IN THE SUPREME COURT OF FLORIDA

AMENDMENTS TO THE FLORIDA)
RULES OF EVIDENCE) Case No. **SC00-607**
_____/

COMMENTS OF THE SOLICITOR GENERAL*

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INTRODUCTION AND SUMMARY

The Solicitor General on behalf of himself, Attorney General Robert A. Butterworth, and Statewide Prosecutor Melanie A. Hines, hereby responds to the Court's July 13, 2000, Order Requesting Comments. The Solicitor General's comments address the issues of whether Chapter 98-2 is substantive or procedural and whether the Court should follow the recommendation of the Florida Bar Code and Rules of Evidence Committee ("Bar Committee").

As to the first issue, the Solicitor General submits that provisions of the Evidence Code are both procedural and substantive in nature and it is inappropriate and unnecessary to categorize Chapter 98-2 or any other provision as solely substantive or solely procedural. The Florida Constitution vests the Court and the Legislature with concurrent authority to adopt rules of evidence, and the Court is free to adopt or modify a rule of evidence enacted by the Legislature as it deems appropriate.

As to the second issue, the Solicitor General neither supports nor opposes the recommendation of the Bar Committee, but offers the legislative history of Chapter 98-2 to demonstrate that the rule was originally intended to apply only to a narrow class of civil cases, and not to criminal cases. Narrowing the application of the rule to specific civil actions may alleviate many of the Bar Committee's concerns while furthering the legislative purpose underlying Chapter 98-2.

IS CHAPTER 98-2 SUBSTANTIVE OR PROCEDURAL IN NATURE ?

This Court has consistently recognized that the "Florida Evidence Code is both substantive and procedural in nature." In re Florida Evidence Code, 675 So.2d 584 (Fla. 1996); In re Amendment of Florida Evidence Code, 497 So.2d 239, 240 (Fla. 1986). Furthermore, the Court has never attempted to define which portions of the Code are substantive and which portions are procedural,[1] and such analysis is unnecessary to resolve this case.

The distinction between substantive and procedural laws has been described as a "twilight zone"[2] and as Justice Terrell once noted, "[t]he limits of procedural and substantive law have not been defined and no two would agree where the one leads off and the other begins." Petition of Florida State Bar Ass'n for Promulgation of New Florida Rules of Civil Procedure, 199 So. 57, 59 (Fla. 1940). The "general tests" for determining whether a law is substantive or procedural in nature are set forth in Justice Atkins' concurring opinion in In re Florida Rules of Criminal Procedure, 272 So.2d 65,

[1] In In re Florida Evidence Code, 372 So.2d 1369, 1370 (Fla. 1979), the Court adopted the Evidence Code as amended through 1978 on a temporary basis and allowed interested parties to provide objections to individual rules by stating "the basis why the challenged rule is procedural rather than substantive." No objections were filed, so the Court did not address the procedural/substantive issue. See In re Florida Evidence Code, 376 So.2d 1161 (Fla. 1979). Similarly, in the subsequent cases involving the Evidence Code, there does not appear to have been any objection to the language adopted by the Legislature, which would have caused the Court to consider the nature of any particular provision of the Evidence Code.

[2] See generally Earl, The Rulemaking Power of the Florida Supreme Court: The Twilight Zone Between Substance and Procedure, 24 U. Fla. L. Rev. 87 (1971).

66 (Fla. 1972). Those tests have become maxims of Florida law, but they are much more difficult to apply than to recite. Their application is especially difficult in the context of the Evidence Code. Cf. Means, The Power to Regulate Practice and Procedure in Florida Courts, 32 U. Fla. L. Rev. 442, 470-72 (1980).

An argument could be made that the entire Evidence Code is procedural in nature because it governs the parties, their counsel, and the court throughout the progress of the case.[3] However, this Court has declined to reach such a conclusion in the past, see In re Florida Evidence Code, 376 So.2d 1161, 1162 (Fla. 1979), and should not do so in this case. Such a conclusion would be inconsistent with article III, section 11(a)(3), Fla. Const., which precludes the Legislature from adopting "rules of evidence in any court" by special law or general law of local application but thereby implicitly authorizes the Legislature to adopt such rules by general law. Together article III, section 11(a)(3) and article V, section 2, Fla. Const., provide the Legislature and the Court with concurrent jurisdiction over the rules of evidence.[4]

In addition to the practical and policy reasons why the Court should not categorize

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[3] Cf. Milton v. Leapai, 562 So.2d 804, 807 (Fla. 5th DCA 1990), rev'd on other grounds 595 So.2d 12 (Fla.1992) ("Procedural law is the machinery for carrying on the suit, including pleading, process, evidence and practice.") (citing Heberle v. P.R.O. Liquidating Company, 186 So.2d 280 (Fla. 1st DCA 1966)) (emphasis supplied).

[4] Contrast article V, § 15, Fla. Const., which vests "exclusive jurisdiction" in the Supreme Court over attorneys and bar admission.

a rule of evidence as exclusively procedural or exclusively substantive, there is very little authority (and no controlling authority) to guide such an effort. For example, the holding in Dinter v. Brewer, 420 So.2d 932 (Fla. 3rd DCA 1982), suggests that the former testimony exception in section 90.804(2)(a) is not procedural in nature. By contrast, Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961), and several scholarly articles suggest that hearsay exceptions are procedural in nature.

In Dinter, the Third District held that the former testimony hearsay exception in section 90.804(2)(a) is "cumulative" to Fla. R. Civ. P. 1.330 regarding the use of depositions as substantive testimony. See Dinter, 420 So.2d at 934-35; see also Ehrhardt, Florida Evidence § 804.2 (2000) (advocating the Dinter rule). The holding in Dinter suggests that the former testimony exception is not procedural in nature because if it were, the more narrow procedural rule would have controlled the admission of the deposition testimony. Cf. Rodriguez v. State, 609 So.2d 493, 502-03 (Fla. 1992) (Kogan, J., dissenting). A different rule applies in criminal cases, see id. at 498-99, and a recent decision from the Second District appears to conflict with Dinter. See Friedman v. Friedman, 25 Fla. L. Weekly D1641 (Fla. 2nd DCA July 7, 2000) (holding that the admissibility of non-party depositions in civil cases is governed by Fla. R. Civ. P. 1.330(a)(3) rather than section 90.803(22), as amended).

In Dallas County, a case predating the adoption of the Federal Rules of Evidence,

the Fifth Circuit concluded that hearsay rules are a matter of procedure rather than a matter of substance. The case involved the admission of a newspaper article as substantive evidence over a hearsay objection. See Dallas County, 286 F.2d at 390, 392. The court affirmed the admission of the newspaper article and rejected an argument that Alabama law, rather than federal common law, controls the admission of the article pursuant to the Erie[5] doctrine. Id. at 392-93 (citing Monarch Insurance Co. of Ohio v. Spach, 281 F.2d 401 (5th Cir. 1960), which held that an ex parte statement under oath which was inadmissible under § 92.33, Fla. Stat., was admissible in the trial of a diversity case in federal court because the admission of evidence was a procedural matter controlled by federal law). By not applying the hearsay exception in Alabama law, the court must have concluded that the exception was procedural in nature and therefore superseded by federal law.

Commentary on the hybrid nature of the Federal Rules of Evidence and the collaborative process between Congress and the Supreme Court through which the Rules are adopted also offers some guidance, even though the constitutional and statutory provisions governing the adoption of rules of procedure for the federal courts are different than the constitutional provisions governing the adoption of rules of procedure for Florida

[5] Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) (in diversity cases, federal procedural law and state substantive law applies).

courts.[6] See, e.g., Comment, Separation of Powers and the Federal Rules of Evidence, 26 Hastings L.J. 1059 (1975); Joiner, Uniform Rules of Evidence for the Federal Courts, 20 F.R.D. 429 (1957); A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts, 30 F.R.D. 73 (1962) [hereafter "Preliminary Report]. The Hastings Law Journal article traces the development and adoption of the Federal Rules of Evidence. It analyzes the basis of the Supreme Court's authority to adopt procedural rules and the scope of the prohibition against the Court adopting substantive rules. See Comment, supra at 1061-67. The article concludes that majority of the Federal Rules of Evidence are clearly procedural "since they are involved with the orderly dispatch of judicial business." Id. at 1069-70. However, the article further concludes that "[r]ules concerning privileges, presumptions and burdens of proof involve more and should be classified as substantive and thus beyond the Supreme Court's rulemaking power." Id. at 1070 (internal quotations omitted).[7]

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[6] Compare 28 U.S.C. §§ 2072-74 (Congressional delegation of authority to the U.S. Supreme Court to prescribe rules regulating the practice and procedure for federal courts, provided that such rules do not "abridge, enlarge or modify any substantive right") with art. V, § 2, Fla. Const.

[7] Accord Preliminary Report, supra, at 107-08 (parole evidence rule, conclusive presumptions, and burden of proof are substantive in nature); Joiner, supra, at 435 (privileges, burden of proof, and conclusive presumptions are substantive in nature); Dallas County, 286 F.2d at 392 n.5. See also 28 U.S.C. § 2074(b) (requiring Congressional approval of any rule "creating, abolishing, or modifying an evidentiary privilege").

In discussing the substantive nature of privileges, the article submits that privileges promote social policy rather than regulating court procedure. See id. Privileges are derived from the legislature's policy decision to protect certain interpersonal relationships, even at the expense of leaving the truth uncovered in some lawsuits. Id. Accord Ehrhardt, Florida Evidence §§ 303.1-304.1 (2000) (certain types of presumptions are based upon social policy). By contrast, most hearsay exceptions do not promote social policy,[8] but are based on judicial experience regarding the type of out-of court statements that are sufficiently reliable to be introduced as evidence. See, e.g., Idaho v. Wright, 497 U.S. 805, 817 (1990) (discussing concept of "firmly rooted" hearsay exceptions); Ehrhardt, Florida Evidence § 802.2 (2000) (same).

Section 90.803(22), at least as it existed prior to the 1998 amendments, would appear to fall into the latter category. The hearsay exception for former testimony is "firmly rooted" in the law, at least where the declarant is unavailable. See Ohio v. Roberts, 448 U.S. 56 (1980); Ehrhardt, Florida Evidence § 802.2 (2000). The exception was recognized in English common law and has been in Florida law since 1893. See ch. 4135, Laws of Fla. (1893) (codified as amended in § 92.22, Fla. Stat. (1975)); see also

[8] But see § 90.803(23) and (24), Fla. Stat., which are clearly based upon social policy. The hearsay exceptions in those subsections permit the use of certain out-of-court statements made by a child under the age of 11, an elderly person, or a disabled adult which describes abuse suffered by the declarant. The exceptions are intended to protect the declarant from the mental and emotional harm that would likely result from in-court testimony regarding the abuse and other related sensitive matters.

Lawrence, The Admissibility of Former Testimony Under Rule 804(b)(1): Defining a Predecessor in Interest, 42 U. Miami L. Rev. 975 (1988) (discussing history of the former testimony hearsay exception, including the movement away from the "mutuality of parties" requirement to the "similar interests and motive test" under the federal rules).

In sum, even if categorization of Chapter 98-2 was necessary, there is not definitive authority to guide the Court on this issue. To avoid the practical and policy problems implicated by a categorization of Chapter 98-2, the Solicitor General submits the Court should follow its historic approach in reviewing changes to the Evidence Code and not categorize Chapter 98-2 as either procedural or substantive. Instead, the Court should reaffirm the hybrid nature of the Evidence Code with a focus on the policy rationale underlying section 90.803(22), and adopt or refine the rule as necessary to further that policy.

SHOULD THE COURT REJECT OR ADOPT THE BAR COMMITTEE'S RECOMMENDATION?

The Solicitor General will not address the Bar Committee's specific comments and concerns regarding Chapter 98-2, nor will the Solicitor General advocate the adoption or rejection of Chapter 98-2. Instead, the Solicitor General offers the legislative history of Chapter 98-2 which demonstrates that it was originally intended to address only a limited class of civil cases and was not directed to criminal cases. Once the policy concerns

underlying Chapter 98-2 are placed in the proper perspective, the Solicitor General submits that many of the concerns regarding Chapter 98-2 may be reduced or eliminated by adopting a modified version of the rule, which limits the scope of Chapter 98-2 accordingly.[9]

A statutory hearsay exception for former testimony has existed in Florida since 1893.[10] The hearsay exception in section 90.803(22) was adopted in 1976 as part of the comprehensive new Florida Evidence Code. See Ch. 76-237, Laws of Fla. The section applied to "[f]ormer testimony given by the declarant at a civil trial, when used in substantially the same civil proceeding." The Sponsors' Note for section 90.803(22) explained its purpose as follows:

> This exception makes admissible testimony given by a witness at a civil trial when it is introduced at a subsequent civil trial which is substantially

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[9] While the constitutionality of Chapter 98-2 is not at issue in this proceeding, the use of an available witness' former testimony implicates the Confrontation Clause. See Ohio v. Roberts, 448 U.S. 56 (1980) (holding that the use of a witness' preliminary hearing testimony at trial does not violate the defendant's rights under the Confrontation Clause of the Sixth Amendment where the witness was unavailable at trial and the defendant previously had the opportunity to cross-examine the witness); Barber v. Page, 390 U.S. 719 (1968) (describing the defendant's right to confront witnesses against him as a "fundamental requirement" of a fair trial and requiring a good-faith dilligent effort to locate the witness before she will be deemed to be "unavailable"). This issue could be avoided by limiting the application of Chapter 98-2 to civil cases.

[10] See Ch. 4135, Laws of Fla. (1893) (codified as amended in § 92.22, Fla. Stat. (1975)). The exception in section 92.22 was more akin to section 90.804(2)(a) than to section 90.803(22) because it required the declarant to be unavailable. See generally Glicksberg, Former Testimony Under the Uniform Rules of Evidence and in Florida, 10 U. Fla. L. Rev. 269 (1957) (discussing the development of § 92.22). Appendix B includes a chart which compares the different versions of the statutory hearsay exception for "former testimony" that have been in effect since 1893.

> the same proceeding. Thus, in a retrial of a case it is unnecessary to call as a witness a person who testified during the first trial. This exception expands the use of evidence given at a former trial from that provided in existing Fla. Stat. § 92.22 which allowed the use of this evidence only when "a substantial reason ... why the original witness or document is not produced" is shown. Under this exception, this evidence is admissible regardless of the availability of the witness.

Fla. Stat. Ann., Vol. 6C at 358. Section 90.803(22) was amended in 1978 to narrow its application to "a retrial ... involving identical parties and the same facts." See Ch. 78-361, Laws of Fla. The Commentary on the 1978 amendment explained its purpose as follows:

> The amendment restricts the admissibility of former testimony under this exception to a retrial of a civil trial involving the identical parties and the same facts. The amendment did not affect the admissibility of former testimony under Section 90.804(2)(a) when the witness is unavailable.

Fla. Stat. Ann., Vol. 6C at 359. This Court adopted the Evidence Code, including section 90.803(22) as amended by Chapter 78-361, Laws of Fla., as a rule of evidence to the extent that it was procedural in nature. See In re Evidence Code, 372 So.2d 1369 (Fla. 1979), clarified 376 So.2d 1161 (Fla. 1979). The Court did not discuss whether section 90.803(22), or any other provision of the Evidence Code, was substantive or procedural in nature.

Section 90.803(22) remained unchanged for twenty years until it was amended by Chapter 98-2, Laws of Fla. CS/HB 1597, the bill enacted as Chapter 98-2, was passed

by the Legislature twice – once in the 1997 regular session and then again in the 1998 regular session in response to Governor Chiles' veto.[11]

HB 1597 was filed in the 1997 regular session by Representative John Thrasher. A companion measure, SB 1830, was filed by Senator Jim Horne. The bills would have expanded the hearsay exception in section 90.803(22) to include former testimony given by certain enumerated persons at "the same or a different proceeding," rather than only at a retrial. See App. C. The expanded exception would have applied only in civil trials and the former testimony could be used only to "establish the degree of fault of [the declarant], or to establish the authenticity of documentary evidence relevant to the degree of fault of [the declarant]." Id.

HB 1597 was amended by the House Civil Justice and Claims Committee to clarify that the court could exclude the former testimony pursuant to its discretion under sections 90.402 and 90.403, and those amendments were incorporated into a committee substitute. See App. D. SB 1830 was amended by the Senate Judiciary Committee to authorize the use of former testimony upon the same terms and with the same qualifications as set forth in section 90.804(2)(a), except that the declarant need not be

[11] The substance of Chapter 98-2 was actually passed by the Legislature three times, twice in HB 1597 and another time in section 12 of CS/SB 874, the tort reform bill approved by the Legislature in the 1998 regular session. CS/SB 874 was vetoed by Governor Chiles for reasons unrelated to the amendments to section 90.803(22). See Veto Message for CS/SB 874 (May 18, 1998) (available online at http://www.state.fl.us/eog/govdocs/veto/1998veto/sb874_veto.html).

unavailable. The committee testimony and debate on HB 1597 and SB 1830 focused only on the application of the expanded exception in civil cases; it does not appear that either committee considered (or intended) the application of the expanded exception in criminal cases.[12] Our review of the tapes of the committee hearings on HB 1597 and SB 1830 did not identify any discussion regarding the potential application of the amended exception to criminal cases. Accord Letter from Senator Horne to Governor Chiles regarding CS/HB 1597 (May 29, 1997)[13] (unequivocally stating "***This legislation does not apply to criminal cases.***") (emphasis original) (copy in App. H). The testimony and debate at the committee hearings focused on the application of the amended exception in civil cases, particularly mass-tort cases.

The committee testimony of the sponsors and proponents of the bills indicate that the purpose of Chapter 98-2 is to increase judicial economy and efficiency by reducing duplicative depositions, especially in multi-party and mass-tort litigation where the use

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[12] See Staff Analysis of CS/HB 1597, at 3; Staff Analysis of SB 1830, at 6 ("The hearsay exception as expanded by the bill would apply only in civil trials."), 8 (explaining that the "amendment amends s. 90.803(22) to read identically to s. 90.804(2)(a)" but not mentioning the potential application of the expanded exception in criminal cases). The staff analyses are included in Appendices E and F.

[13] Senator Horne's letter to the Governor responded to a letter that expressed the Bar Committee's opposition to CS/HB 1597. See Letter from Pedro J. Martinez-Fraga to Dexter Douglas (May 19, 1997) (copy in App. G). The issues raised in that letter are substantially the same as the objections to Chapter 98-2 set forth in the Petition filed in this case.

of former testimony is common and of particular value.[14] Accord Lowenthal, Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedures, 63 Fordham L. Rev. 989, 992-93, 1019-27 (1995) (suggesting that the expanded use of former testimony in mass-tort cases would promote judicial efficiency without sacrificing fairness to the parties because of the unique nature of such cases). Opponents of HB 1597 and SB 1830 argued that the bills were intended for and would only benefit mass-tort defendants such as asbestos manufacturers.[15] Proponents of the bills responded that the expanded hearsay exception would benefit both plaintiffs and defendants in mass-tort

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[14] See, e.g., Comments of Rep. Thrasher and Rep. Silver on HB 1597, Tape of House Floor Debate (Apr. 24, 1997) (available at Florida State Archives, R.A. Gray Building, Series 38, Box 252); Comments of Sen. Horne explaining purpose of SB 1830 and CS/HB 1597 (Apr. 30-May 1, 1997) (tapes available at Senate Document Center, Room 304 of the Capitol). Accord Comments of George Meros, representing the Florida Chamber, Tape Recording of Workshop on HB 1597 by House Civil Justice and Claims Committee (Apr. 8, 1997) (available at Florida State Archives, R.A. Gray Building, Series 414, Box 1146) [hereafter "Meros Testimony"]. And see Legislative Bill Analysis for HB 1597 by Office of the Governor, at 2, 3 (May 15, 1997) (recommending that the Governor allow the bill to become law without signature, and noting that the Bar Committee is "more comfortable with [the bill] now since the amendments were adopted") (available at Florida Records Storage Center, SRC Box 130803, Agency No. 6, Accession No. 98-1892); Letter from Attorney General Butterworth to Governor Chiles regarding CS/HB 1597 (May 28, 1997) ("The primary intent of the legislation is laudable: reducing the cost of civil litigation.") (copy in App. I).

[15] See, e.g., Testimony of Evan Yaglewell, Esq., representing asbestos disease victims, Tape Recording of Workshop on HB 1597 by House Civil Justice and Claims Committee (Apr. 8, 1997) (available at Florida State Archives, R.A. Gray Building, Series 414, Box 1146); Testimony of Paul Jess, representing Florida Academy of Trial Lawyers, Tape Recording of Hearing on SB 1830 by Senate Judiciary Committee (Apr. 23, 1997) (available at Florida State Archives, R.A. Gray Building, Series 625, Box 846); Testimony of Wayne Hogan, representing asbestos disease victims, Tape Recording of Hearing on SB 1830 by Senate Judiciary Committee (Apr. 23, 1997) (available at Florida State Archives, R.A. Gray Building, Series 625, Box 846).

cases and that its application was broader than asbestos cases.[16] For example, the proponents suggested that the expanded exception might apply in the event of multiple lawsuits arising out of an accident between a bus and a car. See Meros Testimony, supra. In such circumstances, the car driver's deposition or trial testimony from an earlier suit by a bus passenger could be used by subsequent bus passengers in their suits against the driver, and it might be used by the bus company in suits against it by bus passengers to limit its liability by showing the liability of a non-party (the car driver). Id. The proponents argued that the use of the driver's former testimony (in lieu of additional depositions or trial testimony) would not sacrifice reliability or fairness at the expense of judicial economy because the car driver's testimony would be the same (whether in the first suit or the twentieth) and each plaintiffs' interest in developing that testimony would be the same. Id. Accord Lowenthal, supra, at 992-93, 1019-27.

On the floor of the House, an amendment to CS/HB 1597 was offered to limit the bill's applicability to testimony given after the effective date of the bill. See H. Journ. at 858 (Apr. 24, 1997). That amendment failed,[17] and CS/HB 1597 subsequently passed the House by a vote of 107 to 6. See H. Journ. at 1116 (Apr. 28, 1997).

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[16] See Meros Testimony, supra. See also Johns-Manville Sales Corp. v. Janssens, 463 So.2d 242 (Fla. 1st DCA 1984), rev. denied, 467 So.2d 999 (Fla. 1985) (involving the use of former testimony under section 90.804(2)(a) by plaintiffs in asbestos litigation).

[17] This same amendment was rejected by the Senate. See S. Journ. at 1061 (Apr. 30, 1997) (Amend. 1D).

The Senate adopted a "strike everything" amendment to CS/HB 1597 which conformed the bill to SB 1830, as amended. See S. Journ. at 1095 (Apr. 30, 1997). There were two differences between the "strike everything" amendment and the amendment to SB 1830 adopted by the Senate Judiciary Committee. First, the "strike everything" amendment included the language from CS/HB 1597 which authorized the court to exclude the former testimony pursuant to sections 90.402 or 90.403. Second, the "strike everything" amendment added the phrase "or a person with a similar interest" to the list of persons who could have had an opportunity to develop the former testimony before it can be used in the subsequent proceeding.

The latter change was subject to considerable debate, both in committee and on the Senate floor.[18] The debate centered on the lack of a definition for the phrase "person with a similar interest" and the perceived inequity in allowing former testimony to be used where it may have been given many years ago and the party against whom it was offered did not have an opportunity to cross-examine the witness. Accord Petition at 2 (comment (c)). On this point, the Solicitor General notes that Florida is not the only state whose evidence code includes this phrase; at least six other states have former testimony

[18] See, e.g., Comments of Sen. Campbell in floor debate on Amend 1A to SB 1830 (Apr. 30, 1997) (Tapes 4, 6, 8) (available at Senate Document Center, Room 304 of the Capitol); Testimony of Paul Jess, representing the Florida Academy of Trial Lawyers, and Wayne Hogan, representing asbestos disease victims, Senate Judiciary Committee (Apr. 23, 1997) (commenting on Amend. 1 to Amend. 1 to SB 1830) (tapes available at Florida State Archives, R.A. Gray Building, Series 625, Box 846, amendment available at Florida State Archives, R.A. Gray Building, Series 18, Box 2271).

exceptions which include the same or similar language.[19] While the exceptions in those states require the declarant to be unavailable, the case law interpreting those statutes and rules should provide Florida courts guidance in interpreting the phrase "person with a similar interest" in section 90.803(22).

The Senate approved CS/HB 1597, as amended, by a vote of 37 to 0. See S. Journ. at 1242 (May. 1, 1997). The House concurred in the Senate amendment and then unanimously (118 to 0) passed CS/HB 1597, as amended.[20] See H. Journ. at 1754 (May 1, 1997).

Governor Chiles vetoed CS/HB 1597. In his veto message, the Governor stated:

> I cannot support Committee Substitute for House Bill 1597 because it reduces a party's ability to confront and question a witness. I do not see as beneficial a reform to the Evidence Code which creates an open-ended exception that precludes the right of a litigant to cross-examine witnesses at trial. This bill would primarily operate to the benefit of large, multi-state corporations that have engaged in extensive litigation throughout the country in many venues and jurisdictions. These multi-state corporations would have a distinct advantage of being able to pick and choose from depositions that have never been made public records, and offer these depositions as testimony. The opposing party would not have the right to confront the declarant about the statements.

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[19] See Tex. R. Evid. 804(b)(1); Mont. R. Evid. 804(b)(1); Neb. Rev. Stat. § 27-804; Minn. R. Evid. 804(b)(1); Cal. Evid. Code § 1292(3),; La. Evid. Code § 804.B(1). See also Lowenthal, supra, at 1028 n.187 (referring to the Texas rule as a model and also citing similar rules in California, Hawaii, Nebraska, New Mexico, and Wisconsin).

[20] In explaining the Senate amendment to CS/HB 1597 to the House, Representative Thrasher stated, "the Senate made a technical amendment to the bill." See Tape Recording of House Floor Debate (May 1, 1997) (available at Florida State Archives, R.A. Gray Building, Series 38, Box 253).

> Further, I am concerned that the proposed legislation precludes a fact-finder from evaluating a witness' demeanor and credibility. The proposed legislation would allow a party to conduct a trial by deposition, even if the declarant is available to testify. Consequently, a fact-finder is denied the ability to weigh the witness' demeanor and credibility.
>
> Even though I am sure that the Legislature did not intend it to be so, this statute creates an untenable potential for unfairness to all parties to a lawsuit.

Veto Message for CS/HB 1597, at 2 (May 29, 1997) (copy included in App. J). The "real" reason for the Governor's veto appears to be the uncertain impact of the amended exception on the then-pending tobacco litigation.[21] There is nothing in the Governor's veto message which would suggest that the Governor contemplated the application of the amended hearsay exception in criminal cases.

On the second day of the 1998 regular session, the House voted 93 to 22 to override the Governor's veto.[22] See H. Journ. at 119 (Mar. 4, 1998). The following

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[21] See Letter from Attorney General Butterworth to Governor Chiles (May 28, 1997) (recommending veto of CS/HB 1597 "because of its potential adverse impact on the State of Florida's pending lawsuit against tobacco manufacturers") (copy included in App. I). See also Comments of Rep. Thrasher during debate on veto override (Mar. 4, 1998) (tape available at Florida State Archives, R.A. Gray Building, Series 38, Box 255) (stating that Governor's veto was based on the potential impact of the bill on the tobacco litigation and with that litigation having settled, the Governor no longer objected to the bill) [hereafter "House Veto Override Debate"]; Comments of Sen. Horne and Sen. Dyer during debate on veto override (Mar. 11, 1998) (Tape 3) (available at Senate Document Center, Room 304 of the Capitol) (same) [hereafter "Senate Veto Override Debate"].

[22] The Legislature's authority to override the veto of CS/HB 1597 during the 1998 regular session rather than during the intervening the 1997 special session on education was upheld in Chiles v. Phelps, 714 So.2d 453 (Fla. 1998).

week, the Senate voted 35 to 3 to override the veto. See S. Journ at 148 (Mar. 11, 1998). There was no debate on the veto override in the House and the debate in the Senate focused on procedural matters rather than the substance of the bill. See House Veto Override Debate, supra; Senate Veto Override Debate, supra. The amendments to section 90.803(22) in Chapter 98-2 became effective on June 30, 1998– 60 days after sine die of the 1998 regular session– pursuant to article III, section 9, Fla. Const.[23]

[23] This constitutionally-prescribed effective date may raise questions regarding the language in section 2 of the bill, which purports to limit the application of the expanded exception to "pending cases in which the final pretrial conference occurs on or after that date." (emphasis supplied). It is unclear whether this language was superseded in its entirety by the constitutionally-prescribed effective date or whether the language was unaffected except that the words "that date" now refer to June 30, 1998 rather than July 1, 1997. The Court may need to clarify this issue to the extent that it adopts all or a portion of Chapter 98-2 as a court rule. Cf. In re Florida Evidence Code, 376 So.2d 1161, 1162 (Fla. 1979) (addressing confusion surrounding the effective date of the Evidence Code).

CONCLUSION

The Solicitor General submits that the Court should not categorize Chapter 98-2 as exclusively substantive or exclusively procedural. Instead, the Court should reaffirm the hybrid nature of the Evidence Code as well as the Court's concurrent jurisdiction with the Legislature over the Evidence Code. This concurrent jurisdiction allows the Court to adopt or modify Chapter 98-2 as it deems appropriate. In this regard, the Court should consider limiting the application of Chapter 98-2 to a narrow class of civil cases, and not criminal cases. A narrowly applied rule may alleviate many of the concerns raised by the Bar Committee, and would further the legislative purpose underlying Chapter 98-2.

REQUEST TO PARTICIPATE IN ORAL ARGUMENT

The Solicitor General respectfully requests the opportunity to participate in oral argument scheduled in this case for August 30, 2000.

Respectfully submitted this **15th** day of August, 2000.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this **15th** day of August, 2000, a true and correct copy of the foregoing was provided by **U.S. Mail** to the following:

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Tallahassee, FL 32399-1100

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Tallahassee, FL 32399-1100

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_____
Attorney

IN THE SUPREME COURT OF FLORIDA

AMENDMENTS TO THE FLORIDA)
RULES OF EVIDENCE) Case No. **SC00-607**
_____/

APPENDIX TO THE
COMMENTS OF THE SOLICITOR GENERAL*

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Solicitor General

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* On behalf of the Solicitor General, Attorney General Robert A. Butterworth, and Statewide Prosecutor Melanie A. Hines.

INDEX TO APPENDIX

Appendix

CHAPTER 98-2

Committee Substitute for House Bill No. 1597

An act relating to evidence; amending s. 90.803, F.S.; revising an exception to the prohibition against hearsay evidence; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (22) of section 90.803, Florida Statutes, 1996 Supplement, is amended to read:

90.803 Hearsay exceptions; availability of declarant immaterial.—The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(22) FORMER TESTIMONY.—Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, provided, however, the court finds that the testimony is not inadmissible pursuant to s. 90.402 or s. 90.403. ~~at a civil trial, when used in a retrial of said trial involving identical parties and the same facts.~~

Section 2. This act shall take effect July 1, 1997 and shall apply to pending cases in which the final pretrial conference occurs on or after that date.

Vetoed by the Governor May 29, 1997.

Passed the House over the veto March 4, 1998.

Passed the Senate over the veto March 11, 1998.

Filed in Office Secretary of State March 12, 1998.

Appendix

COMPARISON OF FLORIDA'S STATUTORY HEARSAY EXCEPTIONS FOR "FORMER TESTIMONY"

	§ 90.803(22) (1976 to 1978)	§ 90.803(22) (1978 to 1998)	§ 90.803(22) (Current – as amended by ch. 98-2)	§ 92.22 (1893 to 1976)[1]	§ 90.804(2)(a) (1976 to current)
Type of cases in which the exception applies	Civil	Civil	Civil and Criminal	Civil[2]	Civil and Criminal
Type of evidence to which the exception applies	Testimony (at trial)	Testimony (at trial)	Testimony (at trial or in deposition)	Oral or written evidence	Testimony (at trial or in deposition)
Subsequent proceedings in which the former testimony may be used	"substantially the same civil proceeding"	Retrial involving "identical parties and the same facts"	"same or a different proceeding"	retrial or "any other civil cause or civil proceeding, as to any matter in issue at a previous trial or hearing"[3]	"same or a different proceeding"
Unavailability of the declarant required?	No	No	No	Yes	Yes
Prerequisites for use at the subsequent proceeding	None specified in statute	None specified in statute	party against whom the former testimony is offered, or predecessor in interest, or person with a similar interest, had an opportunity and similar motive to develop the former testimony; court finds the testimony is not inadmissible pursuant to §§ 90.402 or 90.403	evidence has been reported stenographically or reduced to writing in the presence of the court; party against whom the evidence offered, or his privy, was a party at the former trial; the issue is substantially the same in both proceedings; court is satisfied that report of evidence from the former trial is correct	party against whom the former testimony is offered, or predecessor in interest, had an opportunity and similar motive to develop the former testimony

Notes:

[1] The language which became section 92.22 was originally adopted in Chapter 4135, Laws of Fla., in 1893. It was subsequently amended in 1909, 1919 and 1921 by Chapters 5897, 7838 (§ 10), and 8572, Laws of Fla., respectively.

[2] Prior to 1921, the former testimony hearsay exception applied in criminal cases as well. Compare ch. 4135, Laws of Fla. (1893) and ch. 5897, Laws of Fla. (1909) and ch. 7838, § 10, Laws of Fla. (1919) with ch. 8572, Laws of Fla. (1921).

[3] Prior to 1919, the exception only permitted the use of former testimony at a retrial of the same case. Compare ch. 4135, Laws of Fla. (1893) and ch. 5897, Laws of Fla. (1909) with ch. 7838, § 10, Laws of Fla. (1919).

Appendix

By Representative Thrasher

A bill to be entitled

An act relating to evidence; amending s. 90.803, F.S.; providing additional exceptions to the prohibition against hearsay evidence; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (22) of section 90.803, Florida Statutes, 1996 Supplement, is amended to read:

90.803 Hearsay exceptions; availability of declarant immaterial.--The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(22) FORMER TESTIMONY.--Former testimony given by the declarant:

(a) At a civil trial, when used in a retrial of such ~~said~~ trial involving identical parties and the same facts; or.

(b) As a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or a different proceeding, if:

1. The testimony is the statement of a person whose fault is an issue in the action, in either an individual or a representative capacity; a statement of which he or she has manifested his or her adoption or belief in its truth; a statement by a person specifically authorized by him to make a statement concerning the subject; a statement by his agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the

relationship; or a statement by a co-conspirator made during the course, and in furtherance, of the conspiracy;

2. The testimony is used in a civil trial to establish the degree of fault of such person, or to establish the authenticity of documentary evidence relevant to the degree of fault of such person; and

3.a. The party against whom the testimony is now offered, or another person, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; or

b. The testimony, when given, was a statement against interest.

Section 2. This act shall take effect July 1, 1997.

****

SENATE SUMMARY

Provides additional exceptions to the prohibition against hearsay evidence for former testimony given by a declarant who is a witness at another hearing of the same or a different proceeding, or in a deposition in the same or a different proceeding.

Appendix

By the Committee on Civil Justice & Claims and Representative Thrasher

A bill to be entitled

An act relating to evidence; amending s. 90.803, F.S.; providing additional exceptions to the prohibition against hearsay evidence; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (22) of section 90.803, Florida Statutes, 1996 Supplement, is amended to read:

90.803 Hearsay exceptions; availability of declarant immaterial.--The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(22) FORMER TESTIMONY.--Former testimony given by the declarant:

(a) At a civil trial, when used in a retrial of such ~~said~~ trial involving identical parties and the same facts; or~~.~~

(b) As a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or a different proceeding, if:

1. The testimony is the statement of a person whose fault is an issue in the action, in either an individual or a representative capacity; a statement of which he or she has manifested his or her adoption or belief in its truth; a statement by a person specifically authorized by him or her to make a statement concerning the subject; a statement by his or her agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of

the relationship; or a statement by a co-conspirator made during the course, and in furtherance, of the conspiracy;

2. The testimony is used in a civil trial to establish the degree of fault of such person, or to establish the authenticity of documentary evidence relevant to the degree of fault of such person;

3. The testimony is not inadmissible pursuant to the court's discretion under s. 90.402 or s. 90.403; and

4.a. The party against whom the testimony is now offered, or another person, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; or

b. The testimony, when given, was a statement against interest.

Section 2. This act shall take effect July 1, 1997.

Appendix

STORAGE NAME: h1597s1z.cjcl
DATE: October 8, 1998

FINAL ACTION
SEE FINAL ACTION STATUS SECTION

HOUSE OF REPRESENTATIVES
COMMITTEE ON
CIVIL JUSTICE & CLAIMS
FINAL BILL RESEARCH & ECONOMIC IMPACT STATEMENT

BILL #: CS/HB 1597

RELATING TO: Evidence

SPONSOR(S): Representative Thrasher

STATUTE(S) AFFECTED: s. 90.803, F.S.

COMPANION BILL(S): SB 1830 by Senator Horne (i)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) CIVIL JUSTICE & CLAIMS YEAS 8 NAYS 1
(2)
(3)
(4)
(5)

I. FINAL ACTION STATUS:

The Governor vetoed CS/HB 1597 on May 29, 1997. However, the Legislature passed CS/HB 1597 over the Governor's veto, and the bill became law. (Chapter No. 98-2) The Governor's subsequent attempt to have the Legislature's action overturned by the Florida Supreme Court failed. See Chiles v. Phelps, 1998 WL 349858 (Fla. 1998).

II. SUMMARY:

CS/HB 1597 amends s. 90.803, F.S. This section provides hearsay exceptions under circumstances where the availability of the declarant is immaterial. CS/HB 1591 broadens the scope of evidence admissible under the "former testimony" exception to the hearsay rule. This bill extends the framework of the exception located at s. 90.804(2)(a), F.S., which applies to former testimony when the declarant is unavailable as a witness, to the exception located at s. 90.803(22), F.S., with applies irrespective of the availability of the witness.

Under the appropriate circumstances, CS/HB 1597 would lessen the costs of litigation.

III. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

1. **Hearsay** - Hearsay evidence is inadmissible in civil and criminal proceedings. Section 90.801(c), F.S., defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Section 90.801(a) defines "statement" as "[a]n oral or written assertion," or as "[n]onverbal conduct . . . if it is intended . . . as an assertion." Absent an exception to the hearsay rule, former testimony, if offered to prove the truth of assertions made therein, would not be admissible at trial. Hearsay evidence is not considered to be as reliable as testimony given under oath, because the trier of fact cannot observe the demeanor of the witness. The right of confrontation, contained in the Sixth Amendment of the federal constitution, was designed to allay this concern. In *Pointer v. Texas*, 380 U.S. 400 (1965), and *Douglas v. Alabama*, 380 U.S. 415 (1965), the Supreme Court of the United States determined that the Fourteenth Amendment applies the Confrontation Clause to the states.

2. **Former Testimony** - Former testimony has been partially excepted from the hearsay rule. The Florida Statutes actually contain two exceptions for former testimony. The first applies irrespective of the declarant's availability. It is narrowly crafted. The second applies only when the declarant is unavailable to testify. It allows the introduction of a considerable range of hearsay evidence.

   a. **Declarant's Availability Immaterial** - Section 90.803, F.S., contains several hearsay exceptions that do not require the declarant to be unavailable. Paragraph (22) provides for the admissibility of "[f]ormer testimony given by the declarant at a civil trial, when used in a retrial of said trial involving identical parties and the same facts."

   b. **Declarant Unavailable** - Several hearsay exceptions apply to situations where the declarant is unavailable to testify. According to s. 90.804(1), F.S., unavailability occurs when the declarant is exempted from testifying by a court ruling, refuses to testify despite a court order, suffers from memory failure which prevents testimony, has died, suffers from a physical or mental illness which precludes testimony, or is not amenable or susceptible to process. Paragraph (2)(a) creates an exception for former testimony. This exception is modeled after that contained in the Federal Rules of Evidence. It allows the court to admit evidence concerning:

      > Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is not offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

3. **The Federal Rules of Evidence** - The Federal Rules of Evidence, at Rule 804, contain a "former testimony" exception. The federal exception only applies when the declarant is unavailable. Because the federal rules place great weight on the meaning conferred by observing the demeanor of the witness, they prefer live testimony in all cases where the declarant is available.

B. EFFECT OF PROPOSED CHANGES:

CS/HB 1597 would amend s. 90.803, F.S. As mentioned earlier, this section provides hearsay exceptions under circumstances where the availability of the declarant is immaterial. Specifically, CS/HB 1591 would amend paragraph (22) of s. 90.803, F.S., which contains the former testimony exception. It would broaden the scope of evidence admissible under this exception.

1. **Extension of the "Former Testimony" to New Proceedings** - CS/HB 1597 would extend the former testimony exception to civil proceedings other than those to which it currently applies (retrials involving the same parties and facts). It would also apply the exception to certain testimony given in depositions. In these respects, CS/HB 1597 would bring s. 90.803, F.S., (where the declarant's availability is immaterial), into conformity with s. 90.804, F.S. (where the declarant must be unavailable) and Rule 804 of the Federal Rules of Evidence.

2. **Reliability Indicators** - CS/HB 1597 would only allow the admission of former testimony if the party against whom the testimony is offered, a predecessor in interest, or a person with a similar interest, "had an opportunity and similar motive to develop the testimony . . . . "

3. **Would Only Apply to Civil Proceedings** - According to CS/HB 1597, the former testimony exception would be available only where the testimony is offered "in a civil action or proceeding."

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes. CS/HB 1597 would allow courts to admit a slightly greater range of evidence in civil proceedings.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

NA.

(2) what is the cost of such responsibility at the new level/agency?

NA.

(3) how is the new agency accountable to the people governed?

NA.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

NA.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

NA.

(2) Who makes the decisions?

NA.

(3) Are private alternatives permitted?

NA.

(4) Are families required to participate in a program?

NA.

(5) Are families penalized for not participating in a program?

NA.

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

NA.

(2) service providers?

NA.

(3) government employees/agencies?

NA.

D. SECTION-BY-SECTION RESEARCH:

Section 1: Amends s. 90.803, F.S.; applies the former testimony hearsay exception to various civil proceedings; permits the admission of former testimony which meets certain requirements.

Section 2: Provides an effective date of July 1, 1997.

IV. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

The change which would be made by CS/HB 1597 might reduce litigation costs in appropriate cases.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

V. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, It would not contravene the requirements of Article VII, Section 18, of the state constitution.

VI. COMMENTS:

1. **Key Issues** - This subsection uses a question format to stimulate debate about the bill under review.

   a. **Question Presented** - *Should the Legislature broaden the "former testimony" exception to the hearsay rule in circumstances where the declarant's availability is immaterial?*

   b. **Other Policy Considerations:**

      (1) Is testimony taken in depositions sufficiently reliable to come in under this exception to the hearsay rule?

      (2) Should this hearsay exception be expanded to cover statements by predecessors in interest?

      (3) Is there a valid reason for distinguishing between the former testimony exception which applies when the declarant is unavailable, and the former testimony exception which applies irrespective of the declarant's availability? If so, which of the two exceptions should be broader in scope?

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Committee Substitute - At the April 10, 1997 meeting of the Committee on Civil Justice and Claims, members adopted one amendment. The amendment to HB 1597 would allow the admission of former testimony only if such testimony would not be inadmissible pursuant to the court's discretion under s. 90.402, F.S., or s. 90.403, F.S. Section 90.402 provides that only relevant evidence is admissible. Section 90.403, F.S., provides that "[r]elevant evidence is inadmissible if its probative value is outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. At the sponsor's request, HB 1597 was made into a committee substitute. The hearsay exception contained in the Committee Substitute was broader than that contained in the bill which eventually passed the Legislature and which was vetoed by the Governor. Had it passed, the Committee Substitute would have:

1. **Extended the Exception to Statements of Agents and Employees** - The original version of CS/HB 1597 would have allowed the admission of former testimony given by agents or employees of the person, whose fault is at issue in the action, concerning matters within the scope of the agency or employment relationship. Currently, these types of statements do not fall within either former testimony exception in Florida's evidence code or within Rule 804 of the Federal Rules of Evidence.

2. **Extended the Exception to Certain Authorized Statements** - The original version of CS/HB 1597 would have allowed the admission of former testimony which was authorized by a person whose fault is at issue in the action. Such statements are

not currently admissible under the former testimony exceptions in Florida's evidence code or under Rule 804 of the Federal Rules of Evidence.

3. **Extended the Exception to Statements by Co-conspirators** - The original version of CS/HB 1597 would have allow courts to admit the former testimony of certain co-conspirators, if the testimony is given during the course of, and in furtherance of, the conspiracy. Presently, this type of evidence is not admissible under either former testimony exception in Florida's evidence code or under Rule 804 of the Federal Rules of Evidence.

Senate Amendment concurred in by the House - The House or Representatives passed CS/HB 1597 by a vote of 107 to 6, on April 28, 1997. The Senate substantially amended CS/HB 1597 and passed out the amended version on May 1, 1997 by a vote of 37 to 0. The House of Representatives concurred on May 1, 1997, and passed the bill as amended by 117 to 0 vote. The bill that passed the Legislature, as reflected in this Bill Research Statement, applied the former testimony exception for unavailable declarants, to situations where the availability of the declarant is immaterial.

Governor's Veto - On May 29, 1997, the Governor vetoed CS/HB 1597. The Governor's veto message stated, in part:

> I cannot support Committee Substitute for House Bill 1597 because it reduces a party's ability to confront and question a witness. I do not see as beneficial a reform to the Evidence Code which creates an open-ended exception that precludes the right of a litigant to cross-examine witnesses at trial. This bill would primarily operate to the benefit of large, multi-state corporations that have engaged in excessive litigation throughout the country in many venues and jurisdictions. These multi-state corporations would have a distinct advantage of being able to pick and choose from depositions that have never been made public records, and offer these depositions as testimony. The opposing party would not have the right to confront the declarant about the statements.
>
> Further, I am concerned that the proposed legislation precludes a fact-finder from evaluating a witness' demeanor and credibility. The proposed legislation would allow a party to conduct a trial by deposition, even if the declarant is available to testify.

Subsequent History - The Governor convened a five-day special session of the Legislature in November of 1997, to deal with educational facilities and spending. The Legislature did not attempt to address or override the Governor's veto of CS/HB 1597 at that time. Just before the beginning of the 1998 regular session, the Governor filed a petition for writ of mandamus, directing the Clerk and Speaker of the House to return all vetoed bills and signed objections from the 1997 regular session to the Deparment of State. The Florida Supreme Court refused to address the matter during the 1998 regular session, and continued the case until the conclusion of the 1998 regular session.

Chamber Actions - During the 1998 regular session, the Florida House of Representatives and the Florida Senate voted to override the Governor's veto of CS/HB 1597 and CS/HB 1227. The House vote was 93 to 22, and the Senate vote was 35 to 3.

Chiles v. Phelps, 1998 WL 349868 (Fla. 1998) - Following the Legislature's override of the Governor's veto, Governor Chiles and other Petitioners alleged that the Legislature's override was invalid under Article III, Section 8 of the Florida Constitution. They alleged that the Legislature was required to override the vetoes during the 1997 special session and that, by failing to do so, the Legislature had lost the authority to override. The Florida Supreme Court rejected Petitioners' argument. According to the Court:

[T]o interpret article III, section 8(b) as urged by petitioners would create conflict with article III, section 3(c)(1), Florida Constitution. That provision requires a vote of two-thirds of the membership of each house in order to take up legislative business outside the purview of the proclamation convening the special session or of a communication from the Governor. We are precluded from construing one constitutional provision in a manner which would render another provision superfluous, meaningless, or inoperative. See State v. Butler, 70 Fla. 102, 69 So. 771, 781 (1915). Although petitioners claim that the legislature has in the past taken up vetoed bills during a special session without a vote of two-thirds of the membership, this is not a basis for finding that the legislature had the authority to do so.

To require the legislature to consider during a special session all bills vetoed after adjournment of the regular session defeats the obvious intent of article III, section 3(c) that special sessions be focused on a particular subject matter absent special circumstances. The constitution sets only outer limits on the length of special sessions. See Art. III, § 3(d) (special session shall not exceed twenty consecutive days unless extended by three-fifths vote of each house); In re Advisory Opinion to the Governor, 206 So.2d 212 (Fla.1968) (governor may in the exercise of his discretion determine that an extra session of less than twenty days is in public interest and fix a shorter time period). Thus, the Governor has the ability to call a special session for a short duration. Votes to override vetoes may be controversial and time consuming, drawing legislators' time and attention away from the matters they were called to address during a special session. In order to give full effect to article III, section 3, the legislature must be allowed to focus its attention on the subject matter of a special session, particularly where the length of the session may be very limited.

Accordingly, the Supreme Court denied the petitions, finding no merit in Peititioers' claims that the Legislature violated Article III, Section 8 of the Florida Constitution.

VIII. SIGNATURES:

COMMITTEE ON CIVIL JUSTICE & CLAIMS:

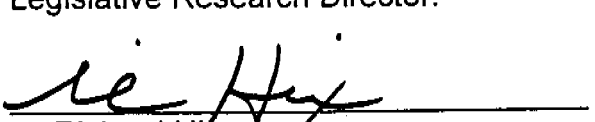
Prepared by: Legislative Research Director:

Charles R. Boning _____

FINAL RESEARCH PREPARED BY COMMITTEE ON CIVIL JUSTICE & CLAIMS:

Prepared by: Legislative Research Director:

Charles R. Boning



Richard Hixson

Appendix

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below)

Date: April 21, 1997 Revised: 4/24/97

Subject: Evidence/Hearsay

	Analyst	Staff Director	Reference	Action
1.	Moody	Lang	JU	Fav/1 amendment
2.				
3.				
4.				
5.				

I. Summary:

The bill broadens the scope of an exception to the hearsay rule of evidence allowing for former testimony to be admitted under certain circumstances regardless of the availability of the declarant.

The bill takes effect July 1, 1997.

This bill substantially amends the following sections of the Florida Statutes: 90.803.

II. Present Situation:

A. Hearsay

Hearsay evidence is inadmissible in civil and criminal proceedings. Section 90.801(c), F.S., defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Section 90.801(a) defines "statement" as "[a]n oral or written assertion," or as "[n]onverbal conduct . . . if it is intended . . . as an assertion." Absent an exception to the hearsay rule, former testimony, if offered to prove the truth of assertions made therein, would not be admissible at trial. Hearsay evidence is not considered to be as reliable as testimony given under oath, because the trier of fact cannot observe the demeanor of the witness.

B. Admission of former testimony regardless of availability of declarant

Presently, the law allows the former testimony of a person to be admitted into evidence in a retrial of a civil trial involving identical parties and facts. s. 90.803(23), F.S., 1996 Supp.

This exception applies whether or not the person who gave the former testimony is available to testify, but only in civil cases. There is no exception for former testimony to be admitted in federal law when the person who gave the previous testimony is available to testify again.

C. Defining "unavailable"

A broader exception applies in state and federal law to both criminal and civil cases, but only when the declarant is *unavailable*. s. 90.804(2)(a), F.S. and Rule 804(b)(1), Federal Rules of Evidence. This exception provides that a person's former testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding may be admitted if the person who made the statement is unavailable. *Id.* However, the party against whom the testimony is offered, or in a civil action or proceeding, a predecessor in interest, must have had an opportunity and similar motive to develop testimony by direct, cross, or redirect examination. *Id.*

Under the Florida Evidence Code, a person is "unavailable" for the purposes of the exception if the person:

(a) Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(c) Has suffered a lack of memory of the subject matter of his or her statement so as to destroy the declarant's effectiveness as a witness during the trial;

(d) Is unable to be present or to testify at the hearing because of death or because of then existing physical or mental illness or infirmity; or

(e) Is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.

However, a declarant is not unavailable as a witness if such exemption, refusal, claim of lack of memory, inability to be present, or absence is due to the procurement or wrongdoing of the party who is the proponent of his or her statement in preventing the witness from attending or testifying.

s. 90.804(1), F.S.

The federal definition of unavailability differs from Florida law in two respects. First, the lack of memory definition reads, "testifies to a lack of memory." Rule 804(a)(3), Federal Rules of Evidence. Second, while under Florida law a declarant is defined for all the listed exceptions as unavailable if the proponent of a statement has been unable to procure the declarant's attendance *or testimony* by process or other reasonable means, the federal rule limits this aspect of the definition of "unavailable" to an inability to procure the declarant's *attendance* for the exception applying to former testimony. Rule 804(a)(5), Federal Rules of Evidence.

D. Former testimony as evidence

Under current law, there are other ways that former testimony may be admitted without the necessity of meeting these conditions. Current law allows former testimony given during a civil trial to be admitted in substantially the same proceeding, s. 90.803(23), F.S. Further, testimony taken during a deposition is admissible: to impeach a witness; by an adverse party for any purpose if it is the deposition of a party or of anyone who at the time of the taking of the deposition was an officer, director, or other person qualified under the rules to testify on behalf of specified types of entities; for any purpose if the deponent is dead, at a greater distance than 100 miles or is out of state unless the absence was procured by the party offering the deposition; if the witness cannot attend or testify due to age, illness, infirmity, or imprisonment; if the person offering the deposition has been unable to procure the attendance of the witness by subpoena; if the witness is an expert or skilled witness; or upon application and notice other exceptional circumstances require admission in the interests of justice. Rules 1.290(a)(4) and 1.330, Florida Rules of Civil Procedure. Also admissible is former testimony offered as an admission, s. 90.803(18), 1996 Supp., or to prove state of mind, 90.803(3), 1996 Supp., or for some other nonhearsay purpose. Ehrhardt, *Florida Evidence*, p. 737, (1997).

However, if the former testimony is sought to be admitted under the 804(2)(a) exception, the witness must be shown first to be unavailable. Even if all of the other elements are met, under current law the testimony will not be admitted absent this showing. *Martin Marietta Corp. v. Roop*, 566 So.2d 40, 42 (Fla. 1st DCA 1990)(transcript from another case not admissible in workers' compensation action without showing witness was unavailable). Florida courts have found death, whereabouts unknown, insanity, bodily infirmity which renders attendance at court dangerous and unduly burdensome, sickness with an inability to attend court, and diminished memory, as reasons for justifying the use of former testimony. Rule 804((1), Florida Rules of Evidence, sponsor's note (1979)(citations omitted).

E. Admission of former testimony when declarant unavailable

Once it is established that the declarant is unavailable it must be shown that the former testimony was given under oath and that there was an opportunity to cross-examine the witness. The rule treats direct and re-direct testimony as the equivalent of cross-

examination. Ehrhardt, p. 738. Further, even if the opportunity to examine the witness was waived, this element is satisfied. *Id.* at n.4.

> If the testimony is offered against the same party that it was offered against in the previous proceeding, no unfairness is apparent in requiring him to accept his own prior conduct on cross-examination or decision not to cross examine. If the testimony was originally offered by the party it is now being offered against, the party should not be heard to object to evidence he once offered on his own behalf.

Rule 804((1), Florida Rules of Evidence, sponsor's note (1979).

The exception applies to both criminal and civil cases, but only in criminal cases must the party against whom the statement is offered have actually been a party in the previous proceeding. s. 90.804(2)(a), F.S., 1996, Supp. In a civil case, either the party against whom the evidence is offered or "a predecessor in interest" must have had the opportunity to examine. *Id.* Thus, in a civil case this could include successor corporations or an estate of a decedent. Ehrhardt, p. 739. This has been broadly construed in federal courts. *Id.* at n.8 *citing Dykes v. Raymark Indus, Inc.*, 801 F.2d 810, 816 (6th Cir. 1986), cert. denied, 481 U.S. 1038 (1987)(a deposition in an asbestos case was admissible against a party who had no legal relationship to any party in the case. "[T]he fact of being a predecessor in interest is not limited to a legal relationship, but is also to be determined by the second aspect of the test under the rule: whether the defendant had an opportunity and similar motive to develop testimony by cross-examination.").

In *Dykes*, the court stated that the preferred approach in determining admissibility was for the attorneys to present and the court to consider the circumstances under which the first testimony was taken so that the motives of the first case can be obtained. *Dykes v. Raymark Indus, Inc.*, 801 F.2d 810, 816 (6th Cir. 1986). In noting the important question of potential prejudice against a party who never had an opportunity to adequately refute the testimony admitted, the court stated that it is incumbent upon counsel when objecting to explain as clearly as possible precisely, including what lines of questioning would have been pursued, why the motive and opportunity of the party in the first case were not adequate to develop the cross-examination which the instant party would have presented. *Id.* at 817. The court went on to comment on the "great risk" inherent in the application of the former testimony exception to expert testimony including the dangers that "an alert attorney may simply search out expert testimony which he conceives to be favorable to his cause" and the fact that experts who "are not adequately cross-examined, even though an opportunity is present, are often prone to create too heavy an aura of authoritativeness." *Id.* The court then sums up the balance present in the exception on former testimony to the federal hearsay rule:

> Obviously, Rule 803 [sic] is not designed to deprive the opposite party of the historic right of cross-examination; rather, it is intended to permit parties to employ proof and testimony which is essentially reliable,

> cannot be effectively obtained in any other manner, and whose relevancy and probity is such that its introduction outweighs the possible prejudicial value which may result from denying cross-examination.

Id.

While Florida courts have ruled that deposition testimony in a civil case that is not admissible under the Rules of Civil Procedure may be admitted if the other criteria are met under s. 90.804(2)(a), the courts have determined that the only depositions admissible in criminal proceedings are those taken in compliance with Rule 3.190(j), Florida Rules of Criminal Procedure. Ehrhardt, p. 742-43 (citations omitted).

F. The "catch-all" exception in the Federal Rules of Evidence

Finally, the federal Rules of Evidence offer a "catch-all" exception to the hearsay rule both when the declarant is available and when the declarant is not. Rules 804(b)(5) and 803(24), Federal Rules of Evidence. These exception specify that a statement that does not meet the listed exception but that has equivalent circumstantial guarantees of trustworthiness may be admitted if the proponent of the statement informs the adverse party sufficiently in advance of the contents and particulars of the statement and the intention that it be offered if the court finds:

1. the statement is offered as evidence of a material fact,
2. it is more probative then other available evidence, and
3. admission of the statement into evidence will serve the general purpose of the rules and the interests of justice.

Id. Florida, however, provides no such "catch-all" exception regardless of whether the declarant is available or not.

> Although such an exception was included in the early drafts of the [evidence] Code, it was felt that since one of the most important purposes in codifying the law of evidence was to provide certainty and clarity, that purpose would be defeated by the inclusion of a catch-all exception. There was also a feeling that if hearsay exceptions were to be listed, they all should be listed. If the need developed for an additional exception the legislature could amend the code to provide for it.

Ehrhardt, p. 730.

III. Effect of Proposed Changes:

The bill proposes to expand the current exception to the hearsay rule of evidence allowing former testimony to be admitted in a civil trial regardless of the availability of the declarant. The bill provides that in addition to the current law allowing admission of former testimony in a retrial

involving the identical parties and the same facts, specified former testimony would be admitted in limited circumstances. The declarant must have been:

- as a witness
- at another hearing of the same proceeding, *or*
- at another hearing of a different proceeding, *or*
- at a deposition taken in compliance with law in the course of the same proceeding, *or*
- at a deposition taken in compliance with law in the course of a different proceeding,

and the testimony must be a statement:

- of a person, in individual or representative capacity, whose fault is at issue in the action;
- which the declarant has manifested his or her adoption or belief in its truth;
- by a person specifically authorized by him to make a statement concerning the subject;
- by the declarant's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship; or
- by a co-conspirator made during the course, and in furtherance, of the conspiracy,

and

- the testimony must be used in a civil trial to establish the decree of fault of the declarant, *or* to establish the authenticity of documentary evidence relative to the degree of fault of such person; *and*
- the party against whom the testimony is now offered, *or another person*, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; *or*
- the statement, *when given*, was a statement against interest.

Thus, the bill extends the current hearsay exception to different proceedings and to certain testimony given in depositions. Further, the bill extends the exception to statements of others including agents and employees, authorized statements, and co-conspirators. However, these extensions are limited by two indicators of reliability. First, the testimony must have been given by the declarant (or by the specified associates of the declarant), whose fault is at issue and who has exhibited a belief in the truth of the statement. Second, the party against whom the former testimony was offered must have had an opportunity to develop the testimony by direct examination, cross examination, or redirect examination, unless the testimony was a statement against interest. The hearsay exception as expanded by the bill would apply only to civil trials.

The bill does not require that any person or fact in the action in which the former testimony is being offered have any connection with the action in which the testimony is given. There is no limitation on the time that may have passed between two proceedings and no requirement that the adverse party be placed on notice of the intent to use the former testimony. Further, this expansion of the hearsay exception results in additional circumstances in which the trier of fact has no opportunity to observe the demeanor of a witness. The trial court's function is to evaluate and weigh the evidence based upon demeanor and credibility of witnesses. *Bhargava v. Bhargava,* 682 So.2d 224 (Fla. 3d DCA 1996) *citing Shaw v. Shaw*, 334 So.2d 13 (Fla. 1976). "The demeanor, physical appearance, gestures, voice intonations, etc. of the witness while testifying are also critical factors which bear on the credibility of the witness. And such factors clearly cannot be captured or articulated on a trial transcript". *Sanford v. State*, 1996 WL 267900 (Fla. 3d DCA 1996).

Finally, the bill requires that for admission into evidence under this exception, the former testimony must be "the statement of a person whose fault is at issue in the action." This qualification has a significant impact in Florida where all defendants to whom some fault may be attributed must be included for an appropriate apportionment of damages whether the person or entity is a party to the action or not. *Fabre v. Marin*, 623 So.2d 1182, 1185 (Fla. 1993). However, in order to include a nonparty on the verdict form pursuant to *Fabre*, the defendant must plead the negligence of the nonparty as an affirmative defense and specifically identify the nonparty. *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262, 1264 (Fla. 1996). Further, "*there must be evidence of fault* of a nonparty before a jury can determine the fault of that nonparty". *W.R. Grace & Company-Conn. v. Dougherty*, 636 So.2d 746, 748 (Fla. 2d DCA 1994). The court specified what would be required in an asbestos case such as the one before it on appeal: evidence establishing the specifics of different products; how often the products were used on the job site on which the plaintiff worked; and the toxicity of those products as they were used. *Id.* at 748.

The bill takes effect July 1, 1997.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may result in cost savings for proponents of former testimony who will not need to bring the individual to testify in person. However, this could negatively impact the adverse party in such cases who may need to pay the costs of bringing the witness live to rebut inaccurate or incomplete former testimony.

C. Government Sector Impact:

There may be an increase in hearings to determine whether the "opportunity and similar motive" existed to develop the particular former testimony.

VI. Technical Deficiencies:

The bill allows the admission of former testimony if such testimony "*is the statement of a person whose fault is an issue in the action.*" It is not clear from the language of the bill whether the "action" referred to is the previous action, in which the testimony was given, or the current action, in which the former testimony is offered.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Judiciary:
The amendment amends s. 90.803(22) to read identically to s. 90.804(2)(a) thus allowing former testimony to be admitted if it was given by the witness in the same or a different proceeding, or in a deposition taken in compliance with the law in a same or difference proceeding, if the party against whom it is offered had an opportunity and similar motive to develop testimony by direct, cross, or redirect examination *regardless of whether the declarant is available or unavailable* to testify again. This amendment changes application of the July 1, 1997 effective date to apply to pending cases in which the final pretrial conference occurs on or after that date.

Bill No. SB 1830

Amendment No. 1 353218

CHAMBER ACTION

Senate | House

The Committee on Judiciary recommended the following amendment:

Senate Amendment

On page 1, lines 17-30, and on page 2, lines 1-13, delete those lines

and insert:

Section 1. Subsection (22) of section 90.803, Florida Statutes, 1996 Supplement, is amended to read:

90.803 Hearsay exceptions; availability of declarant immaterial.--The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(22) FORMER TESTIMONY.--Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest had an opportunity and similar

motive to develop the testimony by direct, cross, or redirect examination. ~~at a civil trial, when used in a retrial of said trial involving identical parties and the same facts.~~

Section 2. This act shall take effect July 1, 1997 and shall apply to pending cases in which the final pretrial conference occurs on or after that date.

Appendix

GREENBERG
ATTORNEYS AT LAW
TRAURIG

Pedro J. Martinez-Fraga
579-0595

May 19, 1997

VIA FAX & FEDERAL EXPRESS

Dexter Douglass
General Counsel
Office of the Governor
209 The Capitol
Tallahassee, FL 32399-0001

Re: Proposed Legislation CS/HB 1597 – Hearsay Rule

Dear Mr. Douglass:

This correspondence is in furtherance of our telephone conference on Friday, May 16, 1997, concerning The Florida Bar Code & Rules of Evidence Committee's opposition to CS/HB 1597, which would create a new exception to the hearsay rule of the Florida Evidence Code. That exception represents a stark and unjustified departure from current jurisprudence addressing this narrow and critical issue.[1]

A. The Actual State of the Law

Florida law follows the majority view[2] in holding that the former testimony of a witness is admissible as a hearsay rule exception where two rudimentary but essential precepts are met:

---

[1] A review of state court jurisprudence from other jurisdictions reflects that the "former testimony" exception to the hearsay rule in most instances is patterned after Federal Rule of Evidence 804(b)(1), which reads:

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

[2] The governing Florida statutory provision, §90.804(2)(a) Fla. Stat. comports with the majority of jurisdictions that have fashioned an evidentiary rule providing for a former testimony hearsay exception pursuant to the federal counterpart paradigm. Section 90.804(2)(a) provides:

i) a witness is unavailable and
ii) the person against whom the testimony is offered, or a predecessor in interest, had an opportunity to examine the witness.

Moreover, Fla. R. Civ. P. 1.330(a)(3) limits the use of a deposition at trial, upon the hearing of a motion, or in an interlocutory proceeding to those instances where:

i) a party was present or represented at the taking of the deposition or who had reasonable notice of it so far as admissible under the rules of evidence applied as though the witness where then present and testifying, and

ii) If the court finds (a) the witness is dead; (b) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; (c) that the witness is unable to attend or to testify because of age, illness, infirmity, or imprisonment; (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; (e) upon application and notice, that such exceptional circumstances exist as to make it desirable in the interest of justice and with due regard to the importance of presenting the testimony of the witnesses orally in open court, to allow the deposition to be used; (f) the witness is an expert or skilled witness.

Section 90.804(2)(a) Fla. Stat. and Fla. R. Civ. P. 1.330(a)(3) seek to preserve the time-honored tenet that only in very narrow and stringent circumstances shall a witness' former testimony be deemed admissible without providing the fact-finder with an opportunity to assess the witness' demeanor in evaluating credibility. As such, under current law former testimony constitutes the best evidence only where the witness is unavailable to render live testimony and provide the fact finder with an opportunity to examine the totality of circumstances from which reasonable inferences may be drawn concerning a witness' credibility. Additionally, the current state of the law preserves a party's due process right to confront an adverse witness. As more fully set forth below, these two venerable principles are eviscerated by the proposed legislation, CS/HB 1597.

---

(2) **Hearsay Exceptions.** The following are not excluded under s90.802 [the Hearsay Rule], provided that the declarant is unavailable as a witness:

(a) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

B. The Proposed Legislation

The proposed legislation being considered by the Hon. Governor Chiles (CS/HB 1597) is inimical to §90.804(2)(a) Fla.Stat. and Fed. R. Civ. P. 1330(a)(3).

The proposed provision merely transfers §90.804(2)(a) Fla. Stat. to §90.803 Fla. Stat. and adds to the "victims" of such hearsay "persons with a similar interest." Accordingly, pursuant to this legislation, former testimony is admissible irrespective of whether the witness is available to testify (i.e., even where the witness is available to testify) and where the person against whom the evidence is offered never had an opportunity to question the witness concerning the former testimony.

Put simply, CS/HB 1597 should be rejected based upon six rudimentary precepts.

First, the legislation precludes a fact-finder from evaluating a witness' demeanor and thereby hampers a comprehensive evaluation of the witness' credibility. Consequently, the use of deposition testimony is unduly broadened creating "trial by deposition." In this same vein, the rule expands the use of depositions in all stages of a judicial proceeding beyond that contemplated by Fla. R. Civ. P. 1.330(a)(3).

Second, the proposed legislation precludes a party from confronting an adverse witness, since the party against whom the evidence is offered, or a predecessor in interest, must have had an opportunity to question the witness as to the former testimony. This constitutional right is not preserved merely by adding the words "a person with a similar interest." To the contrary, the term obscures the right since there is no case law, or other guidepost, that articulates with any specificity the circumstances pursuant to which a non-party may meet the "person with similar interest" standard.

Third, CS/HB 1597 is little more than a transparent effort to transpose §90.804(2)(a) to §90.803, while stripping §90.804(2)(a) of the "unavailability" requirement.

Fourth, the proposed legislation shall measurably shift current expense burdens relating to the introduction of evidence. Presently, a proponent seeking to admit evidence bears the expense associated with that effort. Pursuant to CS/HB 1597, however, that expense shall shift from the party attempting to offer the evidence to the party against whom the evidence is offered. It is foreseeable that the party against whom the evidence is now being offered shall have to call other witnesses (often the actual witness whose former testimony is being introduced) to examine the circumstances under which the prior testimony was taken, as well as the actual testimony itself. Under this scenario the party against whom this testimony is offered shall probably have to call the actual witness adverse in order to challenge the prior testimony. In this connection, the proposed legislation shall tend to increase litigation costs.

Fifth, the new provision inevitably will add to the length of trial proceedings. If adopted, CS/HB 1597 shall cause courts and litigants to review both proceedings (probably *in camera*) to determine that the "similar motive" component necessary to develop the testimony is identical in both actions.[3] The "similar motive" component to CS/HB 1597 shall inevitably spawn more litigation and thereby undermine the very principle that it purports to advance, i.e., judicial economy in complex proceedings.

Lastly, the "party against" limitation prescribed in the proposed legislation invariably shall place prosecutors at a distinct disadvantage, since defense testimony in a co-defendant's case (deposition and trial testimony) could be offered against the State but the State would not have an equal use of such testimony based upon this limiting criteria.

Even a cursory review reflects that the proposed legislation cannot withstand sustained analysis. In addition to constituting a needless departure from settled jurisprudence and the prevailing view in federal and state fora, CS/HB 1597 also undermine fundamental principles of judicial economy by increasing the cost of litigation (see paragraphs 4-5 above) and unjustifiably shift the expenses traditionally associated with the introduction of evidence, thereby disavowing any economically grounded policy argument that its proponents may otherwise aver in its favor. More importantly, under no reasonable hypothesis of law or equity can the proposed bill cure the constitutional confrontation clause problems that it creates.

I remain at your disposal should you have any concerns or questions regarding this matter. My direct line is (305) 579-0595.

Respectfully,

Pedro J. Martinez-Fraga

PJMF/kmf

cc: President John W. Frost, II (via fax)

[3] The comparable challenge under existing law is limited only to the case of "unavailability," which presents a narrow issue that does not mandate an elaborate factual inquiry.

Appendix

file w/ HB 1597

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

May 29, 1997

SENATOR JIM HORNE
8th District
VIA FAX

COMMITTEES:
Ways and Means,
Sub. B (Education),
Chairman
Commerce and Economic Opportunities,
Vice Chairman
Criminal Justice
Education
Judiciary
Rules and Calendar

JOINT COMMITTEE:
Legislative Committee on Intergovernmental Relations

The Honorable Lawton Chiles
Governor
State of Florida
The Capitol
Tallahassee, Florida 32399-0001

RE: Evidence Code - House Bill 1597

Dear Governor Chiles:

I would like to take this last opportunity to relay some points concerning the Evidence Code bill (CS/HB 1597). It is my understanding that you are strongly considering a veto of this legislation.

The benefits of this bill to all Florida citizens are real. It provides juries with greater access to reliable information to help them get to the truth, and it enhances judicial economy and efficiency in the court system.

With reference to the letter from Pedro J. Martinez-Fraga of Greenberg and Traurig, I would like to point out the following. Mr. Martinez-Fraga lists six rudimentary precepts as a basis for rejection of this bill. My responses to these six items are listed below.

1. The letter states that the legislation precludes a fact-finder from evaluating a witness' demeanor and thereby hampers a comprehensive evaluation of the witness' credibility. This is not accurate. *The legislation does not preclude fact-finder - they can still call that witness.*

2. The proposed legislation precludes a party from confronting an adverse witness, since the party against whom the evidence is offered, or a predecessor in interest, must have had an opportunity to question the witness as to the former testimony . . . . . To the contrary, the terms obscures the right since there is no case law, or other guidepost, that articulates with any specificity the circumstances pursuant to which a non-party may meet the "person with similar interest" standard. *It is important to point out that any time you change the law, you must establish precedent with new case law. In the future, cases will be established that will settle this issue.*

REPLY TO:
☐ 1650 Lakeside Drive, Suite 208, Jacksonville, Florida 32210-6389 (904) 381-6005
☐ 342 Senate Office Building, Tallahassee, Florida 32399-1100 (904) 487-5027

TONI JENNINGS
President

ROBERTO CASAS
President Pro Tempore

3. CS/HB 1597 is little more than a transparent effort to transpose FS 90.804(2)(a) to FS 90.803, while stripping FS 90.804(2) of the "unavailability" requirement. *There is no hidden element here. This was the intent of the proposed legislation.*

4. The proposed legislation shall measurably shift current expense burdens relating to the introduction of evidence. *Again, this is not the case. The Judge has the authority to determine the reliability of the evidence through judicial discretion. If any party wants to challenge the evidence, they would and should bear the costs associated with that testimony.*

5. The new provision inevitably will add to the length of trial proceedings . . . . *Perhaps, but only for a limited amount of time until there is some case precedent.*

6. The "party against" limitation prescribed in the proposed legislation invariably shall place prosecutors at a distinct disadvantage, since defense testimony in a co-defendant's case (deposition and trial testimony) could be offered against the State but the State would not have an equal use of such testimony based upon this limiting criteria. *Absolutely not true. This legislation does not apply to criminal cases.*

I hope that this information I have provided may address some of your concerns and I would appreciate your careful consideration of this matter.

Thank you for your continued interest.

With kind regards,

Sincerely,

JAMES W. HORNE
Senator, District 6

JWH:gfm

Appendix

STATE OF FLORIDA

OFFICE OF ATTORNEY GENERAL

ROBERT A. BUTTERWORTH

May 28, 1997

The Honorable Lawton Chiles
Governor
The Capitol
Tallahassee, Florida 32399-0001

Re: CS/HB 1597

Dear Governor Chiles:

I respectfully recommend that you veto Committee Substitute for House Bill 1597 because of its potential adverse impact on the State of Florida's pending lawsuit against tobacco manufacturers. The primary intent of the legislation is laudable: reducing the cost of civil litigation. However, it appears that an unintended consequence of the bill is to compromise -- or at least complicate -- the State's case against Big Tobacco, which goes to trial at the beginning of August in West Palm Beach.

The problem presented by the bill is that it changes the law surrounding the introduction of documentary evidence in court, but no one can be certain of the scope of these changes or how the courts will interpret them. These changes are not directly based on the Federal Rules of Evidence, which has historically provided the framework and body of caselaw upon which the Florida Evidence Code has been constructed and applied. The author of our Evidence Code, Professor Charles Ehrhardt of the Florida State University College of Law, has expressed concerns about the types of evidentiary changes that would be codified into law by CS/HB 1597. In addition, experienced trial lawyers on the State's tobacco litigation team, including lawyers in this office, have examined the bill and found it troublesome. It appears the bill would present tobacco manufacturers' lawyers with increased opportunities to confuse the issues and the jury at trial.

Under the extraordinary circumstances of the State's upcoming tobacco trial, a veto is warranted.

Sincerely,

Robert A. Butterworth
Attorney General

Appendix

STATE OF FLORIDA

Office of the Governor

THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

LAWTON CHILES
GOVERNOR

May 29, 1997

97 MAY 29 PM 5:33
TALLAHASSEE, FLORIDA

The Honorable Sandra B. Mortham
Secretary of State
PL 02, The Capitol
Tallahassee, Florida 32399

Dear Secretary Mortham:

By the authority vested in me as Governor of Florida, under the provisions of Article III, Section 8, of the Constitution of Florida, I do hereby withhold my approval of and transmit to you with my objections, Committee Substitute for House Bill 1597, enacted during the 99th Session of the Legislature of Florida since statehood in 1845, convened under the Constitution of 1968, during the Regular Session of 1997, and entitled:

> An act relating to evidence: . . . .

Committee Substitute for House Bill 1597 broadens the former testimony hearsay exception under section 90.803(22), Florida Statutes. Under section 90.803(22), Florida Statutes, a court may admit former testimony "given by the declarant at a civil trial, when used in a retrial of said trial involving identical parties and the same facts." The availability of the declarant is immaterial in admitting the former testimony under section 90.803(22).

In contrast to section 90.803(22), the evidence code also provides section 90.804(2)(a), Florida Statutes, a former testimony hearsay exception when the declarant is unavailable. Section 90.804(2)(a) provides that the following former testimony is admissible:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Committee Substitute for House Bill 1597 transfers the former testimony exception in section 90.804(2)(a) to section 90.803(22). The result of the bill is to broaden the amount of former testimony that can be introduced in a civil trial without a showing that the declarant is unavailable to testify.

I cannot support Committee Substitute for House Bill 1597 because it reduces a party's ability to confront and question a witness. I do not see as beneficial a reform to the Evidence Code which creates an open-ended exception that precludes the right of a litigant to cross-examine witnesses at trial. This bill would primarily operate to the benefit of large, multi-state corporations that have engaged in extensive litigation throughout the country in many venues and jurisdictions. These multi-state corporations would have a distinct advantage of being able to pick and choose from depositions that have never been made public records, and offer these depositions as testimony. The opposing party would not have the right to confront the declarant about the statements.

Further, I am concerned that the proposed legislation precludes a fact-finder from evaluating a witness' demeanor and credibility. The proposed legislation would allow a party to conduct a trial by deposition, even if the declarant is available to testify. Consequently, a fact-finder is denied the ability to weigh the witness' demeanor and credibility.

Even though I am sure that the Legislature did not intend it to be so, this statute creates an untenable potential for unfairness to all parties to a lawsuit.

For these reasons, I am withholding my approval of Committee Substitute for House Bill 1597, and do hereby veto the same.

Sincerely,

LAWTON CHILES

LC/gdk