**ORIGINAL**



IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC00-607

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# AMENDMENTS TO THE FLORIDA RULES OF EVIDENCE

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## COMMENT AND REQUEST FOR ORAL ARGUMENT OF THE FLORIDA BAR CODE AND RULES OF EVIDENCE COMMITTEE

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## Preliminary Statement

Chapter 98-2, §1, Laws of Florida (F.S. 90.803(22) of the Evidence Code) is procedural in nature based on a historical analysis of the federal rules and a review of relevant federal and Florida case law. The former testimony hearsay exception as amended currently states:

> **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.

(emphasis supplied).

While the reasons mandating the Court's rejection of Section 90.803(22) as a rule of evidence are compelling and are more fully addressed below, this memorandum squarely focuses on the procedural aspects of Section 90.803(22) because the section is procedural – and not substantive – in nature.

## I. THE HEARSAY EXCEPTIONS TO THE FEDERAL RULES OF EVIDENCE ARE PROCEDURAL

In Glen Eagleship Management Co. v. Leondakos, 602 So.2d 1282, 1283-1284 (Fla. 1992), the Court stated that "We look to the federal rules and decisions for guidance in interpreting Florida's civil procedure rules." See Moore v. State, 452 So.2d 559, 560 (Fla. 1984) (construing a section of the Florida evidence code patterned after a federal rule in accordance with federal court decisions interpreting the federal rule). The federal rules of evidence concerning hearsay historically are procedural. Prior to the enactment of the Federal Rules of Evidence in 1975, the federal rules of civil procedure included evidence. In explaining why the advisory committee included evidence in the original rules of federal civil procedure (Rules 43 and 44), the chairman of the committee stated that the committee included evidence in the original rules "because rules of evidence are matters of procedure." Wright & Miller, Federal Practice and Procedure: Civil 2d §2401 (1994) (citing Mitchell, Proceedings of the Cleveland Institute, 1938, p. 186). The advisory

committee drafting the Federal Rules of Civil Procedure determined that the Supreme Court had the power under the Rules Enabling Act to promulgate rules of evidence. Id. at §2401 n.4-7.

The Fifth Circuit confirmed that issues concerning the admissibility of evidence are procedural and not substantive in Dallas County v. Commercial Union Assurance Company, Ltd., 286 F.2d 388, 392-393 (5th Cir. 1961). The plaintiff in that case contended that the hearsay rule was"a matter of substance, not of procedure." At trial the plaintiff objected on grounds of hearsay to the introduction of a newspaper article and claimed that it was not admissible under any of the exceptions to the hearsay rule. On appeal, the plaintiff argued that the law of Alabama governed the hearsay issue because the hearsay rule was substantive in nature. The court found that the newspaper article and the underlying hearsay issue was "within the procedural competence of the federal district court". Id. at 393. The court cited Monarch Insurance Company of Ohio v. Spach, 281 F.2d 401, 408 (5th Cir. 1960) to support its determination:

> For the most part, however, rules of evidence relate to what lawyers have long thought of as procedure. This is attested by the presence of Rules 43 and 44 in the Federal Rules. The Rules Enabling Act denied the power of the Supreme Court in such Rules to affect substantive rights. That the Supreme Court, after having this problem brought sharply to mind, thought it appropriate to include

> them is some considered evidence that with respect to admissibility at least, the subject was procedural.

Id. at 408.

Other federal courts also have acknowledged the procedural nature of the hearsay rules. In Nadiak v. Civil Aeronautics Board, 305 F.2d 588, 593 (5th Cir. 1962), cert. denied, 372 U.S. 913, the court held that evidence admitted despite hearsay objections did not constitute error because"the technical rules of evidence that govern procedures in the courts are not necessarily applicable to administrative proceedings." Id. at 593 (emphasis added). Moreover, the court in Bromley v. Michigan Education Association-NEA, 82 F.3d 686, 693 (6th Cir. 1996) stated that:

> [a]mong the procedural safeguards available in a judicial forum are rules of evidence that treat hearsay with skepticism. . . .

The hearsay exceptions contain procedural components:

> The exceptions to the hearsay rule serve as a 'procedural' substitute for the missing 'substantive' reliability check usually provided by cross-examination. This safeguard allows the jury to consider the probative value of the hearsay evidence alongside live testimony. The exceptions serve as a substitute for the screening typically carried out by the cross-examination of the declarant, the opportunity for the jury to see the declarant make the statement, and the oath-taking of the witness in the courtroom.

James Donald Moorehead, Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability, 29 Loy. L.A. Rev. 203, 219 (1995).

## II. UNDER FLORIDA LAW, THE HEARSAY EXCEPTIONS ARE PROCEDURAL

The Florida Supreme Court followed the reasoning of two United States Supreme Court cases in support of a finding that "Section 90.803(23), Florida Statutes is procedural and that the statute does not affect 'substantial personal rights.'" Glendening v. State, 536 So. 2d 212, 215 (Fla. 1988). In Glendening, the plaintiff argued that the trial court erred in admitting out of court statements under a hearsay exception, section 90.803(23), because the retrospective application of the hearsay exception violated the prohibition against ex post facto laws. The court in Glendening clearly stated that "changes in the admission of evidence have been held to be procedural." Id. at 214 (citing Hopt v. Utah, 110 U.S. 574, 4 S. Ct. 202, 28 L.Ed. 262 (1884) and Thompson v. Missouri, 171 U.S. 380, 18 S. Ct. 922, L.Ed. 204 (1898)).

Florida case law recognizes the interchangeable relationship between the Florida Rules of Civil Procedure and the Florida Rules of Evidence. "Exceptions to the rule excluding depositions as hearsay are found not only in the rules of civil

procedure, but in the rules of evidence." Dinter v. Brewer, 420 So. 2d 932, 934 (Fla. 3d DCA 1982).

The court in Dinter explained that when considering the admissibility of a deposition, Florida Rule of Civil Procedure 1.330 provides exceptions to the exclusion of a deposition. The court noted:

> While it is true that when considering the admissibility of a deposition we are conditioned to look to the Florida Rule of Civil Procedure 1.330, that rule merely supplies certain exceptions to the rule excluding hearsay, that is, when the deposition is to be used in the action for which it was taken, or in a proceeding supplemental to, or a retrial of, that action. But when the deposition does not come within the exception provided in the civil procedure rule, we must turn to the rules of evidence in our search for an exception.

Id. at 934.

Accordingly, the provisions in the Florida Evidence Code such as § 90.803(22) relating to admissibility of deposition testimony is procedural in that both rule 1.330 of the Rules of Civil Procedure and Section 90.803(22) of the Evidence Code address the same procedural matters.

Fla.R.Civ.P. 1.330 (Use of Depositions In Court Proceedings) contains virtually identical provisions to Fed.R.Civ.P. 32 (Use of Depositions In Court

Proceedings) with few differences.[1] See In Re The Florida Bar, 265 So. 2d 21, 32 (Fla. 1972) (stating that rule 1.330 is derived from federal rule 32). In 1998 the Florida Supreme Court added language to 1.330(a)(1) providing that:

> any deposition may be used by any part for the purpose of contradicting or impeaching the testimony of the deponent as a witness or for any purpose permitted by the Florida Evidence Code.

(emphasis added).

The 1998 amendment to Rule 1.330 continues the consistency with Fed.R.Civ.P. 32. See In re: Amendments to the Florida Rules of Civil Procedure, 718 So. 2d 795, 798 (Fla. 1988). The reason for the 1980 revision to Fed.R.Civ.P. 32(a)(1) was "to expressly allow for the use of depositions as permitted by the Federal Rules of Evidence." 7 Moore's Federal Practice § 32 App.04 at 6 (3d ed. 2000). The 1980 Advisory Committee Notes comment that the language of the subdivision (before the revision) is "too narrow". However, the Florida legislature's recent enactment of the former testimony hearsay exception creates a tension between the Florida Rules of Civil Procedure and the Evidence Code

[1] Subsection (a)(3)(F) of the Florida rule, for which there is no counterpart in the federal rule, permits the use of a deposition, an expert, or skilled witness for any purpose. Subdivision (c) of the Florida rule concerns adverse witnesses and Subdivision (c) of the federal rule addresses the use of non-stenographic depositions. Neither provision has a counterpart in the other rule. Subsection (d)(3)(c) relating to the time for objecting to written questions provides different time periods for a party to object. The Florida rule allows ten days while the federal rule allows only five days.

concerning the admissibility into evidence of a nonparty's deposition. See Friedman v. Friedman, 2000 WL 898097 (Fla. 2d DCA, July 7, 2000). The procedural safeguards enunciated in Fla.R.Civ.P. 1.330(a)(3) limiting the use of deposition testimony may not override the broad expansion of the use of prior testimony irrespective of a witness' availability.

As noted in this Court's Order Requesting Comments dated July 13, 2000, the Florida Bar Code and Rules of Evidence Committee targeted a number of legally problematic features in this new legislation. First, this novel hearsay exception precludes a fact finder from evaluating a witnesses' demeanor and thereby hampers a comprehensive evaluation of the witnesses' 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 at all stages of a judicial proceeding beyond that contemplated by Fla.R.Civ.P. 1.330(a)(3).

Second, the new amendment precludes a party from confronting an adverse witness, because the party against whom the evidence is offered, or a predecessor in interest, may not 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 interests" standard.

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

Fourth, the legislation will significantly shift expense burdens relating to the introduction of evidence. Presently, a proponent seeking to admit evidence assumes the expense associated with that effort. Pursuant to the new amendment, 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 and likely that the party against whom the evidence is now being offered will 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 the 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 amendment tends to increase litigation expense and time.

Fifth, the new provision inevitably will add to the length of trial proceedings. The amendment shall cause courts and litigants to review both proceedings (probably in camera) to determine that the "similar motive" component necessary to develop the testimony as identical in both actions. Put simply, the new exception eviscerates 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.

## III. REQUEST FOR ORAL ARGUMENT

The Florida Bar Code and Rules of Evidence Committee respectfully requests oral argument on the issues concerning its Comment filed pursuant to this Court's Order Requesting Comments on Chapter 98-2 § 1, Laws of Florida, Amending Section 90.803(22), Florida Statutes.

## CONCLUSION

The Supreme Court of Florida should not adopt, as a rule of evidence, Chapter 98-2, § 1, Laws of Florida, which amends Section 90.803(22), Florida Statutes.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amendments to the Florida Rules of Evidence – Comment and Request for Oral Argument of the Florida Bar Code and Rules of Evidence Committee has been furnished via U.S. Mail this 15th day of August, 2000 to: See attached service list.

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