A Hypothetical

RICH N. BUCKS, a prominent chairman, chief executive officer and president of a relatively small yet well-recognized Arizona-based software corporation, Valley of the Sun, Inc. (VOSI), asks you to defend his company in a litigation matter. Mr. Bucks is a fast-track, big-picture visionary whose goal is to develop his corporation into one of the nation's top 10 software companies by 2001. To make this lofty goal a reality, VOSI hired two computer software specialists from a competing company, Software Systems, Inc. (SSI).

SSI has sued VOSI, claiming that VOSI lured the computer software specialists from SSI and then specifically assigned them to design the same type of software processors they had developed at SSI. SSI further claims that VOSI's actions were concocted at the highest level of VOSI's corporate structure and that high-level VOSI executives were involved in all stages of the scheme.

SSI requests to depose 12 individuals who are current or former VOSI employees. Mr. Bucks is upset that he has been noticed for a deposition and believes the opponent's attorneys are simply trying to harass him. Opposing counsel insists on deposing Mr. Bucks, claiming that he is shielding his actions from scrutiny by virtue of his title.

Do you permit the deposition, or move for a protective order?

This hypothetical illustrates the special dilemma that exists for counsel representing high-level corporate executives in complex litigation—balancing the right of the opposing party to conduct discovery against the right of a corporate executive to avoid being subjected to undue harassment and abuse. Counsel often must make the difficult decision of whether to make a high-level corporate executive available for an "apex" deposition or file a motion for a protective order that limits the deposition or avoids it altogether.

Effectively Defending High

The Apex Deposition Doctrine

Webster's dictionary defines apex as "the highest or uppermost point," suggesting that the apex deposition doctrine applies solely to a corporation's leader. However, the apex doctrine applies in all suits in which "a party seeks to depose a corporate president *or other high level corporate official*" who does not have discoverable knowledge.[1] Courts employ the apex doctrine to preclude depositions of high-ranking officials where the deposition is sought for the purpose of harassing the official and the official has little or no relevant knowledge of the subject matter involved in the litigation.

There are numerous risks and costs associated with making a corporate official available for a deposition, such as lost opportunity costs, the inconvenience that appearing for a deposition creates for high-level executives and the burden of scheduling sufficient time for counsel to prepare the executive effectively for a deposition. Furthermore, "high-level corporate testimony cannot be undone easily if the answers do not square with the facts as they become better understood through subsequent discovery."[2]

On rare occasions, if the facts and circumstances of a particular case are in the corporation's favor, the benefits of having a corporate executive testify may outweigh the costs. For example, making your executive available for a deposition may increase the likelihood that your adversary will do the same. This is especially important for attorneys who want to depose the opponent's high-ranking corporate executive or executives.

Relevant Case Law

The first reported case in which the court prevented a party from initiating discovery at the apex of the corporate hierarchy is *M.A. Porazzi Co. v. The Mormaclark*,[3] a 1951 federal court decision. There, the

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court precluded the deposition of a vice president, finding that he could add no additional information beyond that of a lower-level employee. Since *Porazzi*, federal case law has played a prominent role in the development of apex discovery guidelines. In *Salter v. Upjohn Co.*,[4] the Fifth Circuit prohibited a deposition of Upjohn's president because he had no direct knowledge of the particular facts of the case. Similarly, in *Mulvey v. Chrysler Corp.*,[5] the court refused the deposition of Chrysler President Lee Iacocca, finding that he was a "singularly unique and important individual who can be easily subjected to unwarranted harassment and abuse."[6]

California, Texas and New York have established guidelines for apex discovery.[7] A majority of state appellate courts, however, including Arizona, have not yet established guidelines for such discovery. Texas arguably has the most developed apex discovery law. The Texas Supreme Court, in *Crown Cent. Petroleum Corp. v. Garcia*, adopted the apex deposition guidelines that were created by other federal and state courts. The *Crown* court held:

"When a party seeks to depose a corporate president or other high level corporate official and that official (or the corporation) files a motion for protective order to prohibit the deposition accompanied by the official's affidavit denying any knowledge of relevant facts, the trial court should first determine whether the party seeking the deposition has arguably shown that the official has any unique or superior personal knowledge of discoverable information. If the party seeking the deposition cannot show that the official has any unique or superior personal knowledge of discoverable information, the trial court should grant the motion for protective order and first require the party seeking the deposition to attempt to obtain the discovery through less intrusive methods. . . . After making a good faith effort to obtain the discovery through less intrusive methods, the party seeking the deposition may attempt to show (1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate."[8]

In *Liberty Mutual Ins. Co. v. Superior Court of California*, the California Court of Appeals summarized and adopted the apex discovery guidelines of four major federal decisions. The analysis by the *Liberty* court is similar to that in *Crown*.[9] The court further explained that if the plaintiff can make a good cause showing "that the high-level official possesses necessary information to the case," and after less intrusive methods of discovery are exhausted (or if less intrusive methods of discovery are unsatisfactory, insufficient or inadequate), "the trial court may then lift the protective order and allow the deposition to proceed."[10]

"Effective preparation of an apex official is essential. . . . An ill-prepared official . . . can lead to disaster."

Applying the Apex Discovery Guidelines

Collectively, Rule 26 of the Federal Rules of Civil Procedure (or Rule 26 of the Arizona Rules of Civil Procedure if the action is in state court) and federal and state case law form the discovery guidelines that determine whether a court will permit the deposition of an apex official. These guidelines can assist counsel in deciding whether to seek a protective order to preclude or limit the deposition of a corporate official or prepare the official for the deposition. What follows are ten "demandments" that counsel should keep in mind when faced with a deposition request for an apex official.

1. Do not make any assumptions about a high-level official's scope of knowledge.

Determining a high-ranking official's scope of knowledge is perhaps the most important factor in deciding whether to file a protective order. Top executives, like Mr. Bucks in the hypothetical, normally devote the majority of their time and attention to activities involving the "big picture." Counsel should never assume, however, that high-level officials always lack personal knowledge of the issues at the heart of the controversy and should be prepared to ask detailed questions about that individual's knowledge. Documents evidencing meetings or communications involving the apex official also should be scrutinized.

2. Determine whether the high-level official possesses "unique or superior personal knowledge."

Courts require the opposing party to show that the high-level official they seek to depose possesses "unique or superior knowledge of discoverable information.[11] That standard is a rigid one that requires a showing, beyond mere relevance, that the official possesses knowledge of relevant facts that is "greater in quality or quantity than other available sources."[12] In addition, the party requesting the apex deposition must show that the official's "unique or superior knowledge" is unavailable through less intrusive methods.[13]

Case law suggests that "some knowledge" may not be enough to meet the "unique and superior personal knowledge" standard. Recently, in *In re Alcatel USA Inc.*, two high-level Samsung Electronics Corp. executives (the current chairman/chief executive officer and a former chairman) were sued for allegedly stealing trade secrets from a competitor. The plaintiff argued that the chairman/CEO possessed unique and superior personal knowledge because he was the leader of the organization and set the company vision with lofty goals. The court quashed the deposition, holding, "Virtually every company's CEO has similar characteristics. Allowing apex depositions merely because a high-level corporate official possesses apex-level knowledge would eviscerate the very guidelines established."[14] The court also quashed the plaintiff's request to depose the former chairman. The court held that, although he may have been made aware of information related to the underlying facts of the case via reports prepared by others, the unique or superior personal knowledge requirement cannot be satisfied if based merely on "some knowledge." The court added that doing so would make the apex deposition guidelines meaningless.[15]

3. If a high-level official lacks personal knowledge of the subject matter in controversy, move for a protective order to limit or preclude the deposition.

When the lack of knowledge argument is applicable, counsel should assert this defense and move for a protective order to quash the deposition. The motion should include a "know nothing" affidavit confirming that the official has no personal knowledge of the subject matter involved in the litigation. The motion is particularly necessary when it can be effectively argued that the deposition is sought merely to harass the official and coerce settlement.[16]

4. If a high-level official possesses limited personal knowledge of the subject matter in controversy, counsel should seek to limit the scope of the deposition.

There are a variety of ways in which counsel can limit the deposition. One strategy is to offer to allow the opposing party to depose other, lesser-ranking employees who may have more knowledge of the issue in controversy, thus counteracting the need to depose an apex official. Another strategy is the argument that the apex official only possesses limited personal knowledge and/or other lower-level officials possess equal or greater knowledge of the subject matter involved in the litigation. This argument may force plaintiffs either to explore the apex official's knowledge through written interrogatories[17] or first take the deposition of lower level officials and "wait and see" if the apex official can truly contribute knowledge or information.

5. Avoid using the "lack of recollection" argument.

If an apex official has or may have personal knowledge of the events or facts in controversy but has difficulty remembering these events, the strategies outlined in the fourth "demandment" should be used as opposed to making a "lack of recollection" argument. In *Travelers Rental Co., Inc. v. Ford Motor Co.*,[18] the court held that the plaintiff was entitled to notice and depose several high-level Ford Motor Company executives who claimed they could not remember the specific nature of their

involvement in the case. The court noted that a plaintiff is entitled to test a defendant's claimed lack of knowledge or lack of recollection when that plaintiff can show that the defendant has some knowledge of or participated in events that are at issue in the litigation.

6. Determine whether the opposing party had the opportunity to obtain the information sought through less intrusive methods.

A party's efforts to employ a less intrusive means of discovery must be reasonable.[19] Reasonable efforts to obtain less intrusive discovery include taking depositions of other witnesses with equal or greater knowledge of the relevant events, attempting to obtain the information through written interrogatories, deposing the corporation itself to elicit testimony from an individual qualified to produce the information sought, or a combination of these alternative forms of discovery. However, "Merely completing some less intrusive discovery does not trigger an automatic right to depose [the] apex official."[20]

7. Determine whether the information sought is duplicative and/or cumulative.

The "duplicative or cumulative"[21] argument is employed when an apex official has personal knowledge of the facts in issue, but those facts already have been obtained by the opponent via depositions of other witnesses. To successfully use this argument, counsel must be able to show that the discovery sought is also unreasonable.[22]

8. Know who has the burden of persuasion.

The party seeking the apex official's deposition generally bears the burden of proving that the official has unique or superior personal knowledge of discoverable information that cannot be obtained through less intrusive methods of discovery.[23] However, there are some circumstances in which a party moving for a protective order will bear the burden of persuasion. For example, the moving party will bear the burden of proof when that party has personal knowledge of the facts pertaining to the litigation.[24]

9. Make sure the official is adequately prepared for the deposition if the court denies the motion for a protective order.

High-ranking corporate officials are very busy, generally have inflexible schedules and, like most clients, want to minimize their legal expenses. Although witness preparation is time-consuming and expensive—even more so for apex officials—the effective preparation of an apex official is essential. A high-ranking corporate official who is able to deliver a polished presentation and exude a confident manner may persuade opposing counsel to seek a quick settlement in the case. An ill-prepared official, on the other hand, can lead to disaster.

10. Always act with good faith and common sense.

Discovery can be extremely expensive. These costs rise significantly when a party to the litigation abuses the discovery process. Moreover, discovery is a system designed to be self-executing; when breakdowns occur, they cause courts, opposing counsel and clients to expend far more resources than would be required absent the abuse. According to the court in *In re Convergent Technologies Securities Litig.*,[25] discovery problems occur when "counsel are less interested in satisfying the law's requirements than in seeking tactical advantages. . . . Good faith and common sense hardly seem to be the dominant forces." Counsel must act with good sense and judgment and take the necessary steps to comply with the spirit of the applicable rule. This means that counsel must think about the legitimacy and cost-effectiveness of all discovery requests. "It is irresponsible, unethical, and unlawful [for counsel] to use discovery for the purpose of flexing economic muscle."[26]

Conclusion

Representing apex officials in the discovery stage of complex litigation presents a true challenge. High-ranking corporate officials like Mr. Bucks are very busy and expect counsel to help them avoid depositions so that they can tend to company business. Counsel must determine whether the plaintiff is entitled to depose the official or seek a motion for a protective order limiting or barring the deposition. Although this decision ultimately will depend on the facts of the case, counsel should look to the ten "demandments" for guidance.

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ENDNOTES

1. *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995) (emphasis added). It is important to note that corporate officials are not exempt from apex depositions simply because they are corporate officials. Instead, the corporate official only can invoke the apex doctrine when he or she has been noticed for deposition because of his or her corporate position. *See Simon v. Bridewell*, 950 S.W.2d 439 (Tex. Ct. App. 1997).
2. Charles F. Preuss & Erika C. Collins, *How to Avoid, Control or Limit Depositions of Top Executives*, 63 DEF. COUNS. J. 213, 213 (April 1996).
3. 16 F.R.D. 383 (S.D.N.Y. 1951).
4. 593 F.2d 649 (5th Cir. 1979).
5. 106 F.R.D. 364 (D.R.I. 1985).
6. *Id.* at 366. The court also added that because Iacocca signed an affidavit claiming he had no knowledge of the facts that the plaintiffs were seeking, the plaintiffs needed to first explore the true nature of Iacocca's knowledge through written interrogatories.
7. *See, e.g., Broadband Communications Inc. v. Home Box Office, Inc.*, 157 A.D.2d 479 (N.Y. App. Div. 1990); *Liberty Mut. Ins. Co. v. Superior Court of Calif.*, 13 Cal. Rptr. 2d 363 (Cal. Ct. App. 1992); *Crown Cent. Petroleum Corp.*, 904 S.W.2d at 125.
8. 904 S.W.2d at 128.

9. 13 Cal. Rptr. 2d at 367. The court explained that "less intrusive methods" include interrogatories directed to high-level officials, deposing lower-level employees to acquire the information sought and deposing the corporation itself, thus requiring the corporation to produce the individual(s) most qualified to testify on its behalf.
10. *Id.*
11. *See, e.g., Baine v. General Motors Corp.*, 141 F.R.D. 332 (M.D. Ala. 1991); *Mulvey*, 106 F.R.D. at 364; *Community Federal Sav. & Loan Ass'n v. FHLBB*, 96 F.R.D. 619 (D.D.C. 1983); *Liberty Mut. Ins. Co.*, 13 Cal. Rptr. 2d at 363; *Crown Cent. Petroleum Corp.*, 904 S.W.2d at 125.
12. *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 179 (Tex. 2000).
13. S*ee id.* at 176.
14. *Id.* at 177. *But see Speadmark, Inc. v. Federated Dep't. Stores, Inc.*, 176 F.R.D. 116 (S.D.N.Y. 1997) (apex official's knowledge may be deemed unique even if others along corporate hierarchy possess similar knowledge).
15. *Id.*
16. *See Monsanto Co. v. May*, 889 S.W.2d 274, 277 (Tex. 1994).
17. *See, e.g., Mulvey,* 106 F.R.D. at 366 (requiring that the knowledge of Chrysler President Lee Iacocca on the subject matter of the case first be explored by written interrogatories).
18. 116 F.R.D. 140, 143 (D. Mass. 1987).
19. *In re Daisy*, No. 99-0500, 2000 Tex. LEXIS 37, at *8 (Tex. Apr. 13, 2000).
20. *Id.* at *8.
21. The "duplicative or cumulative" argument is derived from Rule 26(b)(2) of the Federal Rules of Civil Procedure and provides, in relevant part, that the court should invoke its power to limit discovery if "the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive."
22. *See Travelers Rental Co.,* 116 F.R.D. at 140.
23. *Speadmark*, 176 F.R.D. at 116; *Naftchi v. New York Univ. Med. Ctr.*, 172 F.R.D. 130 (S.D.N.Y. 1997).
24. *See Speadmark*, 176 F.R.D. at 116; *Naftchi*, 172 F.R.D. at 130.
25. 108 F.R.D. 328, 332 (N.D. Cal. 1985).
26. *Id.*