PROTECTING YOUR C.E.O.

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THE CEO AS WITNESS

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THREE KEY QUESTIONS

- **Should you call the CEO as a witness?**
- **If yes, how do you prepare the CEO to testify?**
- **If no, how do you protect the CEO from being deposed?**

SHOULD YOU CALL THE CEO AS A WITNESS?

- **Advantages**
  - **Jury wants to hear from the CEO.**
  - **CEO can tell the corporate story.**
  - **The CEO is CEO for a reason: most CEOS have the makings of an outstanding witness**
- **Disadvantages**
  - **--High risk**
  - **--The "I know nothing," "I know everything" and "I'm above it all" traps.**

THE CEO AS WITNESS: FACTORS TO CONSIDER

- **Jurisdiction**
- **High Dollar Exposure?**
- **CEO Demeanor**
- **CEO Interest in Being a Witness**
- **CEO's Prior Courtroom or Deposition Experience**
- **Skill of Opponent**
- **Willingness To Prepare**
- **Will Opponent's CEO Testify?**

THE TESTIFYING CEO: IMPRESSION IS EVERYTHING

- **Post-verdict jury research has been conducted in cases in which the CEO testified.**
- **CEOs commonly described as "cold," "arrogant," "condescending," "out of touch," "nervous," "agitated", "impatient," "argumentative," "insincere."**
- **Control the impression you create through a carefully planned direct examination**

THE PERILS OF CROSS

- **The CEO must stay consistent in tone.**
- **Don't argue with the attorney**
- **Don't argue with the judge**
- **The courtroom is not the boardroom: CEO must remember who is in control**
- **Answer the question**
- **Avoid the traps**

PREPARATION IS THE KEY

- **Insist on sufficient time to prepare the CEO.**
- **Focus on the fundamentals**
- **Crowd control: try to eliminate the "Entourage" factor**
- **Videotape/DVD**
- **Mock cross is a necessity**

Fighting The CEO Deposition: Relief Can Be Hard To Come By

The rules favor broad discovery and disfavor orders barring depositions altogether:

> **"It is exceedingly difficult to demonstrate an appropriate basis for an order barring the taking of a deposition." *Naftchi v. NYU Medical Center*, 172 F.R.D. 130, 132 (S.D.N.Y. 1997)**

Result: unless counsel for the target deponent adopts a careful and creative strategy, odds are the court will order the deposition.

(Too Much) Honesty May Not Be The Best Policy

- **The "I'm too busy" trap**

  "The fact that the witness has a busy schedule is simply not a basis for foreclosing otherwise proper discovery." *CBS Inc. v. Ahern*, 102 F.R.D. 820, 822 (S.D.N.Y. 1984)

- **The "I'm too important" trap**

  "High ranking corporate executives are not automatically given special treatment which excuses them from being deposed." *General Star Indemnity vs. Platinum Indemnity,* 210 F.R.D. 80, 83 (S.D.N.Y. 2002)

Solution: Apex Doctrine

The apex doctrine bars the deposition of a high level corporate executive under the following circumstances:

1) **Where the party seeking discovery has not yet attempted to obtain the information from lower level employees of the corporation; or**
2) **Where the apex executive has no knowledge of the facts of the case; or**
3) **Where the deposition is sought as a means of harassing the apex executive.**

***See generally General Star*, 210 F.R.D. 80, 82-83 (S.D.N.Y. 2002); *see also Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995); *Celerity Inc.,* 2007 WL 205067 (N.D. Cal 01/25/07) (apex deposition notices "create tremendous potential for abuse or harassment").**

Using the Apex Doctrine

Make The Winning Pitch:

- **Instead of stonewalling, offer alternatives: are there other lower level witnesses who a) have relevant information and b) have yet to be deposed? Has there been a 30(b)(6)?**

- **Establish via affidavit the target exec's lack of knowledge.**

- **If apex deposition is being used as means of harassment or to illegitimately obtain settlement leverage, make the allegation and PROVE IT.**

Preventing the CEO Deposition In Two Easy Steps

STEP ONE: Make the plaintiff climb the ladder.

- **Apex deposition will not be granted unless plaintiff has sought information through "less intrusive" means of discovery. See *In re Daisy Manufacturing Co.*, 17 S.W.3d 654, 658 (Tex. 2000).**

Force plaintiff to issue discovery requests and seek depositions of lower level (but knowledgeable) employees.

PRACTICE TIP: Don't allow lower level employees to "pass the buck." *See DR Systems, Inc. vs. Eastern Kodak*, 2007 WL 2973008 (S.D. Cal 09/14/09).

STEP TWO

STEP TWO: After the plaintiff climbs the ladder, the apex testimony he has requested will be rendered redundant.

- **"Unless the executive has some unique knowledge, it is appropriate to preclude a redundant deposition of that individual." *Consolidated Rail Corp. vs. Primary Industry Corp.*, 1993 U.S.Dist. LEXIS 12600 (S.D.N.Y. Sept. 10, 1993).**

- **"An individual has unique or superior knowledge when he or she is the ONLY person with personal knowledge of the information sought. . . .". *In Re Alcatel, USA*, 11 S.W. 3rd at 79 (emphasis added).**

No Matter Who Has The Burden, Take The Plaintiff On By Filing An Affidavit That Makes Clear Executive Has No Knowledge

Courts have ordered apex depositions where the apex deponent failed to file an affidavit stating his or her lack of relevant knowledge. *Citigroup v. Hotsberg*, 915 So.2d 1265 (2005) (Sandy Weill, CEO of Citigroup, ordered to testify when he failed to file an affidavit.).

LESSON: Ideally, the target should file an affidavit emphasizing that the target exec has no relevant knowledge. *See Elvis Presley Enterprises v. Elvisly Yours Inc.,* 936 F.2d 889 (6th Cir. 1991).

Location, Location, Location

Fed. R. Civ. P. 26(c) authorizes the filing of a motion for protective order "in the district where the deposition is to be taken."

Get the home field advantage by filing your motion for a protective order in your target's home jurisdiction. *See, e.g., Van Den Eng v. Coleman Company*, 2002 U.S.Dist. LEXIS 40720 (D. Kan. Oct. 21, 2005) (Coleman Company successfully filed protective orders in company's home state, even though wrongful death action was venued in Wisconsin).

Understanding the Limits of the Apex Doctrine

Filing a "I know nothing" affidavit on behalf of the target apex deponent is not a guarantee of success.

Some courts have held that "[e]ven where, as here, a high-ranking corporate officer denies knowledge of the underlying facts, that claim is subject to testing by the examining party." *Treppel v. Biovail et. al.*, (2006 U.S. Dist. LEXIS 7836) (S.D.N.Y. 2006)

Compromise Solutions

- **Interrogatories**
  - ***Baine vs. General Motors Corp.*, 141 F.R.D. at 332, 336 (M.D.Ala. 1991)**
- **Rule 30(b)(6)**
  - **If the plaintiff has not yet noted a Rule 30(b)(6) deposition, a court may require the plaintiff to note such a deposition before conducting apex discovery. *See Folwell v. Hernandez*, 210 F.R.D. 169, 173 (M.D.N.C. 2002)**
- **Rule 31 deposition upon written questions**
  - **Consolidated Rail Corp., 1993 LEXIS 12600 (S.D.N.Y.) (Requiring FRCP 31 dep upon written questions in lieu of live dep testimony)**
- **Scope and time limitations**
  - ***Morales v. E.D. Entyre & Co.*, 229 F.R.D. 661, 663 (D.N.M. 2005) (Court granted deposition but limited its length to one hour)**
  - ***Ray v. Blue Hippo Fundings*, 2008 WL 4830747 (N.D. Cal. 2008) (CEO deposition limited to class certification issues)**

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Mr. Fogg is a partner in the firm. An experienced jury trial lawyer who has tried more than sixty cases to verdict, Mr. Fogg's practice focuses on complex trial work, including product liability litigation, labor and employment lawsuits and the defense of securities and other class action lawsuits. Mr. Fogg also uses his experience as a former SEC attorney and criminal prosecutor to help individuals and companies respond to civil and criminal investigations.

Prior to joining the firm, Mr. Fogg was a senior homicide prosecutor in Seattle, where for several years he exclusively tried murder cases, including a number that received front-page media attention. Before moving to Seattle to become a prosecutor, Mr. Fogg practiced in Washington, D.C., where he began his career as a staff attorney for the Securities and Exchange Commission Division of Enforcement.

Education / Background

- University of Virginia School of Law (J.D., 1989)
- College of William and Mary (B.A., English, 1986; Honors all eligible years)

Representative Cases

- *Johnson, et. al. vs. Bulls Eye et. al*. – Mr. Fogg was part of a Corr Cronin team that represented Bushmaster Firearms in a civil lawsuit sponsored by the Brady Center in connection with the "D.C. Sniper" shootings. The case received national attention before being settled on terms favorable to the client.

- *Metropolitan Mortgage Securities Litigation* (E.D. Wa., D. Ore, Wa. And Ore. State courts) – Mr. Fogg is currently representing the former CEO and Chairman of the company in putative class actions asserting fraud claims, as well as defending the client in parallel investigations conducted by a number of state and federal authorities, including the SEC.

- *Ex Officio vs. Cerf Brothers* – Mr. Fogg was trial counsel for the defendant in a three day arbitration before a three arbitrator panel. Plaintiff sought a seven figure damages award. Result: defense verdict and an award of attorney fees for the defendant.

- *Fluke vs. Milwaukee Tool* – Mr. Fogg defended Milwaukee Tool in a one week evidentiary hearing in a dispute regarding an alleged non-competition agreement. Mr. Fogg also successfully prosecuted the appeal in which the alleged Fluke non-compete agreement was held to be invalid.

- *In re Public Company* – Mr. Fogg is currently representing a public company in parallel criminal and civil investigations, as well as serving as trial counsel for the company in a related securities class action.

- *In re Attorney* – Representation of an attorney in a SEC investigation regarding stock sales.