

## Preventing the Apex Deposition

by

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For almost any person, a deposition will cause a loss in work production, general inconvenience and unwanted distraction, but this is especially exacerbated for high-ranking corporate officials. Of more concern to defense counsel is the potential that any information, or lack thereof, provided by those at the apex of the corporate hierarchy will carry an inference of substantial weight. As such, whether for harassing purposes or proper litigation strategy, apex officials are often sought to be deposed. Even Sam Walton himself has been required to provide deposition testimony regarding a slip-and-fall in a Wal-Mart Store, which he undoubtedly did not witness. *See Wal-Mart Stores, Inc. v. Street* (Tex. 1988) 754 S.W.2d 153.

Luckily for defense counsel in our State, courts have recognized the limited value and great potential for harassment that implicitly follows the depositions of high-ranking corporate officials. Plainly stated, California's Apex Deposition Doctrine requires that a plaintiff seeking to depose a defendant corporation's apex official, must first show that the official possesses unique, relevant knowledge which is not available through less intrusive discovery means. *Liberty Mutual Ins. Co. v. Superior Ct.* (1992) 10 Cal.App.4th 1282, 1289. If the plaintiff cannot meet these burdens, protective orders are properly issued preventing the deposition from going forward. *Id.*

In the early 1990s, California adopted the Apex Deposition Doctrine, which had gained momentum in the federal courts on the heels of tactics enlisted in large automotive product liability cases. In *Liberty Mutual*, which first discussed the doctrine as it pertains to California state actions, counsel sought to depose an insurance carrier's chief executive officer after the plaintiff alleged fraudulent business practices associated with the treatment of her incapacitated husband. *Id.* at 1285-1286. The Court, recognizing the federal doctrine, prevented the deposition holding that when an apex official is not shown to have any involvement in a suit, and other less intrusive means of discovery have not been exhausted, a protective order is appropriate. *Id.* at 1289. Citing California Code of Civil Procedure section 2025 (which subsequently became section 2025.420), the *Liberty Mutual* Court explained that the trial judge has the ability "to protect any party ... from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." *Id.* at 1287. *Liberty Mutual* did not shut the door completely on apex depositions, but did unequivocally state that it is unreasonable for a plaintiff to begin discovery by deposing a high-ranking corporate official. *Id.*

In the fifteen years after *Liberty Mutual*, California case law has been surprisingly silent in testing the parameters of the doctrine. A more recent, unpublished California decision *Donald v. Truck Ins. Exchange* 2004 WL 605303, found that a protective order denying the depositions of an insurance company's vice president of claims and manager of the claims department was not warranted. The denial was grounded on the failure of the defendant to meet the necessary thresholds expressed in *Liberty Mutual*. *Id.* at 7. Essentially, *Donald* stands for the proposition that while the Apex Deposition Doctrine exists, to be successful, a party seeking to prevent an

apex deposition must still enunciate the reasons the court should issue a protective order. Using *Liberty Mutual* and *Donald* as background, certain guidelines can be illuminated to create successful strategies to prevent the apex deposition.

Initially, counsel seeking a protective order under the Apex Deposition Doctrine must meet the primary threshold of showing that the individual to be deposed is actually an apex official. *Id.* While, this might be an easy task if your client is Lee Iacocca, the lines become less clear as you move down the corporate structure. *Liberty Mutual's* deposition restrictions apply to “a corporate president or other official at the highest level of corporate management.” *Liberty Mutual Ins. Co., supra*, 10 Cal.App.4th at 1289. In denying the protective order, the *Donald* Court noted that defense counsel failed to show that the vice president of claims and manager of the claims department fit into “the highest level of corporate management” category. *Donald, supra*, 2004 WL 605303 at 7. Simply stating that the individual is an apex official may not be enough; it is necessary to actually fit your client into the *Liberty Mutual* description. Providing information on the individual’s title and job responsibilities, as well as the corporation’s organizational structure, may be essential if the official is not obviously at the apex of the hierarchy.

Remember, that just because the party to be deposed is an apex official, the deposition is not automatically prevented by law. A corporate official who has unique or superior personal knowledge of discoverable information will still be subject to deposition under the general scope of discovery. *Liberty Mutual Ins. Co., supra*, 10 Cal.App.4th at 1287-1288. Unfortunately, there is no bright-line definition of “unique or superior personal knowledge.” In many matters, responses to written interrogatories and admissions, along with production of corporate documents, will provide all the information that an apex official might know, including corporate structure, finance and policies. Mere receipt of memoranda or letters related to the litigation does not give an apex official unique or superior knowledge. *Id.* at 1287. However, if the apex official is the only person with the knowledge or has a greater quality or quantity of knowledge than other sources, they may be subject to deposition. *See, e.g., In re Alcatel USA, Inc.* (Tex. 2000) 11 S.W.3d 173, 179. Accordingly, in certain situations it may be beneficial to advise apex officials against conducting post-incident interviews or accident scene inspections. *See Kelly, Christopher, A Brief Guide to Resisting Apex Depositions*, FOR THE DEFENSE, Jan. 2009, at 60. Once the deposition has been sought, make sure to specifically inform the court on the lack of the apex official’s knowledge in the motion for a protective order. Declarations from other corporate officials stating an apex official’s lack of knowledge, rather than personal declarations of the apex official, may not be enough. *Donald, supra*, 2004 WL 605303 at 7. Therefore, personal declarations of the apex official specifically highlighting their lack of knowledge should be included when moving for a protective order.

Even if the apex official arguably does have unique or superior knowledge, the plaintiff must exhaust less intrusive means before seeking the deposition. *Liberty Mutual Ins. Co., supra*, 10 Cal.App.4th at 1287. To obtain a protective order, the moving party is required to show “unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.” CAL. CODE CIV PRO § 2025.420(b). Following the language from *Liberty Mutual*, moving party’s burden can be met by simply showing that the plaintiff sought an apex deposition without first exhausting other discovery mechanisms; beginning discovery by deposing apex officials is

inherently unreasonable. *Liberty Mutual Ins. Co., supra*, 10 Cal.App.4th at 1287. The Court provided several examples of alternatives that should be attempted prior to an apex deposition, including written interrogatories directed to the official, deposition of lower-level employees with superior knowledge and an organizational deposition of a person most knowledgeable. *Id.* at 1289. As a result, in the motion for a protective order, be sure to include both the lack of prior discovery and a description of available alternatives.

When seeking a protective order, the goal should be to shift the burden to the plaintiff, forcing counsel to show the court why the deposition of the apex official is necessary and why the information sought cannot be obtained through less intrusive means. Presenting legitimate reasons to prevent the deposition, such as the official's lack of relevant knowledge, coupled with reasonable alternatives, which often come in the form of less costly and intrusive discovery mechanisms, should give the court sufficient reasons to grant a protective order. The most effective approach will demonstrate to the court that your opposition is not an attempt to limit discovery, but instead is an effort to make the process more cost-effective and efficient. In the event that a protective order is not granted, at the very least, plaintiff's motivation for the apex deposition will be revealed, which can be used to limit the scope and harassing character of any subsequent discovery.