

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENT TO FLORIDA  
RULE OF CIVIL PROCEDURE 1.280

N. SC21-929

The undersigned respectfully opposes and submits his comments with respect to the proposed changes to Florida Rule of Civil Procedure 1.280 regarding the Apex Rule, and states:

**I. The Proposed Rule Requires A Party Seeking The Officer's Deposition To Meet Too High A Threshold Standard**

The proposed Rule of Civil Procedure 1.280 initially requires the party opposing the deposition to meet a burden of persuasion that the officer to be deposed is “*high-level for purposes of this rule*”. It seems likely that such a showing will be readily made for any officer. When such a showing is made by the party opposing the deposition, the proposed rule shifts the burden to the party seeking the deposition. The burden on the party opposing the deposition is minor. The shifted burden to the party seeking deposition is extreme, potentially swallowing the right to depose an officer. The proposed rule continues:

*the court must issue an order preventing the deposition, unless the party seeking the deposition establishes either (1) that the officer is not high-level for purposes of this rule, or (2) that the party has exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information.*

It is too high of a standard of proof to require the party seeking deposition to “*establish*” that all other discovery has been exhausted, all other discovery is inadequate, and the officer has unique, personal knowledge prior to deposition. By the Merriam-Webster Dictionary, “*establish*” means to “*put beyond doubt*”. The party seeking to depose should not be held to the same evidence

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standard as a criminal trial. Such a standard does not ever apply to a civil case. Moreover, the deposing party cannot “*put beyond doubt*” the nature of the officer’s testimony until the deposition is completed. It is a monumental and possibly unintended step taken by the proposed rule to change the basis for viable discovery from “*calculated to lead to the discovery of admissible evidence*” to “*put beyond doubt*”. The proposed rule should not require the deposing party to prove all of the above factors beyond any doubt. It is unnecessary for the proposed rule to require the party seeking the deposition to show that it has exhausted all other options for discovery and that other discovery is inadequate. The only requirement necessary should be for the party seeking deposition to show “...*the officer has unique, personal knowledge of discoverable information*”. If the information is “*unique*”, then by definition no other witness can provide the same information. If the information is “*personal*” to the officer, then no other witness can provide it. By definition, if the information is unique and personal, it will satisfy the other requirements promulgated by the proposed rule.

Respectfully Submitted,

TERRELL HOGAN



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