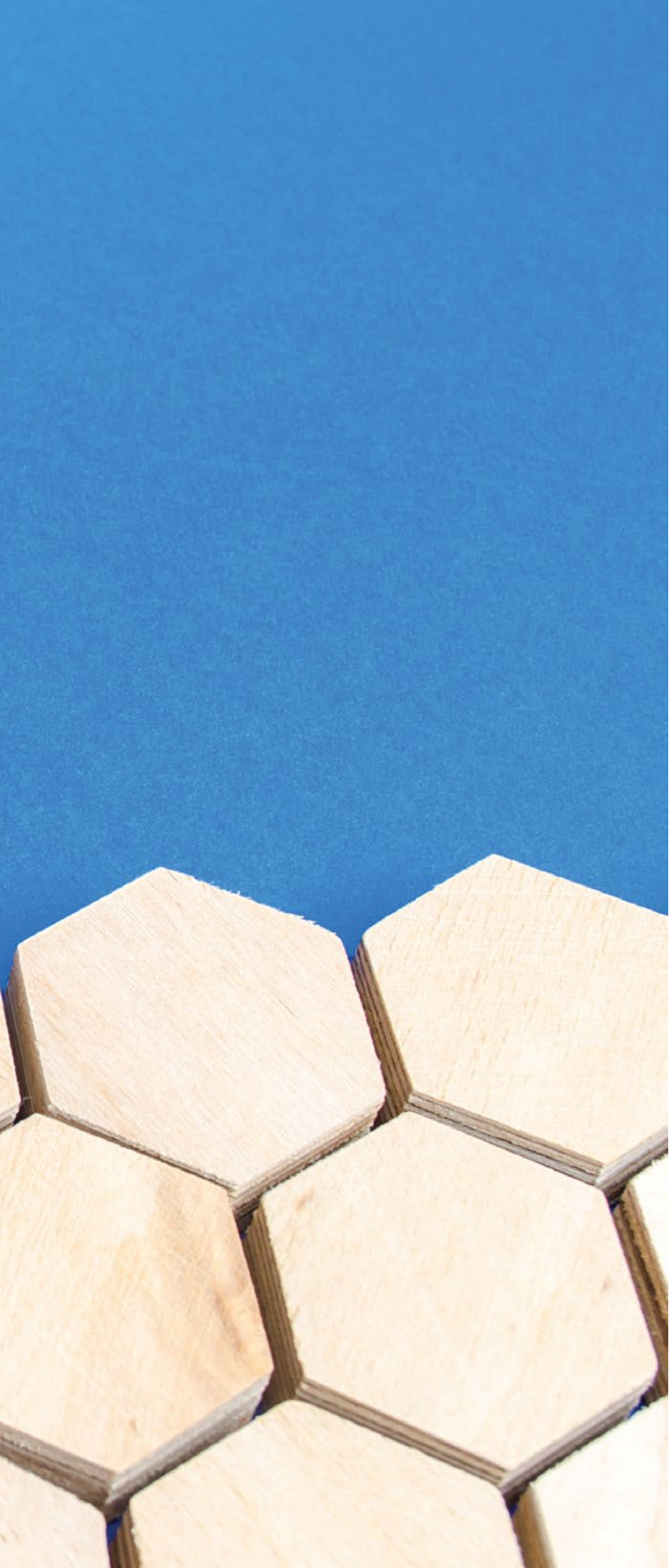
CLOSING THE LOOPHOLE

By || **Kevin M. Ketner**



Don't let witnesses dodge depositions just because they work in the C-suite. Here's how to get their testimony and fill in a crucial piece of your client's case.

Corporations and other entities[1] can act only through their directors, officers, and agents.[2] While procedures for obtaining general corporate knowledge exist—such as written discovery or depositions under Federal Rule of Civil Procedure 30(b)(6) and similar state rules—it's sometimes necessary to determine an executive's personal knowledge and role, which may be beyond the information accessible through these methods. Given this reality, deposing top decision-makers can be critical in holding corporate defendants accountable.

Obtaining these depositions, however, can easily turn into a long, hard-fought battle, especially for C-suite executives of Fortune 500 companies. While it's a simple matter to notice the deposition of an executive, corporate defendants often will seek protective orders precluding the deposition under the "apex doctrine."

The apex doctrine is a judicial construct that shields officials at the top of a corporate hierarchy by requiring that the deposing party show good cause that the official has unique or superior personal knowledge of discoverable information.[3] In addition to claiming undue hardship, corporate defendants may argue that apex depositions are improper when the information sought can be obtained from lower-ranking officials or through alternate means of discovery.[4]

The apex doctrine is fundamentally a burden-shifting mechanism. Generally, the party from which discovery is sought carries the burden of showing good cause when seeking a protective order limiting or

preventing that discovery.[5] But for apex officials, this doctrine shifts the burden to the party seeking discovery.

Courts' Approaches

Despite heavy corporate backing and stacks of amicus filings in test cases across the country,[6] the apex doctrine has failed to gain widespread traction. Many jurisdictions have rejected or opted not to apply the apex doctrine—including the Sixth Circuit, the only federal appellate court to address the doctrine by name—largely due to its burden-shifting.[7] Other courts have criticized the doctrine's unequal application, which inherently results in preferential treatment for the corporate elite.[8]

Federal courts. Federal courts have adopted varying approaches when considering attempts to block depositions of top corporate executives. In some courts, application of the doctrine results in shifting the burden of proof to the party requesting the discovery.[9] One court went as far as saying the apex doctrine creates a "rebuttable presumption that the deposition of a high-ranking corporate executive either violates Rule 26(b)(2)(C)'s proportionality standard or, on a party's motion for a protective order, constitutes 'good cause' for such an order as an 'annoyance' or 'undue burden' within the meaning of Rule 26(c)(1)."[10]

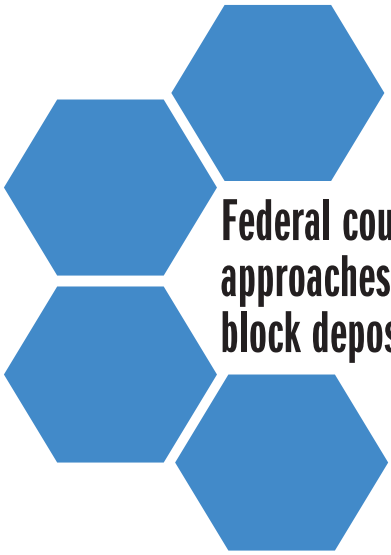
In other federal courts, however, the party seeking relief from discovery bears the burden of establishing that good cause exists for a protective order through application of the apex factors.[11] For example, an Illinois district court held that "the burden under the apex principle is supplied by the general rule [that] a party that seeks to avoid discovery in general bears the burden of showing that good cause exists to prevent the discovery."[12]

Several federal courts have developed a hybrid version of the doctrine, generally requiring the deponent to make some initial good cause showing, while noting that the ultimate burden lies with the executive.[13] These courts may require the party seeking discovery to first establish the relevance of the material sought from the executive or the executive's unique personal knowledge—and then shift the burden to the party opposing disclosure to show good cause for not producing its executive.[14]

And other courts have used the term "apex doctrine" to refer to modifications to routine discovery proceedings, not burden-shifting. In 2021, for example, Apple CEO Tim Cook was required to sit for a deposition with time limitations after a court reasoned that the doctrine is limited to protections identical to those already provided under Rule 26.[15]

Despite Apple's claims that the plaintiffs were not entitled to depose Cook, the court noted that "the apex doctrine limits the length of a deposition, rather than barring it altogether, because of the heavy burden a party faces in blocking a deposition entirely."[16] Accordingly, even federal courts that recognize some version of the apex doctrine are divided on its precise definition and whether it involves any burden-shifting.

State courts. Only five state courts—California, Florida, Michigan, Texas, and West Virginia—have adopted the apex doctrine: four through common law and one through codification in its rules of civil procedure.[17] The remaining states have declined to adopt the doctrine, and courts in at least eight states—Colorado, Connecticut, Georgia, Indiana, Missouri, New York, North Carolina, and Oklahoma—have expressly rejected it, including states that model their rules of civil procedure fully or partially on the federal rules.[18] Like some federal courts, at least one state high court has constructed its own framework that harmonizes the apex doctrine's principles with the state's rules of procedure.[19]



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Overcoming Apex Challenges

If you anticipate needing to depose an apex official in your case, conduct a thorough presuit investigation of your jurisdiction's adoption of the apex doctrine and its variants and determine how it will apply given the case facts.

After filing, raise the need to depose an apex witness as soon as possible. In federal court, disclose the need at the initial Rule 26(f)(2) conference, identify the issue in the joint discovery plan, and raise the issue with the judge during the Rule 16(b) scheduling conference.

PREVIOUS SPREAD: ANDRII YALANSKYI/GETTY IMAGES

Courts favor predictability in discovery, and judges routinely deny untimely deposition requests.[20]

Pick your battles. Before seeking an apex deposition, weigh the costs and choose your battles wisely. If the case relates to the apex witness's personal actions, then the deponent cannot escape deposition.[21] But although big targets can be tempting, the bigger the fish, the harder the fight. Deposing Jeff Bezos in a case against Amazon may seem tempting, but unless the deposition relates to his personal actions or unique relevant knowledge, consider deposing someone lower down the chain.[22]

Preparation. Before noticing a high-level executive, be thoroughly prepared to articulate the specific subject matter at issue and why you believe the official has personal knowledge of relevant information. Courts have found apex status insufficient when the executives potentially possessed relevant information.[23]

In addition, pursue alternate means of acquiring the facts early on. If unsuccessful, your failed efforts to obtain the information can be persuasive. For example, show the judge that responses to interrogatories seeking the information were insufficient and that your good faith efforts to obtain the discovery have failed. Prepare strong evidentiary support from other discovery, such as deposition testimony or authenticated documents, displaying the apex official's actions, communication, or knowledge relevant to the subject matter. Of course, Rule 26(a)(1) disclosures identifying the apex witness as an "individual likely to have discoverable information" are highly persuasive.[24]

Make reasonable concessions. When requesting the deposition of a high-level executive, such as the CEO of a Fortune 500 company, make a good faith showing of offering reasonable accommodations to the other side. This may include agreeing to limit the deposition to a certain number of hours, taking the deposition at a location convenient to the apex witness,[25] or limiting the subject matter and scope of the deposition. For example, a plaintiff can proactively mitigate burden-based arguments by agreeing up front to take the deposition via Zoom.

As with any deponent, the trial court retains discretion to restrict the duration, scope, and location of an apex deposition.[26] The trial court's ability and means to shape discovery disputes is vast—and that discretion is largely rooted in the court's familiarity with a given dispute. Courts may be more likely to use discretionary tools to limit, rather than wholly preclude, an apex deposition, particularly when the requesting party has acted reasonably and diligently in setting forth the need for such discovery.[27]

Corporate defendants will go to great lengths to prevent an apex deposition. The outcome ultimately may depend on your jurisdiction, but early preparation, prudent selection, and good faith concessions can go a long way in overcoming any apex challenge that may come your way.

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Notes

1. The apex doctrine also has been applied to high-level government officials. *See, e.g.*, *Sourgoutsis v. U.S. Capitol Police*, 323 F.R.D. 100, 114 (D.D.C. 2017); *K.C.R. v. Cty. of Los Angeles*, 2014 WL 3434257, at *3–5 (C.D. Cal. July 11, 2014); *In re C.R. Bard, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 2014 WL 12703776, at *3 (S.D.W. Va. June 30, 2014); *Church of Scientology of Boston v. I.R.S.*, 138 F.R.D. 9, 12 (D. Mass. 1990).
2. *LaTele Television, C.A. v. Telemundo Commc'ns Grp.*, 9 F.4th 1349, 1357 (11th Cir. 2021) ("A corporation is an artificial entity that can only act through its officers, agents, and employees."). *See also In re Oakwood Homes Corp.*, 356 F. App'x 622, 628 n.4 (3d Cir. 2009); *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1512 (10th Cir. 1994).
3. *Serrano v. Cintas Corp.*, 699 F.3d 884, 901 (6th Cir. 2012).
4. *Gookins v. Cty. Materials Corp.*, 2020 WL 3397730, at *2 (S.D. Ind. Jan. 7, 2020).
5. Fed. R. Civ. P. 26(c)(1).
6. For example, in *Gen. Motors, LLC v. Buchanan*, 874 S.E.2d 52, 63 (Ga. 2022), a number of groups and corporations submitted amicus briefs in support of defendant General Motors, including Kia America Inc., United Parcel Service Inc., Delta Air Lines Inc., Coca-Cola Co., the U.S. Chamber of Commerce, and Attorney General of Georgia.
7. *Serrano*, 699 F.3d at 901–02. *See also Nat'l Collegiate Athletic Ass'n v. Finnerty*, 191 N.E.3d 211, 221 (Ind. 2022); *BlueMountain Credit Alt. Master Fund L.P. v. Regal Ent. Grp.*, 465 P.3d 122, 131–32 (Colo. App. 2020); *Bradshaw v. Maiden*, 2017 WL 1238823, at *5 (N.C. Super. Ct. Mar. 31, 2017); *Netscout Sys., Inc. v. Gartner, Inc.*, 2016 WL 5339454, at *6 (Conn. Super. Ct. Aug. 22, 2016); *Crest Infiniti II, LP v. Swinton*, 174 P.3d 996, 1004 (Okla. 2007); *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. 2002).
8. *See, e.g.*, Order, *Phillips v. Gen. Motors Corp.*, No. 9:98-CV-00168 (D. Mt. Feb. 24, 2000), ECF No. 69 (granting motion to compel deposition of vice-chairman, adding "I am befuddled by an argument that status alone creates a different set of rules for important people. . . . Short of some proof of harassment, the rules apply to everyone in the same way."); Order, *Synovus Trust Co. v. Honda Motor Co.*, No. 4:03-CV-1402 (M.D. Ga. Aug. 11, 2004) (granting motion to compel deposition and noting that "the Court is unpersuaded by Defendants' implication that we have a 'caste' litigation system which divides witnesses into two classes—a privileged class that must be protected from the inconveniences associated with litigation and everyone else who must put aside private matters temporarily for the administration of justice").
9. *See, e.g.*, *Degenhart v. Arthur State Bank*, 2011 WL 3651312, at *1 (S.D. Ga. Aug. 8, 2011); *Hickey v. N. Broward Hosp. Dist.*, 2014 WL 7495780, at *2 (S.D. Fla. Dec. 17, 2014).
10. *Performance Sales & Mktg. LLC v. Lowe's Cos., Inc.*, 2012 WL 4061680, at *4 (W.D.N.C. Sept. 14, 2012).
11. *See, e.g.*, *Scott v. Chipotle Mexican Grill, Inc.*, 306 F.R.D. 120, 122 (S.D.N.Y. 2015) (stating that even in apex doctrine scenarios, the plaintiff bears no burden to show that the deponent has special knowledge).

12. *Dyson, Inc. v. Sharkninja Operating LLC*, 2016 WL 1613489, at *1 (N.D. Ill. Apr. 22, 2016).
13. *See, e.g., Naylor Farms, Inc. v. Anadarko OGC Co.*, 2011 WL 2535067, at *2 (D. Colo. June 27, 2011); *Alliance Indus., Inc. v. Longyear Holding, Inc.*, 2010 WL 4323071, at *4 (W.D.N.Y. Mar. 19, 2010); *Tierra Blanca Ranch High Country Youth Program v. Gonzales*, 329 F.R.D. 694, 697–98 (D.N.M. 2019).
14. *Id.*
15. Specifically, in 2021, the Northern District of California ordered Cook to sit for a seven-hour deposition after Apple's failed attempt at invoking the apex doctrine. *See In re Apple iPhone Antitrust Litig.*, 2021 WL 485709, at *3 (N.D. Cal. Jan. 26, 2021).
16. *Id.*
17. *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995); *Liberty Mut. Ins. Co. v. Super. Ct.*, 13 Cal. Rptr. 2d 363, 365–67 (Cal. Ct. App. 1992); *Alberto v. Toyota Motor Corp.*, 796 N.W.2d 490, 494–96 (Mich. Ct. App. 2010); *State ex rel. Mass. Mut. Life Ins. Co. v. Sanders*, 724 S.E.2d 353, 364 (W. Va. 2012); *In re Amend. to Fla. Rule of Civ. Pro. 1.280*, 324 So. 3d 459, 461 (Fla. 2021).
18. *Serrano*, 699 F.3d at 901-02. *See also Nat'l Collegiate Athletic Ass'n*, 191 N.E.3d at 221; *BlueMountain Credit Alt. Master Fund*, 465 P.3d at 131–32; *Bradshaw*, 2017 WL 1238823, at *5; *Netscout Sys.*, 2016 WL 5339454, at *6; *Crest Infiniti II*, 174 P.3d at 1004; *State ex rel. Ford Motor Co.*, 71 S.W.3d at 607.
19. *Nat'l Collegiate Athletic Ass'n*, 191 N.E.3d at 221 ("[W]e decline to adopt the apex doctrine and instead harmonize its principles with our trial rules in establishing a framework for trial courts to use to determine whether good cause exists to limit or prohibit the deposition of a high-ranking official.").
20. *See, e.g., Haviland v. Catholic Health Initiatives-Iowa*, 692 F. Supp. 2d 1040, 1044 (S.D. Iowa 2010); *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 331, 332 (N.D. Ill. 2005).
21. *See* Hon. Iain D. Johnston, *Apex Witnesses Claim They Are Too Big to Depose*, 41 Litigation 1 (2014), www.lb7.uscourts.gov/documents/15cv2207.pdf (citing *Clinton v. Jones*, 520 U.S. 681 (1997)).
22. *See, e.g.*, Redacted Order Granting Defendant Amazon.com, Inc.'s Motion for Protective Order Preventing Disposition of Jeffery Bezos, *Ceiva Logic, Inc. v. Amazon.com, Inc.*, No. 2:19-CV-09129-AB-MAA (C.D. Cal. October 26, 2021), www.cadwalader.com/uploads/media/CDCA-2-19-cv-09129-166.pdf.
23. *Eaton Corp. v. Weeks*, 2014 WL 700466, at *7 (E.D. Mich. Feb. 24, 2014) (that the proposed deponents are "busy executives of Fortune 500 companies" is not sufficient to avoid deposition "where the executives may have relevant information").
24. Johnston, *supra* note 21.
25. *Gookins v. Cty. Materials Corp.*, 2020 WL 3397730, at *3 (S.D. Ind. Jan. 7, 2020); *see also Andes Petroleum Ecuadro Ltd. v. Occidental Expl. & Prod. Co.*, 2022 WL 3227874, at *3 (S.D.N.Y. Aug. 10, 2022).
26. *See, e.g., Garcia*, 904 S.W.2d 125.
27. *See, e.g., Eight Mile Style, LLC v. Spotify USA Inc.*, 2022 WL 2794280, at *2 (M.D. Tenn. July 15, 2022); *E.E.O.C. v. JBS USA, LLC*, 2012 WL 5328735, at *2 (D. Neb. Oct. 29, 2012).