



The Apex Doctrine: Protect Your Corporate Executives From Harassment

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Because few cases proceed to trial, discovery and, more specifically, depositions are the focal point in most civil litigation. The permissible scope of discovery is usually very broad – permitting a party to discover information regarding any matter that is relevant to a claim or defense. When a party attempts to notice the deposition of a corporation’s high-ranking executive—an “apex” official—for no reasonable purpose, however, some jurisdictions are willing to issue a protective order to prohibit such a deposition under what is known as the Apex Doctrine.

Armed with broad leeway, some litigants and their counsel attempt to set the deposition of high-level corporate executives, even though these individuals have little or no unique personal knowledge of the key facts or ultimate issues in the case. The true goal of these depositions is not to uncover relevant information, but rather to harass or inconvenience the corporate executive and to exert pressure in an effort to force a settlement.

In many jurisdictions, attorneys have successfully protected their corporate clients’ C-suite from unnecessary or overreaching depositions under the Apex Doctrine. The doctrine recognizes that, although the scope of discovery is broad, it cannot be limitless. In determining whether to allow an apex deposition, courts consider: (1) whether the executive has unique personal knowledge of facts at issue in the case; (2) whether the information sought from the executive can be obtained from another witness or through an alternative discovery method; and (3) whether sitting for the deposition is a severe hardship in light of the executive’s obligations to the company. If the party requesting the apex deposition cannot meet these burdens, protective orders are properly issued preventing the deposition from going forward.

1. Unique Personal Knowledge

The party seeking the apex deposition must show that the high-level executive in question has unique and personal knowledge of the claims at issue in the case before subjecting the executive to a deposition. Unless the executive is truly intertwined in the facts of the case, the company’s counsel should be able to show that the executive’s general knowledge of the company’s operations or his isolated statements about the subject matter of the litigation are not enough to justify the deposition. Be mindful, however, that other corporate witnesses should share this view of the executive’s non-involvement in the underlying facts. If another witness testifies that the executive was involved in the underlying dispute, the executive may lose the Apex Doctrine’s protection.

2. Alternative Means of Discovery

Generally, courts will not allow a party to depose a high-level executive before the party has exhausted other less intrusive discovery methods. As a result, a party opposing an apex deposition should request that the deposition be delayed until the party seeking the deposition has exhausted other means of discovery, including: (1) interrogatories; (2) depositions of lower-level employees with relevant knowledge; (3) depositions on written questions; and (4) the deposition of a designated corporate representative under Rule 30(b)(6).

3. Undue Hardship

A showing of undue hardship on the company or the apex deponent can provide a sufficient basis for moving to quash an apex deposition notice. In determining whether undue hardship exists, the company's attorney will want to marshal facts that demonstrate: (1) potential for business disruption; (2) the number of individuals that directly report to the executive; and (3) a likelihood of harassment of the executive. These facts should be presented by affidavit in sufficient detail to support a successful motion for protective order.

In applying the Apex Doctrine, courts will balance the liberal rules governing discovery against the need to protect parties from abusive and oppressive litigation tactics. The attorney representing the company and its executive should challenge the party seeking the deposition to present good-faith arguments to the court as to why it *needs* the deposition, with the aim of preventing that party from using the deposition notice to gain leverage in the litigation or to harass executives of the company. Unless the opposing party can show that the apex official is the only person with the knowledge or has greater quality or quantity of knowledge than other sources, the apex official should not be subject to deposition.

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