

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENT TO FLORIDA
RULE OF CIVIL PROCEDURE 1.280**

CASE NO. SC21-929

COMMENTS OF THE CIVIL PROCEDURE RULES COMMITTEE

Jason Stearns, Chair of the Civil Procedure Rules Committee (“the Committee”), and Joshua E. Doyle, Executive Director of The Florida Bar, file these comments to the Court’s recent adoption of the Apex Doctrine through amendment to Florida Rule of Civil Procedure 1.280.

By a vote of 34-0-3, the Committee suggests that the Court modify new rule 1.280(h) as follows (new language is indicated by underlining; deletions are indicated by struck-through type):

(h) Apex Doctrine. Alf a party seeks to depose a
current or former high-level government or corporate
officer, the officer or a party may move for an order ~~may~~
~~seek an order~~ preventing the officer from being subject to
~~a deposition.~~ The movant has the burden to persuade
the court that the officer is high-level for purposes of this
rule. ~~The motion, whether by a party or by the person of~~
~~whom the deposition is sought,~~ must be accompanied by
an affidavit or declaration of the officer explaining that
the officer lacks unique, personal knowledge of the issues
being litigated. If the movant officer meets these
burdens of production, the court must ~~shall~~ issue an
order preventing the deposition, unless the party seeking
the deposition ~~demonstrates~~ establishes either:

(1) that the officer is not high-level for
purposes of this rule;

or (2) that it the party has exhausted other
discovery, that such discovery is inadequate, and that
the officer has unique, personal knowledge of
discoverable information.

RECEIVED, 11/09/2021 09:25:20 AM, Clerk, Supreme Court

If the party seeking the deposition meets its burden, then the motion must be denied. In denying the motion, the court may limit the scope and manner of the taking of the deposition under rule 1.280(c). If the motion is granted, t~~The court may vacate or modify the order preventing the deposition if, after additional discovery, the party seeking the deposition can meet its burden of persuasion under this rule. The burden to persuade the court that the officer is high-level for purposes of this rule lies with the person or party opposing the deposition.~~

The Committee now explains the reasons for these suggested changes.

The Committee suggests changing the first sentence so that the rule clearly states that either the officer or a party can seek relief under the rule. The Committee suggests adding the second sentence so that movant's "burden to persuade" is placed immediately before the movant's burden to produce the officer's affidavit. With that change, the last sentence is no longer needed.

The Committee believes that the rule should state that if the movant persuades the court that the officer is high-level, the nonmovant has the right to try to establish that the officer is not high-level.

The Committee also suggests expressly stating that a court denying a motion under this rule may limit the scope and manner of the taking of the deposition under rule 1.280(c). Several committee members were concerned about the possibility of successive motions for protective order being filed after the trial court orders a deposition to proceed. This addition, which tracks language from rule 1.280(d), encourages the court and the parties to timely address any potential limitations on the scope and manner of the deposition.

The other suggested changes are intended to simplify the rule and to conform with *In re Guidelines for Rules Submissions*, AOSC06-14 (Fla. 2006).

The Committee understands that the Apex Doctrine will apply to all depositions sought under the Florida Rules of Civil Procedure, including those sought under rules 1.290, 1.310, and 1.320. If that understanding is incorrect, the Committee suggests that the Court clarify the scope of the doctrine's application.

Respectfully submitted on this 9th day of November 2021.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I certify that this comment was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.045.

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