

SUPREME COURT OF FLORIDA AMENDS RULE 1.280 TO ADD APEX DOCTRINE TO CORPORATE OFFICIALS

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U.S. Litigation and Dispute Resolution Alert

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On 26 August 2021, the Supreme Court of Florida (the Court), on its own motion, issued an opinion amending Florida Rule of Civil Procedure 1.280 (the Opinion).¹ The amendment officially codifies the common-law “Apex Doctrine” and extends its reach to high-level corporate officers.

BACKGROUND

Prior to the Opinion, the Apex Doctrine protected high-level government officials from depositions “unless and until the opposing parties have exhausted other discovery and can demonstrate that the [high-level government official] is uniquely able to provide relevant information which cannot be obtained from other sources.”² The purpose of the doctrine was to prevent agency heads from being subjected to the type of harassment that hinders both the efficiency of agencies and state government as a whole.³

In the 2019 appellate case *Suzuki Motor Corp. v. Winckler*, the First District Court of Appeals held that the Apex Doctrine could not be applied to corporate officials, and noted, “no Florida court has adopted the apex doctrine in the corporate context.”⁴ A dissent from Judge Thomas acknowledged this fact but noted that the rationale of the doctrine, protecting high-level officials from harassment and unjustified discovery, is equally applicable to the private sector.⁵ The Court now takes a similar stance.

NEW LANGUAGE

The Opinion amends Rule 1.280 by adding new subsection (h) titled “Apex Doctrine.” Rule 1.280(h) shall read as follows:

(h) Apex Doctrine. A current or former high-level government or corporate officer may seek an order preventing the officer from being subject to a deposition. 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 officer meets this burden of production, the court shall issue an order preventing the deposition, unless the party seeking the deposition demonstrates that it has exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information. The court may vacate or modify the order 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.⁶

APPLICATION

Rule 1.280(h) does not create automatic protection for high-level officers. Rule 1.280(h) puts the burden on the party resisting deposition to (i) persuade the court that the would-be deponent meets the high-level officer requirement, and (ii) produce an affidavit or declaration explaining the official's lack of unique, personal knowledge of the issues being litigated.⁷

In the Opinion, the Court refuses to define the term “high-level officer,” noting that there is a “rich body of case law applying the term.”⁸ A proper affidavit or declaration will sufficiently “show the relationship between the officer's position and the facts at issue in the litigation.”⁹ Parties who fail to meet the standards of Rule 1.280(h) may still seek relief under Rule 1.280(c).¹⁰

Rule 1.280(h) is effective immediately and applies to pending cases.

KEY TAKEAWAYS

- Parties in litigation need to be aware of this amendment as it is effective immediately and applies to pending cases;
- Those looking to depose high-level corporate officers need to be aware of the new issues Rule 1.280(h) may create for their discovery plan;
- Corporate entities looking to take advantage of Rule 1.280(h) should familiarize themselves with the two burdens placed on parties resisting deposition: (i) persuade the court that the would-be deponent meets the high-level officer requirement, and (ii) produce an affidavit or declaration explaining the official's lack of unique, personal knowledge of the issues being litigated.

FOOTNOTES

¹ *In Re: Amendment to Florida Rule of Civil Procedure 1.280*, No. SC21-929 (Fla. August 26, 2021)

² *Suzuki Motor Corp. v. Winckler*, 284 So. 3d 1107, 1109 (Fla. 1st DCA 2019) (quoting *Dep't of Agric. & Consumer Servs. v. Broward Cnty.*, 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002))

³ *Dep't of Agric. & Consumer Servs. v. Broward Cnty.*, 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002)

⁴ *Id.*

⁵ *Id.* at 1113 (Thomas, J. dissenting).

⁶ *In Re: Amendment to Florida Rule of Civil Procedure 1.280*, at Appx.

⁷ *Id.* at 12.

⁸ *Id.* at 9.

⁹ *Id.*

¹⁰ *Id.* at 14

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