Opposing "Apex" Depositions of Top Corporate Executives

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An Article examining when courts may prohibit depositions of high-level executives and setting out key steps to take when moving to quash or delay them in federal court.

Whether used as a tool for legitimate discovery or as an attempted point of leverage, it has become an increasingly common tactic for opposing counsel to seek the depositions of top corporate executives, especially in asymmetrical discovery postures where only one side has high-level executives to depose. These depositions are referred to as apex depositions. Because apex depositions pose unique challenges for the deponent and corporation, an evolving line of jurisprudence has developed that provides guidance on how to quash them.

Though often viewed with apprehension, a party should consider the receipt of an apex deposition notice or subpoena an opportunity to demonstrate the reasonableness of its position on discovery and the overreaching of the opponent's tactics. Despite the liberal view of discovery specified by the Federal Rules of Civil Procedure (FRCP), courts are skeptical of apex depositions and may quash the deposition to protect the deponent.

This Article examines the case law that has developed on apex depositions and sets out key steps for moving to quash or delay them in federal court.

LIMITS ON THE SCOPE OF DISCOVERY

While the scope of discovery in federal practice is presumptively broad, it is not boundless (*FRCP 26(c)(1)*). For example, a court may limit the scope of discovery:

- To protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.
- To avoid duplication and harassment.
- Where the discovery sought can be obtained from another source that is more convenient, less burdensome or less expensive.
- If a subpoena subjects a non-party to undue burden.

(*FRCP 26(b)(1), (b)(2)(c), (c)(1)* and *45(c)(3)(A)(iv)*.)

Courts use a reasonableness standard to determine whether a notice of deposition or subpoena should be quashed. The court balances the interests served by demanding compliance with the notice against the interests furthered by quashing it and may issue a protective order in appropriate cases (*FRCP 26(c)* and *9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2463 (3d ed.)*). The decision of whether to quash a deposition notice or subpoena is ultimately within the district court's broad discretion (see *Bush v. Dictaphone Corp., 161 F.3d 363, 367 (6th Cir. 1999)*).

THE APEX DOCTRINE

Nearly every court addressing apex deposition notices has observed that these depositions create a tremendous potential for abuse (see *Celerity, Inc. v. Ultra Clean Holding, Inc., No. 05-cv-4374, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007)*). A distinct line of authority has emerged under FRCP 26(c)(1), often referred to as the apex doctrine. Under this doctrine, a court may protect a high-level executive from the burdens of a deposition under any of the following circumstances:

- The executive has no unique personal knowledge of the disputed issues (see *Unique Personal Knowledge*).
- The information sought from the executive can be obtained from:
  - another witness; or
  - an alternative discovery method (see *Alternate Means of Discovery*).
- Sitting for the deposition is a severe hardship in light of the executive's obligations to the company (see *Undue Hardship*).

(*Naylor Farms, Inc. v. Anadarko OGC Co., No. 11-cv-01528, 2011 WL 2535067, at *1 (D. Colo. June 27, 2011)*) (citing *EchoStar Satellite, LLC v. Splash Media Partners, L.P., No. 07-cv-02611, 2009 WL 1328226, at *2 (D. Colo. May 11, 2009)*.)

Some courts have not recognized the apex doctrine as a distinct rule and have instead reached similar conclusions on the basis of Rule 26(c) alone (see, for example, *Naylor Farms, Inc., 2011 WL 2535067, at *1 n.1*). These courts reason that because the language of Rule 26 allows a court to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, there is no need to apply a special doctrine. Regardless of whether a court expressly adopts the terminology "apex doctrine," the inquiry is the same.

UNIQUE PERSONAL KNOWLEDGE

Given the potential for abuse, courts require a high-level executive to have unique and personal knowledge of the claims at issue before subjecting him to a deposition (see *Baine v. Gen. Motors Corp., 141 F.R.D. 332, 334 (M.D. Ala. 1991)*; *Folwell v. Hernandez, 210 F.R.D. 169, 175 (M.D.N.C. 2002)*). Several jurisdictions have strictly enforced the unique knowledge requirement. For example, courts have held that:

- Unless a corporate official has some unique knowledge of the issues in the case, the court may preclude a redundant deposition of the executive while allowing lower-level employees with the same knowledge to be questioned (see *Six W. Retail Acquisition v. Sony Theatre Mgmt. Corp., 203 F.R.D. 98, 102 (S.D.N.Y. 2001)*; *Gen. Star Indem. Co. v. Platinum Indem. Ltd., 210 F.R.D. 80, 83 (S.D.N.Y. 2002)*; *Harris v. Computer Assocs. Int'l, 204 F.R.D. 44, 46 (E.D.N.Y. 2001)*; *Cmty. Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 96 F.R.D. 619, 621 (D.D.C. 1983)*).
- Apex depositions were properly limited by the trial court when the high-level executives noticed had no involvement in the plaintiff's termination of employment (see *Bush, 161 F.3d at 367*; *Patterson v. Avery Dennison Corp., 281 F.3d 676, 679-82 (7th Cir. 2002)*).

Any attempt to justify the deposition of an apex deponent on the basis of the executive's isolated statements about the subject matter of the litigation or general knowledge of the operations of the corporation should fail. Courts have held that:

- The apex doctrine applies despite general statements by high-level executives on topics germane to the allegations in a civil litigation (see *Apple Inc. v. Samsung Elecs. Co., 282 F.R.D. 259, 266 (N.D. Cal. 2012)*).
- The deposition of a high-ranking executive with general knowledge of the corporation's operations must be precluded when the corporation offers for deposition a lower-ranking executive with knowledge of the corporate structure and events at issue (see *Lin v. Benihana Nat'l Corp., No. 10-cv-1335, 2010 WL 4007282, at *2 (S.D.N.Y. Oct. 5, 2010)*).
- A CEO's public statements, even on issues arguably relevant to the other side's claims, are insufficient to justify his deposition (see *Affinity Labs of Tex. v. Apple, Inc., No. 09-cv-4436, 2011 WL 1753982, at *16 (N.D. Cal. May 9, 2011)*).

ALTERNATE MEANS OF DISCOVERY

Courts generally do not allow a party to depose a high-level executive before the party deposes lower-level employees with more intimate knowledge of the case (see *Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979)*; *Gauthier v. Union Pac. R.R. Co., No. 07-cv-12, 2008 WL 2467016, at *4 (E.D. Tex. June 18, 2008)* (plaintiffs' request to take apex depositions may be revisited if they can show that they cannot obtain the necessary information through other means of discovery)).

A party seeking an apex deposition may have to serve interrogatories before deposing a high-level executive (*FRCP 33*). For example, courts have ordered the plaintiffs to serve interrogatories before deposing:

- The honorary chairman and chief executive officer of General Motors, when both executives signed affidavits stating they lacked personal knowledge of the subject matter of the lawsuit (see *Colonial Capital Co. v. Gen. Motors, 29 F.R.D. 514, 518 (D. Conn. 1961)*).
- Lee Iacocca, then chairman of Chrysler Corporation, when he signed an affidavit professing ignorance about the information sought by the plaintiffs (see *Mulvey v. Chrysler Corp., 106 F.R.D. 364, 366 (D.R.I. 1985)*).

If the interrogatory responses prove insufficient, the noticing party may apply to the court to take the apex deposition (see *Colonial Capital, 29 F.R.D. at 518 and Mulvey, 106 F.R.D. at 366*).

Accordingly, the opposing party can request that the deposition of an apex deponent be delayed until the party seeking the deposition has exhausted several other means of discovery, including:

- Depositions of lower-level employees with relevant knowledge.
- Interrogatories.
- Depositions on written questions (*FRCP 31*).
- The deposition of a designated corporate representative under FRCP 30(b)(6), especially when no Rule 30(b)(6) deposition has yet been taken (see *Folwell, 210 F.R.D. at 173* and *Gauthier, 2008 WL 2467016, at *4*).

Particularly when discovery is in its infancy, the party moving to quash an apex deposition can argue that all of these alternative discovery tools should be considered and used before an apex deposition is permitted, and even then only when the requesting party has established a sufficient record that the apex deponent has unique personal knowledge of the proposed subjects of the deposition.

UNDUE HARDSHIP

A showing of undue hardship on the moving party or the apex deponent can itself provide a sufficient basis for moving to quash an apex deposition. Courts generally consider factors such as the:

- Likelihood of harassment of the executive.
- Potential for business disruption.
- Number of individuals that directly report to the executive.

(See *Lin, 2010 WL 4007282, at *2*; *Apple Inc., 282 F.R.D. at 266-70*.)

Potential hardship concerns increase in the context of third-party discovery, where courts are generally more willing to recognize the burdens that one side seeks to impose on a third party not actively engaged in the litigation process (see *Watts v. SEC, 482 F.3d 501, 509 (D.C. Cir. 2007)* (*FRCP 45*'s "undue burden" standard requires district courts to be sensitive to the discovery costs imposed on third parties)).

Courts have been more willing to find the imposition of undue hardship on the executive when there has been a strong factual showing that the executive has no unique personal knowledge that would justify the imposition and inconvenience to his employer (see *In re Ski Train Fire of Nov. 11, 2000 Kaprun, Austria, No. MDL 1428, 2006 WL 1328259, at *10 (S.D.N.Y. May 16, 2006)* ("Courts disfavor requiring the depositions of senior executives unless they have personal knowledge of relevant facts or some unique knowledge that is relevant to the action.")).

STEPS FOR MOVING TO QUASH THE DEPOSITION

After receiving an apex deposition notice and determining that a motion to quash is prudent and likely to be successful, the party opposing the deposition should take several steps to ensure the motion has the best possible chance of success.

REVIEW THE NOTICE OR SUBPOENA FOR PROCEDURAL MISTAKES

The party served with an apex deposition notice should determine whether the noticing party followed all procedural requirements. Procedural defects can give rise to a successful motion to quash regardless of special concerns regarding apex deponents.

For example, counsel should ensure that the party seeking the deposition:

- Issued the notice sufficiently in advance of the requested deposition, including under any local rules that might apply to the timing of the notice.
- Noticed the deposition to occur at a proper location.
- Did not schedule the deposition to occur after the discovery cut-off date.
- Properly served the deposition notice and subpoena.

MEET AND CONFER WITH OPPOSING COUNSEL

The party opposing the apex deposition must meet and confer with the noticing party before filing a motion to quash.

Before the meet and confer, the party opposing the apex deposition should:

- Timely file objections to the deposition notice or subpoena.
- Review the FRCP and any court or judge-specific rules governing the meet and confer process.

At the meet and confer, the opposing party should:

- Strictly follow all governing procedural rules.
- Establish the requesting party's basis for seeking the apex deposition, paying particular attention to whether the request is based on the:
  - deponent's non-unique personal knowledge of relevant events; or
  - general role of the executive in overseeing the corporation's business.
- Offer alternative discovery mechanisms in lieu of the requested apex deposition.
- Request that the apex deposition be delayed until after the proposed alternative means of discovery have been completed and evaluated.

PREPARE THE APEX DEPONENT'S DETAILED AFFIDAVIT

After establishing a sufficient factual record through the meet and confer process, counsel should begin preparing a detailed affidavit from the apex deponent to accompany the motion to quash. Courts generally require an apex deponent to make a factual showing to overcome the presumption of broad discovery under FRCP 26 (see, for example, *Colonial Capital, 29 F.R.D. at 518* and *Mulvey, 106 F.R.D. at 366*).

The apex deponent's affidavit should:

- Attest to the deponent's lack of unique personal knowledge of relevant events and explain why the witness does not have unique knowledge of the subject matter.
- Identify non-apex witnesses who may be knowledgeable about the requested topics.
- Explain the hardship created by the deposition in as much detail as possible, including the timing and duration of any specific scheduling concerns.

The affidavit may be accompanied by similar declarations from other fact witnesses. Because most high-level executives have busy schedules, lawyers must ensure that the executives are provided with ample time to review and approve the content of the affidavit before it is due to be filed with the court.

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