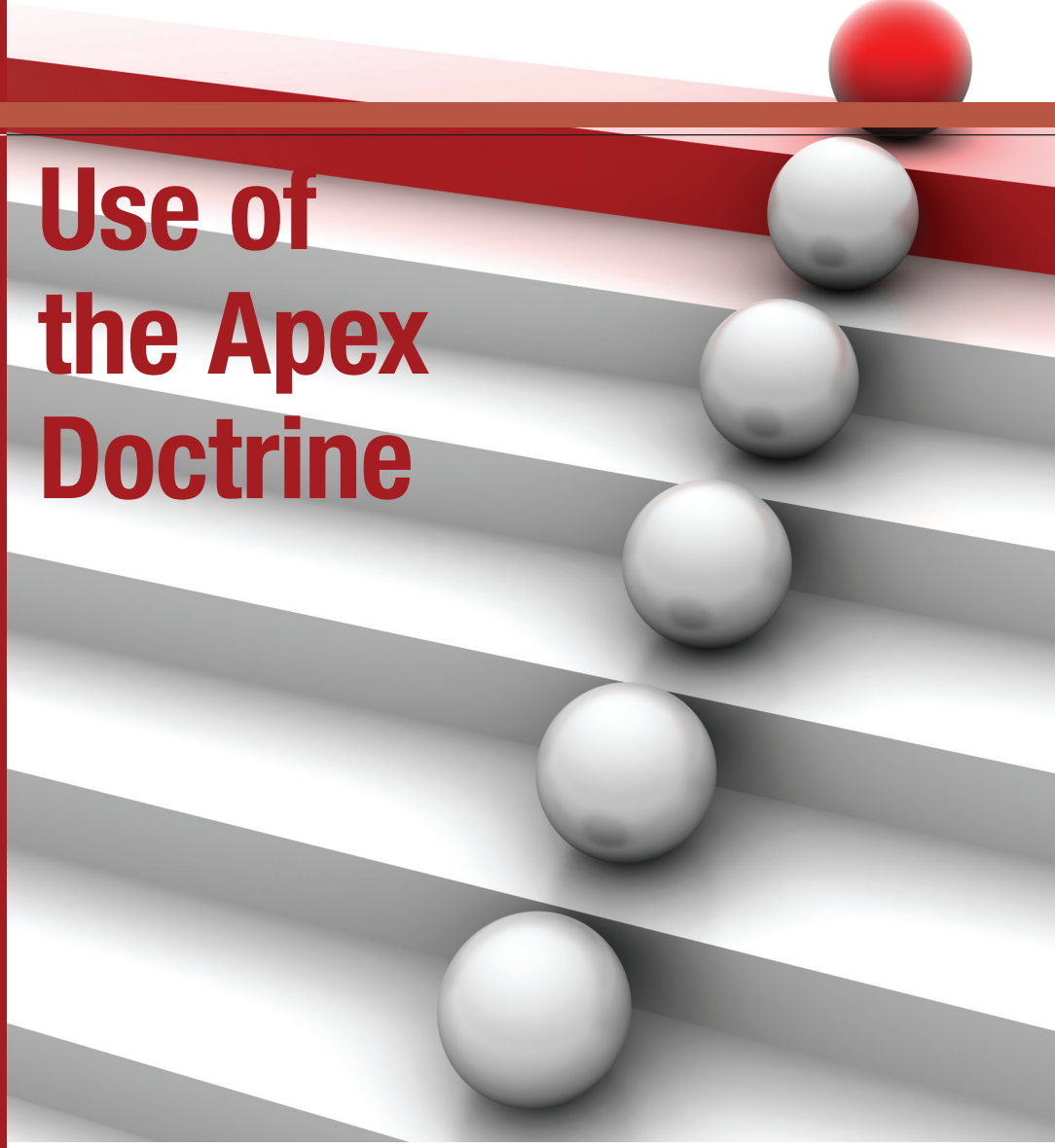
Protect High-Level Corporate Officials from Unnecessary Depositions

Use of the Apex Doctrine

By Christopher M. Tauro and Kip J. Adams

While courts have not widely accepted the doctrine, defense counsel have used it effectively in certain jurisdictions.



Under most rules of civil procedure the permissible scope of discovery is very broad. The federal rules, as well as the corresponding civil rules in many states, permit a party to discover information regarding *any* matter that is *relevant* to any party's claim or defense. *See* Fed. R. Civ. P. 26. While this virtually limitless discovery is important to attorneys as it provides exploratory space to find information that will become the foundation of their clients' cases, the same freedoms allow attorneys to use discovery for purposes other than locating relevant information. For instance, attorneys often attempt to use the discovery process to gain leverage over adversaries. One aggressive discovery tactic is to seek to depose high-level corporate officials of a party opponent. While in some cases the facts and circumstances warrant these depositions, in other cases, high-level corporate officials' knowledge is clearly

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lacking as to the pertinent facts and issues. Yet, attorneys on occasion will make pursuing these depositions primary components of offensive strategies, even after the information that they obtained from previous discovery responses has made them aware of the disconnection.

This strategy capitalizes on three realities of present-day litigation. First, the time, effort, and resources that go into appearing for a deposition, not to mention preparing for it, are often arduous. Few people have the flexibility to spend a day, or even just a few hours, away from their workplaces or their homes answering a seemingly never-ending series of questions on multiple topics. This is especially true of high-level corporate officials with vast responsibilities, oppressive work schedules, and extensive travel schedules. Second, the broad scope of discovery under the rules of civil procedure makes it extremely difficult to obtain protection from a court. As long as it seems likely that a deponent will have at least some information relevant to a party's claims or defenses, the rules permit a party to depose the deponent. *See* Fed. R. Civ. P. 26, 30(a)(1). Third, an individual called to offer a deposition cannot lean as heavily on counsel to do the hefty lifting on his or her behalf as he or she can with a written discovery request. With a written discovery request, a client relies, if not expects, that counsel will review a request in detail, prepare proposed responses, and coordinate the review and execution of those responses in final form at a time and in a manner of the client's choosing. Although an attorney can prepare an individual called to provide a deposition extensively beforehand, ultimately the individual frequently needs to travel to the deposition, sit before the examiner, and answer question after question without any assistance from counsel. And when the examination subjects are not those that the high-ranking corporate official has any detailed knowledge of, or if another employee could answer the questions as well, if not better, the exercise is simply frustrating.

Considering the scope of discovery and these modern realities of litigation, how does an attorney representing a large company or institution protect executives from harassing and unnecessary depositions? As detailed below, one option may be to appeal to the court for relief under the apex doctrine.

The Evolution of the Apex Doctrine

While not widely recognized, some jurisdictions have applied the apex doctrine to limit or even prevent certain depositions from occurring. As you would expect, the term "apex" refers to those individuals, particularly executives, at the "apex" or the top of a company or an organization. While courts have referred to and described the apex doctrine in several decisions, arguably the most widely recognized description comes from the Texas Supreme Court from *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995), and *In re Alcatel USA, Inc.*, 11 S.W.3d 173 (Tex. 2000):

> 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.

Crown Cent. Petroleum Corp. v. Garcia, 904 S.W.2d 125, 128 (Tex. 1995); *see also Liberty Mut. Ins. Co. v. Superior Court*, 10 Cal. App. 4th 1282, 13 Cal. Rptr. 2d 363 (1992) ("particularly instructive" to the *Crown Central* court on apex doctrine guidelines).

In *Alcatel*, the court contemplated that under the *Crown Central* guidelines for the apex doctrine, trial courts may in fact undertake two hearings and issue two orders. The first hearing considers whether to grant a protective order based on the guidelines set forth in *Crown Central*. Then, should a protective order be granted, and other specific methods of discovery engaged in, the court will undertake a second hearing to determine whether it should dissolve the protective order. *In re Alcatel USA, Inc.*, 11 S.W.3d at 176. Thus the apex doctrine may in fact involve two separate determinations at two points in time by a court on the fruitfulness of a deposition. Additionally, since the *Crown Central* and *Alcatel* decisions, in cases invoking the apex doctrine, courts have inconsistently applied Federal Rule of Civil Procedure 26, which requires a party or an individual resisting discovery to demonstrate the need for a protective order. The apex doctrine as set forth in *Crown Central* and *Alcatel* requires the party seeking discovery to make a good-faith effort to obtain the information through less intrusive methods than an "apex deposition,"

and then to demonstrate that (1) it has a reasonable indication that the deposition would "lead to the discovery of admissible evidence," and (2) those "less intrusive methods" have been "unsatisfactory, insufficient or inadequate." *See Crown Cent. Petroleum Corp.*, 904 S.W.2d at 128; *Liberty Mut. Ins. Co.*, 13 Cal. Rptr. 2d at 363; *In re Alcatel USA, Inc.*, 11 S.W.3d at 173. Other courts have followed Federal Rule of Civil Procedure 26 closely, refusing to shift the burden to the party seeking discovery and instead requiring the party resisting discovery to demonstrate the need for protection from harassing and burdensome discovery. *See Crest Infiniti, II, LP v. Swinton*, 2007 OK 77, 174 P.3d 996 ("We decline to adopt a form of the apex doctrine that shifts a burden to the party seeking discovery. In Oklahoma the burden of showing "good cause" is statutorily placed on the party objecting to discovery and is part of that party's motion for a protective order.").

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Crown Central and *Alcatel* were not the first decisions through which courts granted relief to potential deponents under similar circumstances. *See M.A. Porazzi Co. v. The Mormaclark*, 16 F.R.D. 383 (S.D.N.Y. 1951) (precluding the deposition of a vice president because the court found that he could add no additional information beyond that of a lower level employee). But commentators seem to agree that they articulated the doctrine most effectively, and courts have cited them frequently in subsequent decisions concerning the apex doctrine.

Crown Central

The *Crown Central* facts illustrate the realities of modern litigation that make the apex doctrine necessary. The plaintiffs, relatives of a former Crown Central Petroleum Corporation refinery worker who had died of lung cancer that he allegedly developed due to workplace asbestos exposure, sought to depose the chair of the board and chief executive officer of the corporation. *Crown Cent. Petroleum Corp.*, 904 S.W.2d at 126. They filed a motion to require Crown Central to produce him for a video deposition and to produce 32 categories of documents. Crown Central responded with a motion to quash the deposition arguing that the plaintiffs sought the deposition solely for harassment purposes, and it attached an affidavit from the chair. Among other things, the affidavit stated,

> I have no personal knowledge of [the decedent] or his job duties, job performance, or any facts concerning alleged exposure to asbestos by [the decedent]. I was not involved in the day-to-day maintenance decisions made at the Refinery. I have no expertise in industrial hygiene, toxicology, or the health effects of asbestos exposure.

The trial court denied the Crown Central motion to quash the deposition and Crown Central's subsequent motion requesting the court to reconsider the initial motion to quash.

Citing several previous court decisions applying the apex doctrine reaching back more than 50 years, the *Crown Central* court found that in applying the doctrine a court should reasonably accommodate the party seeking discovery so that it could obtain the requested information but without causing the "problems" associated with deposing upper level corporate managers. The *Crown Central* court articulated the most helpful guidelines for the apex doctrine to that date, which other courts facing similar circumstances have referred to.

Recent decisions have clarified what the apex doctrine is and what it isn't. The doctrine, one court said, is not meant to shield high-ranking officers from discovery but to sequence discovery to prevent litigants from deposing high-ranking officials routinely before engaging in less burdensome discovery methods. *Alberto v. Toyota Motor Corp.*, 289 Mich. App. 328, 796 N.W.2d 490, 492 (2010). No court has held that the apex doctrine prevents a party from deposing a high-ranking corporate officer under all circumstances. Certainly, when a party seeks to depose an individual who has personal knowledge of facts relevant to a lawsuit, a court would expect that individual, even a corporate president or CEO, to appear for deposition. *See In re AIR CRASH AT TAIPEI, TAIWAN on October 31, 2000*, MDL1394-GAF (RCX), 2002 WL 32155478 (C.D. Cal. Nov. 6, 2002); *Six W. Retail Acquisition v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98, 102–06 (S.D.N.Y. 2001) (compelling the deposition of the CEO of Sony because the party seeking it presented sufficient evidence that he possessed some unique knowledge on several issues.); *Citigroup Inc. v. Holtsberg*, 915 So. 2d 1265 (Fla. Dist. Ct. App. 2005) (holding a court should deny a protective order covering high-ranking officials when it appears personal knowledge exists of key issues or the motivations of the company are relevant to a case).

The Authority for the Doctrine

Federal Rules of Civil Procedure 26(c) or corresponding local rules provide the general basis under which a party may petition a court to prevent a deposition of a high-level corporate official from occurring by invoking the apex doctrine. Federal Rule of Civil Procedure 26(c) specifies that a court may "for good cause… issue an order… to protect a… person from annoyance, embarrassment, oppression, or undue burden or expense." This rule specifically allows a court to "forbid" the discovery as well as to "prescribe a discovery method other than the one selected by the party seeking discovery." Thus, a court may quash a deposition outright, or it may require parties to find less burdensome means for obtaining the desired discovery. *See Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681–82 (7th Cir. 2002) (affirming a refusal of a district court to compel a deposition of a high-ranking executive in a multinational corporation because the requested deposition would have been a costly and burdensome means of discovery); *Evans v. Allstate Ins. Co.*, 216 F.R.D. 515, 518–19 (N.D. Okla. 2003) (granting a protective order regarding depositions of corporate executives under the apex doctrine).

"High-Level Corporate Official"

A threshold question for counsel considering the apex doctrine is, of course, whether

the person sought for deposition is in fact a "high-level corporate official." In some cases, the answer is obvious. For instance, former Chrysler Corporation Chair Lee Iacocca was determined to be a high-level corporate official by the court following arguments on his behalf that under the apex doctrine, his deposition should not occur. *Mulvey v. Chrylser Corp.*, 106 F.R.D. 364 (D.R.I. 1985) (noting about Iacocca that "he is a singularly unique and important individual who can be easily subjected to unwarranted harassment and abuse. He has a right to be protected, and the courts have a duty to recognize his vulnerability.") More recently, a court automatically afforded Larry Kellner, the former Continental Airlines chief executive officer and chair, the status without discussion when it applied the apex doctrine to prevent his deposition from occurring. *See In re Cont'l Airlines, Inc.*, 305 S.W.3d 849 (Tex. App. 2010). As such, an attorney can usually safely assume that a court will deem a chair, a president, or a chief executive of a company or an organization of any size a high-level corporate official for apex doctrine purposes.

In other cases, it is less clear whether an individual receiving a deposition notice is in fact a high-level corporate officer for the purposes of the apex doctrine. After the chair, president, or chief executive of a company or an organization, the other corporate officers entitled to protection have been vaguely described as those "at the apex of the corporate hierarchy." *Liberty Mut. Ins. Co.*, 13 Cal. Rptr. 2d at 363. Courts have also suggested that the apex doctrine extends not only to high-level corporate officers but also to high-level government officials under the same principle and for similar reasons. *Alberto*, 796 N.W.2d at 493–94 (establishing that under Michigan law the apex-deposition rule applies to high-ranking officials in the public sector and to high-ranking corporate officers in the private sector). However, one court decided that the apex doctrine did not apply to former President George W. Bush in a case seeking to compel him to appear for a deposition related to a dispute over the proposed site of the George W. Bush Presidential Center at Southern Methodist University. *In re Bush*, 287 S.W.3d 899 (Tex. App. Jun 12, 2009) (electing instead to invoke the even higher "meticulous" standard for determining the need to compel a sitting or former President for deposition as established in *United States v. Poindexter*, 732 F. Supp. 142 (D. D.C. 1990)).

What Is "Unique" or "Superior" Knowledge?

Under the apex doctrine, to compel a high-level corporate officer to appear for a deposition, the party seeking the deposition must show that the officer possesses "unique" or "superior" knowledge of the information sought.

The *Alcatel* court did attempt to define what "unique" or "superior" knowledge means. In *Alcatel*, the party seeking to depose the high-ranking corporate official presented fact evidence to the court to demonstrate that the official could have had discoverable information. *In re Alcatel USA, Inc.*, 11 S.W.3d at 179. But the court found that the *Crown Central* guidelines required more than merely discoverable information. "It requires," the court stated, "that the person to be deposed arguably have unique or superior personal knowledge of discoverable information." Merely showing that a high-level executive has some knowledge of discoverable information will not satisfy this requirement. Operating under a "some knowledge" standard would make the apex deposition meaningless.

The *Alcatel* court concluded by noting that although *Crown Central* did not elaborate on what makes knowledge unique or superior, "there must be some showing beyond mere relevance, such as evidence that a high-level executive is the only person with personal knowledge of the information sought or that the executive arguably possesses relevant knowledge greater in quality or quantity than other available sources."

"Less Intrusive" Methods

A fundamental premise of the apex doctrine is that deposing a high-ranking corporate official is unnecessary because the same or similar information is available through "less intrusive" means such as written interrogatories directed to the specific information, or deposing other employees who may have similar information. For example, before compelling Lee Iacocca to submit to a deposition the plaintiffs had to propound written interrogatories to him on the specific issues that they would cover if they deposed him. *Mulvey*, 106 F.R.D. at 366. The plaintiffs could only apply to take an oral deposition after submitting these interrogatories and demonstrating that the answers were insufficient.

While conducting discovery through less intrusive means than a deposition increases the likelihood that a party can make a high-ranking corporate officer appear for deposition, it doesn't mean that a court will compel it. Some courts have held that merely completing some less intrusive discovery does not automatically confer a right to depose a high-ranking corporate official. *In re Daisy*, No 99-0500, 2000 Tex. Lexis 37, at *8 (Tex. April 13, 2000). What a court decides will depend on the discovery results and whether the court believes that relevant information remains undiscovered that only the high-level corporate officer has, or if he or she should provide a deposition for other reasons.

Not Widely Adopted

Despite numerous court decisions supportively applying the apex doctrine, courts have not widely adopted it at this point in time. Reviewing the available case law indicates that only a few select jurisdictions have adopted it, in particular, the state courts of California and Texas. In other jurisdictions, the doctrine has been treated less favorably.

In *State ex rel. Ford Motor Company v. Messina*, the Supreme Court of Missouri unequivocally would not apply the apex doctrine to block an effort to depose several top Ford Motor Company executives. 71 S.W.3d 602, 607 (Mo. 2002). The court held that while opposing litigants may not use a burdensome deposition as a bargaining chip, under Missouri law, parties may depose top-level executives who have discoverable information. However, a court should consider whether a deposition proponent has pursued other methods of discovery, the proponent's need for the deposition, and the burden, expense, annoyance, and oppression to the organization and the proposed deponent that the deposition would cause.

In *Thomas v. International Business Machines*, the court declined to apply

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the apex doctrine when a party sought to depose the chair of the board of directors of IBM. 48 F.3d 478 (10th Cir. 1995). The chair's opposing affidavit argued several grounds, among them that (1) the deposition would take place in Oklahoma City instead of the principal place of business, White Plains, New York; (2) the plaintiff had not deposed any other IBM personnel; (3) the chair had submitted an affidavit stating that he lacked personal knowledge of the pertinent facts material to the plaintiff's claim; (4) nothing in the appellate record showed that the corporate defendant had failed to make available for deposition those corporate employees with knowledge of the pertinent facts material to the plaintiff's claim; and (5) the deposition would cause "severe hardship" because the scheduled deposition conflicted with the chair's specific duties. *Thomas*, 48 F.3d at 483.

However, while neither *Ford Motor Company* nor *Thomas* applied the apex doctrine, they did recognize that deposing a corporate official could be unduly burdensome and oppressive under certain circumstances. *See Crest Infiniti, II, LP*, 174 P.3d at 996. Similarly, while the Supreme Court of Oklahoma recently declined to apply the apex doctrine when two company executives sought protection by invoking it, the court did acknowledge that protective orders in such circumstances could be appropriate while also refusing to shift the burden to the party seeking the discovery to demonstrate a deposition's necessity.

And recently, a decision from the Michigan Court of Appeals applied the apex doctrine, albeit in an opinion with a strongly worded dissent sharply criticizing the doctrine in several ways, including that it violated the principle of equality under the law: "I wish to make clear my belief that high-ranking corporate officers should be held to the same civil discovery standards as any other deponent, witness, or party. Indeed, I believe that our law demands this." *Alberto*, 796 N.W.2d at 502.

Conclusion

Counsel representing large companies and institutions face pressures from many fronts, including the threat that an aggressive opposing counsel will attempt to gain leverage in a lawsuit to achieve a settlement by threatening to depose one or more high-level corporate officers. While courts have not widely accepted the apex doctrine, defense counsel have used it effectively in certain jurisdictions to thwart unnecessary depositions. When raised under the appropriate circumstances, the apex doctrine forces all sides to examine the actual necessity of the deposition, challenges the party seeking the deposition to present good-faith arguments to a court that it needs the deposition, and prevents a litigant from using it to gain leverage in the litigation or to harass the top brass of an opponent. Raising apex doctrine arguments in a motion for a protective order at a minimum alerts a court to the circumstances and increases the chances that under Federal Rule of Civil Procedure 26 or a corresponding state rule a court will limit the time, scope, or duration of the deposition, or order that it not occur at all. FD