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California's inscrutable apex deponent

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You are the attorney for a company which has been sued in a routine business dispute, such as a breach of contract or an employment matter. Just as discovery begins to heat up, the plaintiff notices the deposition of the company's CEO or president. You know that not only does the company's upper management have no knowledge of any facts relevant to the case, but that the deposition is being sought for the purpose of harassing the company and exerting improper leverage in the litigation. The question facing the company and its counsel is, what can be done to block an abusive and unnecessary deposition of the company's highest-ranking officials?

Under California law, the answer is, a lot.

In a body of case law that has developed only in the last two decades, California courts have recognized that the deposition of high-ranking executives of corporate defendants is fraught with the potential for abuse. Beginning in the 1970s, unscrupulous plaintiffs' lawyers attempted in many instances to depose such "apex" or "pinnacle" witnesses with no involvement in the underlying facts for the sole purpose of gaining leverage and extracting a larger settlement payment. In an effort to put a stop to such tactics, courts in many jurisdictions, including California, have adopted the "apex deponent" rule, under which such depositions are presumptively improper.

The apex deponent rule was first articulated in California in *Liberty Mutual Ins. Co. v. Superior Court*, 10 Cal. App. 4th 1282, 1289 (1992). In that case, the plaintiff in the underlying action was locked in a dispute with her injured husband's workers' compensation carrier. Plaintiff's counsel noticed the deposition of the president of the insurance company. The company moved for a protective order to preclude the deposition, and submitted a declaration from the company president in which he stated that he had no involvement in the handling of the company's claims and had no personal knowledge of any facts related to the complaint. In an effort to impart to the president some personal involvement in the case, plaintiff argued that her lawyer had written two letters to the company on which "President, Liberty Mutual Insurance Co." was copied. The Court of Appeal held that the trial court abused its discretion by withholding a protective order when plaintiff sought to depose a "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." The court's statement of the rule has guided California courts in the two decades since *Liberty Mutual* was decided.

The threshold question is, of course, who is an "apex" witness? A corporate officer

is determined to be an apex witness by virtue of his or her position in the company hierarchy. Clearly, the president or CEO of a large corporation falls within the scope of the apex deponent rule. The applicability of the rule is much less clear, however, when the witness whose deposition is sought is not at the very highest levels of management. While an apex deponent has been described redundantly as a "corporate officer at the apex of the corporate hierarchy," the term by its very nature is not readily susceptible to a bright-line test or clear definition. Courts in other jurisdictions have applied the rule to high-ranking officials such as executive vice presidents, general counsel and directors. But the exact location of the dividing line between apex and non-apex officials within the corporate structure is not clear.

A related question that has not been definitively settled is how large an entity must be before it can even be said to have "apex" employees. At one extreme, the "apex deponent" rule applies fairly clearly when the witness to be deposed is one of the highest-ranking officials of a Fortune 500 or other very large company. At the other end of the spectrum, the doctrine would surely not apply to a small company with one office and only a handful of employees. There is no California case that has determined definitively when a company is deemed too small to have "apex" deponents.

Assuming the company can demonstrate that the would-be deponent is an "apex" witness, the party seeking the deposition bears a heavy burden in overcoming the presumption of impropriety. Under California law, the deposition of a high-level corporate officer is not permitted unless the party seeking the deposition makes a showing of "good cause that the officer has unique or superior personal knowledge of discoverable information." *Liberty Mutual*, 10 Cal. App. 4th at 1287. In many if not most instances, the highest-ranking officials of the company will have no unique or superior knowledge of any discoverable information because they are not personally involved in the transactions that underlie the most common forms of litigation, such as personal injury, employment, and breach of contract cases. Such events usually occur several rungs down the corporate ladder.

The issue of personal knowledge will often be determinative of whether an individual is considered an apex deponent. For example, in *Ray v. BlueHippo Funding LLC*, 2008 WL 4830747 (N.D. Cal. 2008), the plaintiff sought to depose defendant's CEO. Although a company's CEO is generally considered to be at the "apex of the corporate hierarchy," the district court found that the apex deponent rule did not preclude the deposition. The CEO had personal knowledge of the facts of the case, which the court noted was "not surprising given that BlueHippo is a relatively small company." The court ordered that his deposition be allowed to proceed.

If, however, the company is large enough that the witness may be considered a true apex deponent, and there is evidence that he or she has some unique or superior knowledge of discoverable information, the party seeking the deposition must still show that it has already exhausted all less intrusive means of discovery to obtain that information. The *Liberty Mutual* court held that if the party seeking to depose an apex witness has not first made efforts to obtain the information sought from that witness from all less intrusive means, the deposition may not go forward. That is not to say that the deposition may not be permitted at a later time if less intrusive means are exhausted and the party can show that the witness is in possession of other discoverable information. The *Liberty Mutual* court acknowledged that if less intrusive "avenues [are] exhausted, and the plaintiff make[s] a colorable showing of good cause that the high-level official possesses necessary information to the case, the trial court may then lift the protective order and allow the deposition to proceed."

The apex deponent rule balances the need to protect high-ranking corporate officials from abusive and unnecessary depositions against the legitimate need of a party to obtain discovery. While the rule has not been universally adopted, courts in other jurisdictions have applied it to preclude abusive depositions of high-ranking company employees. For example, in *Baine* (cited in *Liberty Mutual*), a federal court in Alabama issued a protective order blocking the deposition of the vice president of General Motors in charge of the company's Buick division. Although the would-be deponent had written an internal memorandum detailing his observations of a new seat restraint system that was blamed in the lawsuit for the death of a passenger, the court found ruled that the plaintiff should first exhaust less intrusive means of discovery. These included deposing lower-level company employees with knowledge of the seat restraint system and serving interrogatories on the vice president to explore

whether he had superior knowledge.

While not every attempt to depose a company's top executives is as obviously improper as the deposition of the company president in *Liberty Mutual*, a business seeking to block the deposition of its highest-ranking employees should not hesitate to invoke the apex deponent doctrine where it can be asserted in good faith. Before seeking a protective order, however, counsel for the company should send a letter objecting to the requested deposition and demanding an explanation for why the deposition is necessary and why the information sought cannot be obtained from another source or through other means. Given the heavy burden he or she would have to satisfy in the face of a presumption of impropriety, the party seeking the deposition may well decide that any hoped-for advantage to be gained by the deposition of an apex witness is not worth the risk of a potentially losing court battle. The possible imposition of monetary sanctions for seeking improper discovery and opposing a motion without substantial justification may give counsel further pause.

Even if the court does not preclude the deposition entirely, a good faith motion to block an apex deposition will likely jaundice the court's view of the party seeking the deposition and may help eliminate harassing and unnecessary discovery in the future.

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