

APEX DEPOSITIONS: Ethical Considerations

Presented by:

Robert J. Hannen and Colleen D. Shields

What are Apex Depositions?

- Deposition notices directed at the highest level or “apex” of corporate management.
- Individuals and small companies involved in litigation against large corporations are increasingly seeking apex depositions.
- May be warranted due to the executive’s personal, significant involvement in a particular transaction but sometimes are sought in an apparent attempt to exert leverage on corporate defendants to settle.

Why should you care?

- ❑ The CEO just got noticed for a deposition and you have to inform her.
- ❑ The first question she will likely ask is “Do I have to do this?”
- ❑ The question you don’t want her to ask is “How did this happen?”

“Virtually every court that has addressed deposition notices directed at the highest level or ‘apex’ of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment.” Celerity, Inc. v. Ultra Clean Holding, Inc., 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007). See also Reif v. CAN, 248 F.R.D. 448, 451 (E.D. Pa. 2008).

Rules of Professional Conduct

In advocating for or against Apex depositions, several Rules of Professional Conduct must be considered, including:

Rule 3.1

Rule 3.3 (a)(1)

Rule 8.4(a)

Rule 8.4(c)

Rule 8.4(d)

Ethical Considerations

- Prof. Conduct Rule 3.1:

Meritorious Claims and Contentions. A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

Ethical Considerations:

- Prof. Conduct Rule 3.3(a)(1):

Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

- (1) Make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

Ethical Considerations:

- Prof. Conduct Rule 3.3 - Explanatory Comment:

“ ... although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.”

Ethical Considerations:

- Prof. Conduct Rule 8.4:

Misconduct. It is professional misconduct for a lawyer to:

- (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) . . .
- (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) Engage in conduct that is prejudicial to the administration of justice;

Strategic Discovery

- When seeking apex depositions for strategic purposes, the party seeking the depositions often uses multiple arguments derived from discovery performed earlier in the case.
- The first step to successfully opposing an apex deposition occurs long before the deposition is ever noticed - during the initial phases of discovery.

An Ounce of Prevention

- It is critical to anticipate the arguments when responding to written discovery and when preparing lower level personnel for depositions so that they do not inadvertently provide support for the deposition of a top corporate executive.
- The failure to plan ahead may let the genie out of the bottle.

Factors the Courts will Consider:

- 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 dispute issues.
 - The information sought from the executive can be obtained from another witness or an alternative discovery method.
 - The information sought is duplicative or cumulative.
 - Sitting for the deposition is a severe hardship or undue burden on the executive or the company (for example in light of the executive's obligations to the company at that point in time).

Personal knowledge

- Courts have granted motions for protective orders prohibiting the deposition of Apex witnesses upon findings that the witness was a high-ranking executive with no direct knowledge of the issues in dispute and that plaintiff could obtain the necessary information by deposing lower-ranking officials, such as the personnel who had handled the plaintiff's claim on a day-to-day basis. Koken v. Lexington Ins. Co., Civ-A No. 04-2539, 2005 WL 6051364 (E.D. Pa. July 18, 2005).

Level of Executive's Involvement

- In Cantor v. The Equitable Life Assurance Society of the United States, the court entered a protective order where the defendant had already produced all those individuals who participated in a material manner in the termination of the plaintiffs' benefits which gave rise to the lawsuit. Plaintiffs "provided no evidence" the potential witnesses were involved in the decision which prompted the lawsuit. 1998 WL 544962 (E.D. Pa.)

Duplicative and Cumulative

- “[D]epositions of high level corporate executives may be duplicative, cumulative and burdensome where executive lacks personal knowledge of the disputed events.” Salter v. Upjohn Co., 593 F. 2d 649, 651 (5th Cir. 1979).

Degree of Burden on Company/Executive

- Senior corporate officers are “singularly unique and important individual[s] who can be easily subjected to unwarranted harassment and abuse. [They have] a right to be protected, and the courts have a duty to recognize [their] vulnerability.” Courts thus have the discretion “to prevent oppressive, harassing, inconvenient and burdensome depositions of executive officials.”
Mulvey v. Chrysler Corp., 106 F.R.D. 364 (D.R.I. 1985)

Ethical Considerations:

- When is it mandatory to report “abuse” and when is it discretionary.
- Prof. Conduct Rule 8.3(a):

Reporting Professional Misconduct.

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Questions?

Robert J. Hannen

(412) 566.5911 rhannen@eckertseamans.com

Colleen Shields

(302) 552.2901 cshields@eckertseamans.com