Filing # 137384288 E-Filed 10/27/2021 02:03:30 PM

RECEIVED, 10/27/2021 02:04:21 PM, Clerk, Supreme Court

William W. Large
Florida Justice Reform Institute
210 South Monroe Street
Tallahassee, Florida 32301
Email: william@fljustice.org

October 27, 2021

Via Florida Courts E-Filing Portal

The Honorable Justices of the Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1925

Re: *In re: Amendment to Florida Rule of Civil Procedure 1.280*, Case No. SC21-929

To the Honorable Justices of the Florida Supreme Court:

I write on behalf of the Florida Justice Reform Institute ("FJRI") and the U.S. Chamber Institute for Legal Reform ("ILR"). FJRI is the state's leading organization of concerned citizens, business owners and leaders, doctors, and lawyers who seek the adoption of fair legal practices to promote predictability and personal responsibility in the civil justice system. FJRI represents a broad range of businesses who share a substantial interest in a litigation environment that secures the just, speedy, and inexpensive determination of civil disputes, including through a discovery process that is not overly burdensome and is used only in service of its truth-seeking function. ILR, part of the Chamber of Commerce of the United States of America, is the nation's most influential and successful advocate for civil justice reform. Its mission is to champion a fair legal system that promotes economic growth and opportunity. Given their membership interests, FJRI and ILR strongly support the Court's decision

to amend Florida Rule of Civil Procedure 1.280 to codify the apex doctrine and to extend it to apply to high-level corporate officials.

As this Court well knows, discovery is and should be a tool, used reasonably, to uncover the facts in any dispute. *See Elkins v. Syken*, 672 So. 2d 517, 522 (Fla. 1996). Yet enterprising plaintiffs' attorneys often use discovery as a weapon and a means of gaining leverage over corporate defendants. One way this is done is by seeking to depose a defendant's high-level corporate executives, not because such deposition is "reasonably calculated to lead to the discovery of admissible evidence," *see* Fla. R. Civ. P. 1.280(b)(1), but because doing so will impose logistical hurdles that may push the defendant to settle the case rather than expend time and resources fighting the deposition. *See, e.g.*, Christopher M. Tauro & Kip J. Adams, *Protect High-Level Corporate Officials from Unnecessary Depositions*, 54 No. 2 DRI for Def. 8 (Feb. 2012).

For almost anyone, a deposition is inconvenient and distracting and will cause a loss in work production. This interruption in productivity, however, is exacerbated exponentially for high-ranking executives, whose time must be efficiently managed to focus on a business's success. If executives could routinely be deposed in cases when they lack unique, personal knowledge of the issues being litigated, the burden of litigation on those businesses would increase without any corresponding benefit, and it could lead to a flood of discovery requests for that same executive in other cases, leaving him or her little time to actually do the job of running a business. *See, e.g.*, *Salter v. Upjohn Co*., 593 F.2d 649, 651 (5th Cir. 1979) (upholding an order preventing the deposition of president of defendant company due to fact that president was "extremely busy" and had no personal knowledge of case; other employees with knowledge had been made available); *see also, e.g.*, *Baine v. Gen. Motors Corp*., 141 F.R.D. 332 (M.D. Ala. 1991) (listing among reasons for quashing a deposition of head of Buick division of defendant the officer's "responsibilities to the corporation"). The availability of such invasive discovery also deters worthy candidates from accepting high-level corporate positions, as they face the risk of becoming pawns in litigation—even after leaving that employment. Of concern too is that discovery obtained from such an "apex" executive would carry an unwarranted inference of substantial weight, just by virtue of the executive's position, even where the executive lacks unique, personal knowledge of the facts at hand. Sam Walton himself was required to sit for a deposition regarding a

slip-and-fall in a Wal-Mart store, which he likely did not personally witness. *See Wal-Mart Stores, Inc. v. Street*, 754 S.W.2d 153 (Tex. 1988).

As such, whether for purposes of harassment or as a part of a fishing expedition in an over-aggressive litigation strategy, apex corporate executives are often sought to be deposed despite their lack of knowledge regarding the issues being litigated. Allowing such unconstrained "top down" discovery—and the inevitable abuses of such discovery—leads "to a lack of public confidence in the credibility of the civil court process." *See Elkins*, 672 So. 2d at 522. Moreover, this backwards method of obtaining discovery does nothing to satisfy this Court's guiding principles of relevancy and practicality in discovery.

Florida courts have quite rightly applied the apex doctrine to high-level government officials but, until this Court took action, they had not yet extended the doctrine to the corporate context. The Court's rule amendments correct that omission and enact reasonable safeguards before such a deposition may be held. A high-level corporate officer from whom a deposition is sought will be permitted to explain in an affidavit or declaration that he or she "lacks unique, personal knowledge of the issues being litigated." Once the would-be deponent has met that burden, the party seeking the deposition can overcome it only by demonstrating that the party has "exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information." This burden-shifting framework quite appropriately "forces all sides to examine the actual necessity of the deposition, challenges the party seeking the deposition to present good-faith arguments to a court that it needs the deposition, and prevents a litigant from using it to gain leverage in the litigation or to harass the top brass of an opponent." *See* Tauro & Adams, *supra*, at 6. To avoid any doubt, the Court's amendments also appropriately recognize that *former* high-level corporate and government officials face the same threat of invasive discovery, and ensures that even former executives may avail themselves of the protections provided by the new rule.

For all these reasons, FJRI and ILR are supportive of the amendments to Rule 1.280, which will ensure parties do not engage in unfettered "top down" discovery in either the corporate or governmental context. We thank the Court for its thorough attention to this matter of great public importance.

Respectfully submitted,

/s/ William W. Large

William W. Large (FBN 981273)
President
Florida Justice Reform Institute