

ORIGINAL

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC00-607

FILED
THOMAS D. HALL

AUG 15 2000

CLERK, SUPREME COURT
BY _____

AMENDMENTS TO THE FLORIDA RULES OF EVIDENCE

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

Keith H. Park, Esq.
Keith H. Park, P.A.
2240 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Telephone: (561) 686-7711
Facsimile: (561) 686-8021

*Chairman, The Florida Bar Code
and Rules of Evidence Committee*

Pedro J. Martinez-Fraga, Esq.
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0717

*Committee Member, The Florida Bar
Code and Rules of Evidence Committee*

John F. Harkness, Jr., Esq.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399
Telephone: (850) 560-5600

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

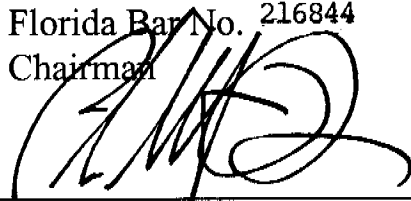
The Supreme Court of Florida should not adopt, as a rule of evidence, Chapter 98-2, § 1, Laws of Florida, which amends Section 90.803(22), Florida Statutes.

Respectfully submitted,

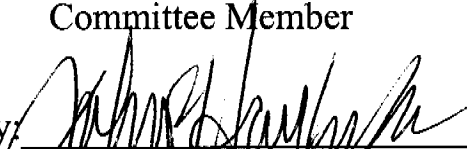
The Florida Bar Code and Rules of
Evidence Committee

By: 

Keith H. Park
Florida Bar No. 216844
Chairman

By: 

Pedro J. Martinez-Fraga
Florida Bar No. 752852
Committee Member

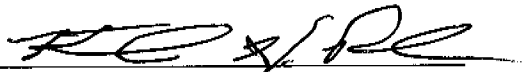
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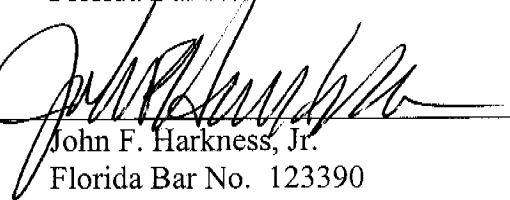
John F. Harkness, Jr.
Florida Bar No. 123390
Executive Director, The Florida Bar

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.

The Florida Bar Code and Rules of
Evidence Committee

By: 
Keith H. Park
Florida Bar No. 216844

By: 
John F. Harkness, Jr.
Florida Bar No. 123390
Executive Director, The Florida Bar

The Honorable Jeb Bush, Governor
The Capitol
Tallahassee, FL 32399-1100

The Honorable Toni Jennings
President of the Senate
Room 418, Senate Office Building
The Capitol
Tallahassee, FL 32399-1100

The Honorable John E. Thrasher
Speaker of the House
Room 420, C, The Capitol
Tallahassee, FL 32399-1300

Florida Chamber of Commerce
136 South Bronough Street
Tallahassee, FL 32301

Neal A. Roth, President
Academy of Florida Trial Lawyers
2665 S. Bayshore D., Pthse. 1
Miami, FL 33133

The Honorable Jack Behr
Public Defender
First Judicial Circuit
P.O. Box 12666
Pensacola, FL 32574

The Honorable Nancy Daniels
Public Defender
Second Judicial Circuit
Leon County Courthouse, Ste. 401
301 South Monroe Street
Tallahassee, FL 32301

The Honorable C. Dennis Roberts
~~Public Defender~~
Third Judicial Circuit
P.O. Drawer 1209
Lake City, FL 32056-1209

The Honorable Louis O. Frost, Jr.
Public Defender
Fourth Judicial Circuit
25 N. Market St., Ste. 200
Jacksonville, FL 32202-2802

The Honorable Howard H. Babb, Jr.
Public Defender
Fifth Judicial Circuit
Lake County Judicial Center
550 W. Main Street
Tavares, FL 32778-7800

The Honorable Bob Dillinger
Public Defender
Sixth Judicial Circuit
14250 49th St. North
Clearwater, FL 33762

The Honorable James B. Gibson
Public Defender
Seventh Judicial Circuit
The Justice Center
251 N. Ridgewood Avenue
Daytona Beach, FL 32114

The Honorable C. Richard Parker
Public Defender
Eighth Judicial Circuit
P.O. Box 2820
Gainesville, FL 32602

The Honorable Joseph W. DuRocher
Public Defender
Ninth Judicial Circuit
435 N. Orange Avenue
Orlando, FL 32801

The Honorable J. Marion Moorman
Public Defender
Tenth Judicial Circuit
255 N. Broadway Avenue
P.O. Box 9000, Drawer PD
Bartow, FL 33831

The Honorable Bennett H. Brummer
Public Defender
Eleventh Judicial Circuit
1320 NW 14th St.
Miami, FL 33125

The Honorable Elliott C. Metcalfe, Jr.
Public Defender
Twelfth Judicial Circuit
2071 Ringling Blvd, 5th Floor
Sarasota, FL 34237

The Honorable Julianne M. Holt
Public Defender
Thirteenth Judicial Circuit
801 E. Twiggs St., 5th Floor
Tampa, FL 33602-3548

The Honorable Herman D. Laramore
Public Defender
Fourteenth Judicial Circuit
P.O. Box 636
Marianna, FL 32447

The Honorable Richard L. Jorandby
Public Defender
Fifteenth Judicial Circuit
Criminal Justice Bldg., 421 3rd St.
West Palm Beach, FL 33401

The Honorable Rosemary E. Enright
Public Defender
Sixteenth Judicial Circuit
P.O. Box 4127
Key West, FL 33041

The Honorable Alan H. Schreiber
Public Defender
Seventeenth Judicial Circuit
North Wing, 201 SE 6th Street
Ft. Lauderdale, FL 33301

The Honorable James Russo
Public Defender
Eighteenth Judicial Circuit
400 South Street
Titusville, FL 32796

The Honorable Diamond R. Litty
Public Defender
Nineteenth Judicial Circuit
Ft. Pierce, FL 34950

The Honorable Robert R. Jacobs II
Public Defender
Twentieth Judicial Circuit
P.O. Drawer 1980
Ft. Myers, FL 33902-1980

The Honorable Curtis A. Golden
State Attorney
First Judicial Circuit
P.O. Box 12726
Pensacola, FL 32575

The Honorable William N. Meggs
State Attorney
Second Judicial Circuit
Leon County Courthouse
Tallahassee, FL 32399-2550

The Honorable Jerry M. Blair
State Attorney
Third Judicial Circuit
P.O. Drawer 1546
Live Oak, FL 32060

The Honorable Harry L. Shorstein
State Attorney
Fourth Judicial Circuit
600 Duval County Courthouse
330 E. Bay Street
Jacksonville, FL 32202

The Honorable Brad King
State Attorney
Fifth Judicial Circuit
19 NW Pine Avenue
Ocala, FL 34475

The Honorable Bernie McCabe
State Attorney
Sixth Judicial Circuit
P.O. Box 5028
Clearwater, FL 33758

The Honorable John Tanner
~~State Attorney~~
Seventh Judicial Circuit
The Justice Center
251 N. Ridgewood Ave.
Daytona Beach, FL 32114-7505

The Honorable Rod Smith
State Attorney
Eighth Judicial Circuit
P.O. Box 1437
Gainesville, FL 32602

The Honorable Lawson Lamar
State Attorney
Ninth Judicial Circuit
P.O. Box 1673
Orlando, FL 32802

The Honorable Jerry Hill
State Attorney
Tenth Judicial Circuit
P.O. Box 9000 - Drawer SA
Bartow, FL 33831

The Honorable Katherine Fernandez Rundle
State Attorney
Eleventh Judicial Circuit
1350 NW 12th Avenue
Miami, FL 33136-2111

The Honorable Earl Moreland
State Attorney
Twelfth Judicial Circuit
4th Floor Criminal Justice Bldg.
2071 Ringling Blvd.
Sarasota, FL 34237-7000

The Honorable Harry Lee Coe III
State Attorney
Thirteenth Judicial Circuit
Courthouse Annex
Tampa, FL 33602

The Honorable Jim Appleman
State Attorney
Fourteenth Judicial Circuit
P.O. Box 1040
Panama City, FL 32402

The Honorable Barry Krischer
State Attorney
Fifteenth Judicial Circuit
401 N. Dixie Highway
West Palm Beach, FL 33401

The Honorable Kirk C. Zuelch
State Attorney
Sixteenth Judicial Circuit
530 whitehead Street
Key West, FL 33040

The Honorable Michael J. Satz
State Attorney
Seventeenth Judicial Circuit
201 SE 6th Street
Ft. Lauderdale, FL 33301

The Honorable Norman R. Wolfinger
State Attorney
Eighteenth Judicial Circuit
2725 Judge Fran Jamieson Way, Bldg. D
Viera, FL 32940

The Honorable Bruce Colton
~~State Attorney~~
Nineteenth Judicial Circuit
411 S. Second Street
Ft. Pierce, FL 34950

The Honorable Joseph P. D'Alessandro
State Attorney
Twentieth Judicial Circuit
Lee County Justice Center
1700 Monroe Street
Ft. Myers, FL 33902

Melanie Ann Hines
Statewide Prosecutor
400 South Monroe Street
Tallahassee, FL 32399-6536

The Honorable Robert A. Butterworth
Attorney General
The Capitol
Tallahassee, FL 32399-1050

Gregory C. Smith
Capital Collateral Counsel
1533-B S. Monroe Street
Tallahassee, FL 32301

John Moser
Capital Collateral Counsel
3801 Corporex Park Dr., Ste. 201
Tampa, FL 33601

Neal Dupree
Capital Collateral Counsel
101 NE 3rd Street
Ft. Lauderdale, FL 33301

Solicitor General Thomas E. Warner
Department of Legal Affairs
PL-01 The Capitol
Tallahassee, FL 32399-1050

Florida Assn. of Criminal Defense Lawyers
Kathryn Bradley, Executive Director
P.O. Box 1528
Tallahassee, FL 32302

Florida Defense Lawyers Association
Linda L. Jude, Executive Director
902 N. Gadsden Street
Tallahassee, FL 32303

Florida Prosecuting Attorneys Association
Steve Urse, Executive Director
107 W. Gaines Street, Ste 119
Tallahassee, FL 32399-1050

Florida Public Defender Association
Elliott C. Metcalfe, President
2071 Ringling Blvd., 5th Floor
Sarasota, FL 34237

George W. Greer, President
Florida Conference of Circuit Judges
14250 49th St. North
Clearwater, FL 33762

Eugene Turner, President
Florida Conference of County Court Judges
Collier County Court
3301 Tamiami Trail E., Bldg. L
Naples, FL 34112

John F. Harkness, Jr.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

Harvey Joel Sepler, Chair
Criminal Law Section, Florida Bar
Office of the Public Defender
1320 NW 14th Street
Miami, FL 33125-1600

Jeffrey P. Wasserman, Chair
Family Law Section, Florida Bar
Muchnick, Wasserman & Dolin
4000 Hollywood Blvd., Ste. 620-N
Hollywood, FL 33021-6751

Robert F. Spohrer, Chair
Trial Lawyers Section, Florida Bar
Spohrer Wilner et al.
444 E. Duval Street
Jacksonville, FL 32202-2767

Keith H. Park, Chair
Code and Rules of Evidence Committee
P.O. Box 3563
West Palm Beach, FL 33402-3563

Professor Charles W. Ehrhardt
Florida State University College of Law
425 W. Jefferson Street
Tallahassee, FL 32306-3400