level corporate executives should not be taken absent some evidence that the executive possesses independent and unique knowledge of the facts giving rise to the dispute and the party seeking the deposition has exhausted all other means of obtaining discovery. *See, e.g., Salter v. Upjohn Co.,* 593 F.2d 649, 651 (5th Cir. 1979) (finding no error in the district court's issuance of a protective order postponing deposition of defendant's president where he had no direct knowledge of plaintiff's claim and other employees had greater knowledge.) However, before seeking a protective order, counsel should attempt to "play nice" and cooperate with opposing counsel by objecting to the notice, explaining why the individual noticed is an improper apex deponent, and proposing alternative lower-level employees to be deposed instead.