

**Examining the C-Suite: Preparing For and Defending Apex Depositions****By Christina M. Zabat-Fran and Michael S. LeBoff**

Not all depositions are created equal. They can run the gamut from the critical to the mundane, but there is nothing quite like deposing the chief executive officer or president of a major corporation. This apex deposition can make or break a case. This article discusses strategies to prepare for and defend these unique depositions.

**What Makes Apex Depositions Different than Other Depositions?**

Apex depositions pose unique challenges, but also present extraordinary opportunity. They are different than other depositions for the same reason why the chief executive officer is different from other employees.



- Apex deponents are extremely busy, giving them little time to learn the nuances of the case and prepare for deposition. It can be a challenge to get them to devote a few hours, let alone a few days, to prepare.
- Apex deponents tend to be big-picture oriented, and thus, are less-versed in the minutia of a particular matter, transaction or event. Day-to-day management is often handled by a lower-level employee.
- Apex deponents are copied on emails and cc'd on countless letters per day that they may never read. Yet, once it is in writing, apex deponents may be deemed to have knowledge of whatever bad facts those unread emails may reveal.

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- Apex deponents are de facto persons most qualified deponents for the company. From technology to finances to employment policy, apex deponents are expected to know everything that goes on in their company. Right or wrong, once an apex deponent testifies to a fact, you are probably stuck with it.
- Apex deponents are used to being in charge. Of course, that is not the case at deposition. It is then understandably a challenge for the apex deponent to cede control of deposition preparation to the trial attorney, and even harder to cede control of the process to the deposing counsel.
- Apex deponents place unique pressures on the company's outside counsel to perform like no other witness can. If the apex deponent is not pleased with outside counsel, there is a good chance outside counsel can get dismissed.

Despite their many challenges, a prepared, knowledgeable apex deponent can do wonders for a case. Apex deponents are used to being on the spot, and thus less likely to get overwhelmed by the moment. They are used to having to be careful with words. They are used to having to clearly communicate the corporate message and vision. They can often be among the smartest, savviest and well-liked people in the company, able to convey those characteristics to the trier of fact. Accordingly, the right apex deponent can often be the best person to communicate your message at trial.

### **Preventing Apex Depositions (Good Luck).**

When receiving a notice to depose your client's president or CEO, the first reaction may be to seek a protective order to prevent the deposition. Think twice. As noted above, the apex deponent may be the best person to communicate your message at trial. If you refuse to present them for deposition, there is little chance a judge will allow you to call that person as a witness at trial. Moreover, seeking a protective order may communicate the wrong message. It may signal that you are afraid what the CEO may say at deposition. If that's the case, you are inviting opposing counsel only to push harder.

If you do seek an order preventing the apex deposition, note there are only limited grounds for such a motion. In *Liberty Mut. Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1289, the court held "when a plaintiff seeks to depose a corporate president or other official at the highest level of corporate management, and that official moves for a protective order to prohibit the deposition, the trial court should first determine whether the plaintiff has shown good cause that the official has unique or superior personal knowledge of discoverable information." If the

party seeking the deposition fails to make that showing, the court should first require the party attempt to obtain discovery through less-intrusive methods, such as interrogatories and person most qualified depositions.

Practically, it will be difficult to prevent an apex deposition if the other side can identify any facts showing the apex deponent had any personal involvement in the underlying transaction or events. If there is any question as to the propriety of the deposition, the vast majority of courts will allow it to proceed. Judges are often unmoved by the arguments that the witness is "too busy" or "too important" to be deposed. Thus, given judges will usually prevent an apex deposition only in the clearest of circumstances, a motion for a protective order is often a waste of time and money.

### **Preparing the Apex Deponent.**

Many people and departments are vying over the CEO's limited time and attention. When the CEO is to be deposed, deposition preparation is another task competing for the same attention. Nevertheless, time and attention is necessary to adequately prepare for the deposition that can make or break a case. Here are some tips:

First, let inside counsel do the heavy lifting. In particular, the general counsel is also in the C-Suite with a direct line to the apex deponent. More importantly, the general counsel works with the apex deponent on a daily basis, hopefully gaining their trust and confidence. This trusted relationship is an asset to leverage in your client's favor. If the general counsel tells the CEO they need to prioritize the deposition, the CEO should listen. That message may carry less weight coming from outside counsel, who likely has little direct contact with CEO and potentially little to no prior history. Inside counsel can communicate messages to the CEO that make the limited prep time available more valuable. Inside counsel can help get the apex deponent up-to-speed on the status and general nature of the case, the case themes, the testimony of other witnesses, and the key documents. Inside counsel can provide valuable insight on the apex deponent's personality and priorities, so that you can communicate effectively and persuasively with them.

Second, be flexible. Apex deponents have packed calendars. This means depo prep sessions may need to take place early mornings, late nights or weekends. You may need multiple shorter sessions, rather than a few longer sessions. Expect and accept cancellations and changes. For these reasons, depo prep should start well before the deposition. Trying to start depo prep with an apex deponent a few days or even a few weeks before the deposition is risky business.

Third, be prepared. When meeting with the CEO, make

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sure you know the case frontwards and backwards. Spend time preparing mock examinations before the prep session. Have the documents ready and organized so you can move through them quickly. When the CEO needs information about the underlying transaction, have that information at the ready. Regardless of how good you think you are on your feet, the prep session with the CEO is not a time to wing it.

Fourth, be efficient and prioritize. The unfortunate reality is that you probably will not get the time with the CEO that you want. So, you need to make the most of the limited time you get. To do that, prioritize issues and themes, and be ready to prioritize even further. You may not get the opportunity to prepare the CEO on every single question or issue, nor may you get the time to show them every possible document. Identify what is most critical ahead of time and focus your prep time on those first.

Fifth, do not go it alone. Most likely, the CEO did not act alone in an underlying transaction or event. There were other corporate officers involved as well. Include those employees in the prep sessions. They will be able to help provide context to certain documents and facts. Moreover, by having multiple witnesses prepare simultaneously, you can identify those issues where the witnesses' recollections of the facts diverge and reconcile those inconsistencies before they are permanently captured in a deposition transcript. Be sure, however, everyone present is covered by the attorney-client privilege.

### **Game Day – Defending the Apex Deposition.**

When the big day finally arrives, it is time to put your pre-deposition preparations to the test. There are no second chances. A flippant remark or uncontrolled outburst caught videotaped at deposition will haunt your case through trial. Conversely, if the properly prepared CEO delivers the right message at deposition, it can take the air out of the other side's sail and may lead to a positive resolution.

At the deposition, like other aspects of life, first impressions matter. Therefore, it is important that the apex deponent dress the part. There is no one-size-fits-all approach for appearance here, but juries and judges will expect the apex deponent to embody the consummate professional. The CEO should dress as if they were presenting at a shareholder or board meeting. Even the most casual of CEO's should not wear shorts and a t-shirt when it comes to a deposition. Political messages should be avoided. Distracting or loud clothing will not help. In this case, boring is often best.

During the deposition, your instinct may be to protect

the client through frequent, aggressive objections and arguing with the deposing counsel. Fight those instincts. Constant objections are not only inappropriate, but they will hinder or prevent your apex deponent from clearly telling the client's story.

If you plan to ask your own apex deponent questions at depositions, be sure to prepare them on those questions. This is one of those situations where you never want to ask a question to which you do not already know the answer. You may think you and the deponent are on the same page. Make no assumptions here. You do not want to surprise the apex deponent with a series of questions they were not expecting.

Apex depositions should be completed in a single day. Constant objections and breaks serve only to delay the deposition and give the other side grounds to go beyond the seven-hour rule. Rarely, do you want to allow the other side a second session with the apex deponent, armed with a copy of the first session's deposition for cross-examination. If this means the deposition needs to continue an extra hour or so, that is okay. You are almost always going to be better off getting the deposition completed in a single session.

It often helps to have inside counsel present. Consider the inside counsel as your key ally. While defending counsel is often focused on the specific questions, quickly searching for objections, and jousting with opposing counsel, inside counsel can view the deposition with a wider lens to identify potential pitfalls. Additionally, at the deposition, the inside counsel can often be the most successful in keeping the apex deponent "on message."

Give the apex deponent the opportunity to perform. If they are performing well, give them more space. If they are struggling with the process, you may need to take them out of the room to refresh on what was covered in depo prep. But, you can only protect them so much. Ultimately, you are going to have to allow the apex deponent to struggle through the process and feel a stakeholder in the consequences.

During and after deposition, keep top of mind the purpose of this process, which is for opposing counsel to garner information they can use to prove their case against your client. Given that, it is likely opposing counsel will score at least some points during the deposition, particularly if there are bad facts in your case. Manage these expectations with the apex deponent, and for yourself. It is not realistic to expect perfection.

Finally, after the deposition, take care to review the transcript for errors, as those errors are only amplified when purporting to come from the CEO. Do not rely on the apex deponent to carefully review their own transcript. Remem-

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ber, their schedule may not allow for a detailed review of the 300-page transcript. Both outside and inside counsel who were present at the deposition can provide value to the client by carefully reviewing for reporter errors or other inaccuracies first, then discussing with the CEO whether to request those revisions.

**Above All – Tell the Truth.**

While the apex deposition may be a great opportunity to have the highest corporate officer tell the client's story, they are not a magician. They cannot make bad facts disappear. They cannot change the law or the written words in a document. If there are bad facts, the CEO must admit and address those bad facts. Nothing will derail your case more than a dishonest chief executive. That dishonesty will reflect company culture and infect all other client witnesses.

On the other hand, an honest apex deponent will demonstrate trustworthiness and professionalism. They will be impeccable with their word and confirm transparency, which will reflect company culture as a whole. Overall, your well-prepared, well-guided apex deponent can be the best person to communicate your message at trial.

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