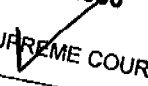


ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
THOMAS D. HALL
AUG 11 2000
CLERK, SUPREME COURT
BY 

AMENDMENTS TO THE FLORIDA
RULES OF EVIDENCE

CASE NO. SC00-607

COMMENTS CONCERNING CHAPTER 98-2, SEC. 1,
LAWS OF FLORIDA, AMENDING SECTION 90.803(22),
FLORIDA STATUTES

These comments relating to the promulgation of the Florida Evidence Code are submitted to assist the Court in addressing the issues raised in its Order Requesting Comments. For the first time since the effective date of the Code in 1979, this Court is asking for comments concerning whether a particular provision of the Code is substance or procedure. The following discussion will hopefully give a historical context to this current issue.

The Florida Evidence Code, chapter 90 of the Florida Statutes, was recommended for adoption to the Florida legislature by the Florida Law Revision Council. At that time, the Law Revision Council was statutorily authorized and was composed of members appointed by the President of the Senate, the Speaker of the House and the Board of Governors of The Florida Bar. Fla. Stat. Sec. 13.91 (1967). The functions of the Council included examining the common law and statutory

law of the state "for the purpose of discovering defects and anachronisms in the law and recommending needed reforms" and to recommend changes in the law to "bring the law of the state into harmony with modern conditions." Fla. Stat. Sec. 13.96 (1967).

At a time prior to the legislature having a large legislative staff for each of the various committees, the Law Revision Council recommended to the legislature the promulgation of broad modern statutory enactments, including the Florida Administrative Procedure Act, the Corporation Act, the Landlord and Tenant Act and the modern Wrongful Death Act.

At about the same time as the federal system was considering the adoption of the Federal Rules of Evidence, the Florida Law Revision Council began to consider the adoption of a Florida Evidence Code. Despite an earlier false start, in 1972 the Council undertook the researching of the existing Florida law of evidence as well as the law of other jurisdictions, and began drafting an evidence code. The undersigned was appointed by the Council as Reporter and Drafter of the Evidence Code project.

After research involving the existing law was completed and recommendations and preliminary working drafts were prepared, a subcommittee of the Council began monthly meetings with the reporter and a drafting group to

discuss the Code. The drafting group was composed of a committee from the Florida Circuit Judges Conference and a committee from the Trial Lawyers Section of the Florida Bar. In addition, there was active participation from representatives of the Florida Supreme Court, the District Courts of Appeal, the County Courts, the Florida Prosecuting Attorneys Association, the Florida Public Defenders Association and the Academy of Florida Trial Lawyers. See Preface, West's Florida Statutes, Annotated 1979. Special Pamphlet. Each section of the working drafts was discussed by this group. Subsequently, new drafts were prepared by the Reporter and brought back to the group. On most issues, the decisions of the group was followed. However, in a few areas, there was disagreement on the rule of evidence to be included, and the Council made the final decision.

The Evidence Code was first introduced during the 1974 session of the Florida legislature. The 1976 session of the legislature adopted the Code and then Governor Askew signed it into law. There were a series of amendments which delayed the effective date of the Code until July 1, 1979.

During the time the Code was being drafted, it was recognized that there was a significant issue as to whether the Code, or particular portions of it, was substance or procedural. The Executive Director of the Council wrote in the Introduction to the Working Drafts:

The debate over whether the enactment of a comprehensive code of evidence should be accomplished by legislation or court rules will continue. The point was debated before the adoption of the Federal Rules by the Supreme Court, and several states have faced the issue.

Florida's division of authority between the Legislature and the Supreme Court with respect to the substantive and procedural law would make the promulgation of a code of evidence impossible without the cooperation of these two branches of government. Questions of substance vs. procedure have been debated for years, and no one has ever been able to draw a clear dividing line. More important, even if a line could be drawn the substance and procedure of the law of evidence are often too interwoven to be separated. A code of evidence must contain both substance and procedure, so its promulgation must be a cooperative effort between the legislature and the Supreme Court. The Florida Law Revision Council must find the avenue of cooperation between those branches of government which will allow the enactment of rules of evidence free from doubts concerning the constitutional authority of either the Court or the Legislature to promulgate this hybrid of substance and procedure. Introduction, C. McFerrin Smith, III, Executive Director, Preliminary Working Draft, Evidence Code, Hearsay, Florida Law Revision Council, January 11, 1974, Florida State Archives, Series 1052, Carton 7.

At least two concerns were voiced. First was to ensure that there was a comprehensive evidence codification of evidence which was located in a single source, and second was to avoid, as much as possible, tensions between the legislative and judicial branches concerning whether a particular section of the Code was substance or procedure.

During the drafting of the Code, the undersigned as Reporter and the then-Executive Director of the Law Revision Council met with Justice James C. Atkins

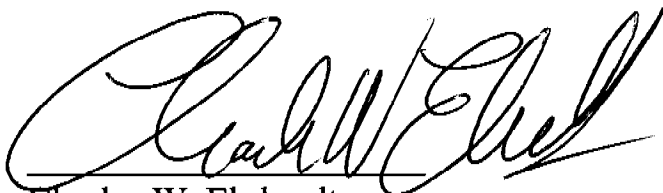
to discuss the substance/procedure issue. He recognized the inextricably intertwined nature of substance and procedure presented in the Evidence Code and the difficulty in separating them. His direction was that the Code should be presented to the legislature and that subsequent to its legislative enactment, the court would adopt any parts of it that were procedural. At that time Justice Atkins reserved the right to the Court not to adopt any portions of the Code which in the Court's judgment were inappropriate.

As a result, after the Code became effective "to avoid multiple appeals and confusion in the operation of the courts caused by assertions that portions of the evidence code are procedural," the Court entered an order adopting as much of Chapter 90, Florida Statutes, as was procedural as a rule of court. That order did not specify which sections of the Code the Court believed were procedural. See In re Florida Evidence Code, 372 So.2d 1369 (1979). Similar orders have continued to be entered on a regular basis as the Code has been amended by the Florida Legislature. See e.g., In re Amendment of Florida Evidence Code, 404 So.2d 743 (1981).

These comments will not take a position on whether the amendment is substantive or procedural in nature, in part because of the difficulty in drawing a clear dividing line as it concerns evidentiary matters. However, the concerns that

were identified during drafting of the Code which relate to the promulgation of a single code of evidence under the Florida Constitution remain very important.

The undersigned requests to participate in the oral argument scheduled in this case.

A handwritten signature in black ink, appearing to read "Charles W. Ehrhardt". The signature is written in a cursive style with a large initial "C" and "E".

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