IADC Committee Newsletter

MEDICAL DEFENSE AND HEALTH LAW

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The deposition of a health care provider's CEO is a frequent tactic used by plaintiffs to distract from the real issues in cases involving medical care. Plaintiffs use this opportunity to develop their theory (and jury argument) that the defendant-facility is focused on "profits over people." Luanne Runge and Paul Greene, discuss the reasons these apex depositions should be treated differently than a typical party-witness deposition.

Do Not Submit! Why You Should Fight the Apex Deposition and How to Do It

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Introduction

Healthcare providers have a difficult balancing act to perform in the court of public opinion, and by extension, in the courtroom. On the one hand, health care providers must be healers. On the other hand, however, these same individuals and the companies for which they work must remain financially solvent to allow these valuable practitioners to perform their art. As any attorney who has ever represented a hospital or long term care facility, is painfully aware, a typical jury does not appreciate the fact that health care is a business. Savvy plaintiff's attorneys play on this sentiment in a number of ways in varying degrees of transparency to try to show that the provider has compromised care in the name of financial health. The theme of "profits over people" is frequently used by plaintiffs' counsel to show the provider is more interested in making money than saving lives.

One tactic increasingly used to exploit this misperception is the deposition of the health care provider's chief corporate official—the CEO or president of a corporate hospital, senior living community, or medical group. Rather than noticing such a deposition to seek information relevant to the underlying malpractice or other professional negligence claim, these depositions, commonly referred to as "apex" depositions, are intended solely to paint the health care provider as a corporate business entity more interested in the bottom line than healing. It is therefore incumbent on the attorney defending the health care provider to resist such attempts to distort the relationship between a provider's financial health and services rendered.

Just how liberal are the discovery rules?

As we all know, modern discovery rules are liberal, allowing the plaintiff discovery of any non-privileged matter relevant to the plaintiff's case.[1] While the rules contemplate limitations on the scope of discovery, "discovery shall be limited when the information is sought from the CEO of the defendant" is unfortunately not one of those limitations. Instead, the rules expansively allow the deposition of *any* person.[2] In fact, courts have allowed the depositions of the CEO of Microsoft in a case involving the development of Windows Vista[3] and, even more strikingly, of Sam Walton in a slip-and-fall[4]. Highly-placed executives are not immune from discovery, and the fact that the witness has a busy schedule is not a basis for foreclosing otherwise proper discovery.[5] Accordingly, if the plaintiff seeks the deposition of the apex officer of a business or corporation, the deck appears at first glance to be stacked in favor of that plaintiff.

Discovery is not, however, boundless. While information sought by discovery need not be admissible at trial if it is reasonably calculated to lead to the discovery of admissible evidence, a court can limit discovery that is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome or expensive.[6] A court can also limit discovery where the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving those issues.[7] In addition, the court can forbid or limit discovery to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Moreover, the likelihood of harassment and business disruption are factors courts should consider in deciding whether to allow discovery

[1] Fed. R. Civ. P. 26(b)(1)

[2] Fed. R. Civ. P. 30(a)(1)

[3] *See Kelley v. Microsoft Corp*., 2008 WL 5000278 (W.D. Wash. Nov. 21, 2008)

[4] *See Wal-Mart Stores, Inc. v. Street*, 754 S.W.2d 153 (Tex. 1988)

[5] *General Star Indemnity Co. v. Platinum Indemnity Co.*, 210 F.R.D. 80, 83 (S.D.N.Y. 2002) (citations omitted)

[6] Fed. R. Civ. P. 26(b)(2)(C)(i)

[7] Fed. R. Civ. P. 26(b)(2)(C)(iii)

of corporate executives.[8] Viewing these limitations on discovery collectively reveals that courts acknowledge the reality that a corporate executive, while not on a pedestal above the fray, should be considered somewhat differently than those more close to the action. With these guidelines in place, it is possible to begin to craft a strategy for avoiding the deposition of your client's apex officer.

So you're telling me there's a chance?

While the Rules of Civil Procedure make apex depositions difficult to avoid, the hurdle to barring an apex deposition is actually much higher than the Rules cited above imply. Courts have augmented this difficulty by making such depositions "exceedingly difficult" to bar.[9] A court issuing an order vacating the notice of a deposition is generally regarded as both unusual and unfavorable,[10] and is "most extraordinary relief."[11] Against that framework, however, it is important to note courts have not said it is *impossible* to bar the deposition of an apex officer. While the window is small, it is through this small window you must go to protect your client from the harassment of an apex deposition.

As noted above, courts acknowledge both tacitly and directly that an apex deposition is different, if only slightly, than a non-executive deposition. For example, courts have held such depositions to be oppressive, inconvenient and burdensome to the defendant.[12] In a case involving an alleged defect in Chrysler minivans, the court forbade the immediate deposition of Lee Iacocca because "he is a singularly unique and important individual who can be easily subjected to unwarranted harassment and abuse. He has a right to be protected, and the courts have a duty to recognize his vulnerability."[13] The key to avoiding an apex deposition, then, is to establish the deposition will result in oppression and harassment and that the potential discovery of relevant evidence is not sufficient to justify that burden.

As an initial matter, it is important to recall the Rules only allow discovery of matter relevant to the plaintiff's claim.[14] Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.[15] In the special circumstance of a plaintiff seeking an apex deposition, courts have found a plaintiff must make "some showing beyond mere relevance."[16] The most common extension beyond relevance is that plaintiffs must make a showing the would-be deponent has some unique or superior personal knowledge or discoverable information.[17]

What exactly is 'unique or superior' knowledge?

Fortunately, these terms are easily defined. "Unique" means exactly that: this apex officer is the *only* person with personal knowledge of the information sought.[18] "Superior" means that the apex officer arguably possesses relevant

[8] *Six West Retail Acquisition, Inc. v. Sony Theatre Management Corp.*, 203 F.R.D. 98, 102 (S.D.N.Y. 2001)
[9] *Naftchi v. New York Univ. Med. Ctr.*, 172 F.R.D. 130, 132 (S.D.N.Y. 1997)
[10] *Investment Prop. Inter. Limited v. IOS, Limited*, 459 F.2d 705, 708 (2d. Cir. 1972)
[11] *Speadmark, Inc. v. Federated Dep't. Stores, Inc.*, 176 F.R.D. 116, 118 (S.D.N.Y. 1997) (citing *IOS, Limited*, 459 F.2d at 708)
[12] *See Baine v. Gen. Motors Corp.*, 141 F.R.D. 332, 334-35 (M.D. Ala. 1991)
[13] *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985)
[14] Fed. R. Civ. P. 26(b)(1)
[15] *Hofer v. Mack Trucks, Inc.*, 981 F2d 377, 380 (8th Cir. 1992) (citations omitted)
[16] *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 179 (Tex. 2000)
[17] *See Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995)
[18] *In re Alcatel*, 11 S.W.3d at 179. The misuse of "unique" to refer to those things that are unusual, but not singular—i.e. existing only in one place or person—is a matter of some personal annoyance to the author. Accordingly, courts' usage of "unique" to mean an absolute is refreshing.

knowledge greater in quality or quantity than other available sources." It is not enough to show the officer has "some knowledge of discoverable information."[19]

Several jurisdictions have adopted the "unique or superior knowledge" test espoused by the Texas Supreme Court.[20] This test therefore provides two routes to avoiding an apex deposition: 1) show that the officer has no unique knowledge; or 2) show that any knowledge the officer has is in no way superior to knowledge lower officials may have. These facts, if proven, segue nicely into an argument that the information sought is obtainable from a more convenient, less burdensome and less expensive source, and therefore the only effect of the apex deposition is to harass the corporate defendant – its top management official. While, as noted above, courts have discussed this issue in terms of shifting the burden to the plaintiff—requiring the plaintiff to demonstrate the apex officer has unique or superior knowledge, thereby necessitating her deposition—defendants must be proactive in combating this approach. One way to do this is by submitting affidavits regarding the limits and extent of the corporate officers' knowledge. Courts have accepted affidavits from apex officials stating they had no unique or superior knowledge.[21] In addition, affidavits of lower level officials establishing their involvement in and knowledge of the facts giving rise to the litigation, will be useful to demonstrate the apex officer's knowledge, if any, is not superior to the knowledge had by a more accessible deponent.

Volunteering someone to demonstrate that knowledge

Courts have consistently found, and Rule 26 itself notes, that the plaintiff is bound to seek discovery from sources that are not cumulative, and to start with those sources that are most convenient and least burdensome.[22] Thus, in order to resist the deposition of an apex officer, and the harassment it entails, defense counsel will likely have to offer a witness or witnesses with the knowledge the plaintiff ostensibly seeks from the apex officer. By doing so, defense counsel can force the plaintiff to march through the appropriate hoops before heading straight to the apex. Procedurally, the plaintiff's compliance with these steps can be compelled through a protective order pursuant to Rule 26(c)(1) or even through a discovery plan submitted pursuant to Rule 26 (f).

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[19] *Id.*

[20] *See Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979) (upholding a protective order in a wrongful death action against a drug manufacturer that barred the deposition of the defendant's president because he was extremely busy and lacked direct knowledge of facts in dispute, and other employees had more direct knowledge); *Community Federal Sav. & Loan Ass'n v. FHLBB*, 96 F.R.D. 619, 621-22 (D.D.C. 1983) (barring deposition of agency official where there was no showing he had "unique personal knowledge"); *Burns v. Bank of America*, 2007 WL 1589437, *3 (S.D.N.Y. June 4, 2007) ("unless it can be demonstrated that a corporate official has some unique knowledge of the issues in the case it may be appropriate to preclude a deposition of a highly-placed executive while allowing other witnesses with the same knowledge to be questioned.")(citations and quotations omitted); *Kelley v. Microsoft Corp.*, 20008 WL 5000278 (allowing deposition of Microsoft CEO where there was showing of his "unique personal knowledge of relevant facts.")

[21] *See General Star*, 210 F.R.D. at 83 (noting that an unequivocal statement of a lack of relevant knowledge by a proposed deponent is required to support an argument of lack of knowledge).

[22] *See Six West Retail Acquisition*, 203 F.R.D. at 102 ("Unless it can be demonstrated that a corporate official has some unique knowledge…it may be appropriate to preclude a redundant deposition of this highly-placed executive while allowing other witnesses with the same knowledge to be questioned."); *General Star*, 210 F.R.D. at 83, ("A court will often deny a request to depose a high ranking corporate official when lower ranking executives have access to the same information."); *Travelers Rental Co., Inc. v. Ford Motor Co.*, 116 F.R.D. 140, 145-46 (D. Mass. 1987) (citing with approval cases deferring the depositions of high-level executives until subordinates with supposedly equal or greater knowledge have been deposed).

What about Rule 30(b)(6)?

Rule 30(b)(6) provides for the deposition of a corporation, through the officer of the named organization's choosing. This vehicle streamlines the discovery process to provide the party seeking discovery with the person most informed and most appropriate to answer the questions proposed by the opposing party. Rather than an apex deposition pursuant to Rule 30(a)(1), "[t]he preferred approach for deposing a corporation is the use of Rule 30(b)(6) which requires the corporation to obtain the information."[23] Rule 30(b)(6) was enacted to put the burden on the corporation to produce the persons to testify to the areas of examination specified in the deposition notice. With the enactment of Rule 30(b)(6), a party may be assured that it will obtain the corporation's knowledge and position with respect to the case. Of course, Rule 30(b)(6) specifically does not preclude other depositions, and "if [the plaintiff is] dissatisfied with the corporation's selection of deponents, plaintiffs can then select an officer, director, or managing agent."[24] Nevertheless, in resisting apex depositions, Rule 30(b)(6) is a useful alternative to propose to the court as an alternative discovery method, guaranteed to be less intrusive and less prone to abuse and harassment, and therefore discovery fights, than is the apex deposition.

Plan accordingly

Should the CEO of the hospital be directly involved in decisions impacting patient care? Should the president of a nationwide group of long-term care communities be informed of the specifics of alleged resident abuse? While such knowledge may, marginally or otherwise, advance the interests of the corporation, answering "yes" to these questions makes resisting apex depositions exceedingly difficult. While this sword is double-edged, as a CEO unfamiliar with patient care is likely to foster the perpetuation of the stereotype discussed at the outset of this article, it may be the best way to insulate your client's apex officers from being compelled to help the plaintiff's attorney play that stereotype in front of a jury. Since executives with unique personal knowledge of facts giving rise to litigation are far more likely to have their depositions taken, however, health care providers should precisely define the roles of their top executives with this consideration in mind.

Conclusion

It is difficult, complex and costly to resist the deposition of a health care provider's top executives. Keeping in mind, however, that excessive damage awards in health care litigation can be and often are driven by savvy plaintiffs encouraging the jury to believe the defendant corporation made its decisions based on the bottom line, rather than on its mission as a collection of healers, makes resistance more attractive. Testimony regarding costs associated with transferring or discharging patients, or with one procedure versus another, can create the appearance of fire where there is no smoke. In short, if the plaintiff wants to play that sound bite to a jury, force them to work for it. Courts and the Federal Rules have outlined steps a plaintiff must take to get to the top of the corporate ladder. By being mindful of the guidelines discussed above, the attorney defending a health care provider can not only control the flow of information and potentially harmful, if immaterial, testimony, but also force the plaintiff to reveal her true intentions: to harass your client into giving up a clip to play in front of a jury. If you can succeed in forcing the plaintiff to show her hand, you will succeed in preventing the apex deposition.

[23] *Folwell v. Hernandez*, 210 F.R.D. 169, 173 (M.D.N.C. 2002)
[24] *Id.*

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