ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-67

AMENDMENTS TO THE FLORIDA RULES OF EVIDENCE

RESPONSE OF THE ACADEMY OF FLORIDA TRIAL LAWYERS TO ORDER REQUESTING COMMENTS ON CHAPTER 98-2, SECTION 1, LAWS OF FLORIDA, AMENDING SECTION 90.803(22), FLORIDA STATUTES

Lawrence J. Block, Jr., Esquire
Searcy, Denney, Scarola, et al.
P. O. Box 3626
West Palm Beach, FL 33402
(561) 686-6300

President, The Academy of
Florida Trial Lawyers

William C. Gentry, Esquire
Law Office of W. C. Gentry, P.A.
One Independent Drive, Suite 1701
Jacksonville, FL 32202
(904) 356-4100

Wayne Hogan, Esquire
Brown, Terrell, Hogan, Ellis,
McClamma & Yegelwel, P.A.
804 Blackstone Building
233 East Bay Street
Jacksonville, FL 32202

Counsel for The Academy of
Florida Trial Lawyers

RESPONSE OF THE ACADEMY OF FLORIDA TRIAL LAWYERS TO ORDER REQUESTING COMMENTS ON CHAPTER 98-2, SECTION 1, LAWS OF FLORIDA, AMENDING SECTION 90.803(22), FLORIDA STATUTES

The Academy of Florida Trial Lawyers, by and through its President and undersigned Counsel, responds to the Request for Comment of the Florida Supreme Court regarding Chapter 98-2, Section 1, Laws of Florida, amending the Florida Evidence Code, as follows:

1. The statutory amendment to the former testimony exception to the hearsay rule [Section 90.803(22)] has been the subject of considerable debate within the Academy of Florida Trial Lawyers as to its potential tactical benefit or detriment. Although the amendment emanated from Owens-Corning, a frequent asbestos disease defendant (*see, e.g., Owens Corning Fiberglas Corp. v. Ballard*, 749 So.2d 483 (Fla. 1999)), there are certain classes of cases in which it may provide an advantage to the plaintiff. Nevertheless, regardless of whether the rule gives a greater advantage to a plaintiff or a defendant, the Academy opposes such a provision for two fundamental reasons:

(a) The statutory amendment is clearly procedural and constitutes usurpation of this Court's exclusive rule making authority in contravention of the separation of powers doctrine, Art. V, §2(a); Art. II, §3, Constitution of

the State of Florida. Particularly given the special interest nature of the amendment, and regardless of any perceived advantage to any particular class of litigants, it would establish a precedent that would undermine the separation of powers and the fundamental principles upon which the Florida Rules of Civil Procedure and Rules of Evidence are predicated.

(b) As recognized by the Florida Rules of Civil Procedure and Code and Rules of Evidence committees of The Florida Bar, the amendment raises serious due process issues regarding a litigant's right to confront adverse witnesses and would allow bootstrapping of remote depositions into Florida litigation. Indeed, at least one District Court has recognized the impropriety of permitting the use of depositions as contemplated by Ch. 98-2, §1. *See Friedman v. Friedman*, 25 Fla. L. Wkly D1641 (2d DCA, July 7, 2000), finding that a non-party deposition could not be used as provided by amended Section 90.803(22) because it did not meet the prerequisites of Rule 1.330(a)(3), Fla.R.Civ.Pro.

2. A review of the history of the subject provision is revealing, not only in regard to the merits of whether it should be adopted as a rule of evidence, but also on the question of whether it is procedural or substantive.

(a) Consideration by the Florida Rules of Civil Procedure Committee.

The substance of the amendment to the former testimony provisions of the Evidence Code was initially proposed in 1995 as an amendment to the Florida Rules of Civil Procedure.[1] In a letter to William C. Gentry, chairman of the Florida Rules of Civil Procedure Committee, George Meros, Esquire, advised as follows:

> "Enclosed please find a proposed change to Rule of Civil Procedure 1.330, submitted on behalf of Owens-Corning. This is submitted to you in accordance with directions given to us by your office. We understand that the Rules Committee will consider this and other changes at a meeting later in November. We also understand from the Florida Bar that the Civil Rules Committee will present its proposed changes to the Florida Bar Board of Governors on January 26, 1996, in Tallahassee." (App. 1.)

As provided by the internal rules of the civil procedure committee, the request for amendment was assigned to an appropriate subcommittee for analysis. The subcommittee reported:

> "The subcommittee decided, unanimously, to disapprove in concept the proposed amendment to Rule 1.330 set forth by George Meros, Jr. The subcommittee felt that, *inter alia*, the proposed rule would pose significant due process problems. (Emphasis added, App. 2.)

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[1] The Appendix attached hereto contains various relevant materials taken from Agenda for meetings of the Florida Rules of Civil Procedure Committee of the Florida Bar and the committee's minutes.

Subsequently, the matter was presented to the full committee. The proposed rule change clearly raised due process issues and, in various contexts, would provide an unfair advantage to one party over another contrary to the spirit and principles of the Rules of Civil Procedure. Accordingly, by a vote of 44-0, it was rejected by the Florida Rules of Civil Procedure Committee and was not proposed to this Court. (App. 3, Minutes of Fla. R. Civ. Proc. Committee, p. 8.)

Significantly, and in apparent recognition of due process considerations before the Civil Procedure Rules Committee, Owens-Corning's proposed civil rule amendment attempted to provide safeguards that were later stripped from the legislative rule. For example, the proposed civil procedure rule required advance notice to the adverse party of the intent to use "prior testimony" and "a fair opportunity to prepare to meet it" and required the testimony to be described with particularity, including the name and address of the deponent. The proposed rule also provided that such testimony would only be allowed when "the interest of justice will be best served by [its] admission... ." (*See* pp. 1-2 of Attachments to Meros' letter, App. 1).[2] However, the amendment to the rule of evidence later

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[2] The rule proposed to the Civil Procedure Rules Committee in 1995 provided:

(b) **Additional Use of Depositions.** At the trial or upon the hearing of a motion or in an interlocutory proceeding, any part or all of a deposition may be

adopted by the Legislature is much more draconian and dispenses with the notice and "interest of justice" provisions.

(b) Code and Rules of Evidence Committee of The Florida Bar.

Having recognized the procedural nature of a rule which would open Florida trials to litigation by deposition without cross-examination by the parties to the action, and being uncertain of obtaining favorable consideration through the mechanism established by this Court for amendments to the Rules of Civil Procedure, the proponent of the rule moved into the legislative theater. Finding a

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used against any party who was not present or represented at the taking of the deposition or who had [sic] did not have reasonable notice of it, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, in accordance with provisions (a)(1)-(6), provided that the court finds all of the following:

(1) at least one participant in the deposition had opportunity and similar motive to develop the testimony by direct, cross or redirect examination;

(2) the testimony is offered as evidence of material fact;

(3) the proponent of the testimony makes know to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the testimony and the particulars of it, including the name and address of the deponent; and

(4) the interests of justice will be best served by the admission of the testimony into evidence. (App. 1.)

more receptive audience in the political arena, the Owens-Corning proposal was first enacted as part of the Evidence Code in 1997 by passage of Committee Substitute for House Bill 1597. As was its responsibility, the Code and Rules of Evidence committee of the Florida Bar reviewed the proposed legislative change and recommended against it (App. 4). In his veto message, Governor Lawton Chiles echoed concerns that had been voiced by both the Civil Procedures Rules Committee and the Rules of Evidence Committee. The Governor concluded that "this statute creates an untenable potential for unfairness to all parties to a lawsuit". (App. 5, Veto Message, May 29, 1997.) However, the veto was overridden in the 1998 legislative session. Subsequently, as is its obligation to this Court, the Code and Rules of Evidence Committee again reviewed the amendment to §90.803(22). Again, the appropriate body of the Florida Bar rejected the provision for the reasons stated in its recommendation to this Court.

3. The statutory amendment clearly seeks to enact a procedural rule change and as such, it is unconstitutional.

One indisputably judicial function is to promulgate the rules governing the courts and legal practice. Article V, §2(a), Constitution of the State of Florida. The Legislature, therefore, has no constitutional authority to enact any law relating

to practice and procedure. *In re Clarification of Florida Rules of Practice and Procedure*, 281 So.2d 204, 204 (Fla. 1973). When it does so, the enactment is void. *State v. Smith*, 260 So.2d 489, 491 (Fla. 1972). *See also Haven Federal Savings & Loan Ass'n v. Kirian*, 579 So.2d 730, 732 (Fla. 1991). The Court may, of course, and has on occasion, adopted rules promulgated by the legislature when the Court deems them appropriate -- particularly when the procedural provisions are integral to some substantive scheme. *See, e.g., Timmons v. Combs*, 608 So.2d 1 (Fla. 1992); *Leapai v. Milton*, 595 So.2d 12 (Fla. 1992). However, such comity does not relax the Court's exclusive authority over practice and procedure and the orderly administration of justice. *See, e.g., Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000).

In cordoning off the territory between that which falls within the Legislature's purview from that which is entrusted to the judiciary, the Supreme Court has adopted a substantive/procedural dichotomy. Substantive law "creates, defines, adopts and regulates rights, while procedural law prescribes the method of enforcing those rights." *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 65 (Fla. 1973)(citations omitted). There can be no doubt that the admissibility of evidence at trial involves "the method of enforcing" substantive rights and is procedural. *Glendening v. State*, 536 So.2d 212, 215 (Fla. 1988). Practice and

procedure comprises "the method of conducting litigation involving rights and corresponding defenses." *Haven Federal Savings & Loan Ass'n*, 579 So.2d at 732 (citation omitted). Those methods include "the course, form, manner, means, method, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion . . . the machinery of the judicial process as opposed to the product thereof." *Id.* (citation omitted). Attempting to change the rules of civil trial practice by enacting a legislative amendment to the evidence code does not change its procedural nature or divest this court of exclusive jurisdiction over the matter.

4. This Court should not adopt and thereby "constitutionalize" a statutory rule that is contrary to fundamental notions of due process and the principles underlying the fair administration of justice.

Regardless of the merits of any attempted legislative rule change, it is essential that this Court preserve its exclusive authority. In the development of American constitutional law, no principle was considered or has proven more important to the protection of liberty and justice than the diffusion of power through the separation of government into distinct branches. The Father of the U.S. Constitution, James Madison, wrote of separation of powers that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the

authority of more enlightened patrons of liberty." The Federalist No. 47, at 301 (C. Rossiter ed. 1961)(J. Madison). He further warned, "the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack." Federalist No. 51, at 321-22 (Madison).

In this system of separated powers, the judiciary plays a critical role, resistant to the political fads and expediencies or "majoritarian whim" that may engulf the other two branches. *See Smith v. Department of Insurance*, 507 So.2d 1080, 1089 (Fla. 1987). For this reason, the courts are entrusted to serve as "an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority." Federalist No. 78, at 467 (A. Hamilton). Chapter 98-2, §1, is a classic example of special interests attempting to bypass the Courts to achieve a judicial advantage through political influence before another branch of government.

Early on, the Florida Supreme Court recognized the essential nature of the separation of powers principle. In *Ponder v. Graham*, 4 Fla. 23 (1851), the Court

eloquently described the importance of the Court's avoiding any relaxation of its exclusive prerogatives lest a little abandonment lead to major mischief.

> If the constitution of a State has any vitality at all, its provisions, separating the several departments of government, do necessarily, as they were designed, restrict this prior usage within constitutional bounds, and prevent a blending together of those powers, which the wisest and best of men have considered the only safe guarantee to public liberty and private rights. . . .
>
> The fundamental principle of every free and good government, is that these several co-ordinate departments forever remain separate and distinct. No maxim in political science is more fully recognized than this. Its necessity was recognized by the framers of our government, as one too invaluable to be surrendered, and too sacred to be tampered with.
>
> * * * *
>
> The purity of our government, and a wise administration of its laws, depend upon a rigid adherence to this principle. It is one of fearful import, and a relaxation is but another step to its abandonment--for what authority can check the innovation, when the barriers so clearly defined by every constitutional writer, are once thrown down.
>
> Under all circumstances, it is the imperative duty of the courts to stand by the constitution.

Id. at 42-43.

Although a political amendment to a rule of evidence may seem a little thing, it intrudes upon the separate and independent authority of the Courts and, if permitted, would presage the erosion of the independence of the judiciary.

CONCLUSION

For the foregoing reasons, the Academy of Florida Trial Lawyers respectfully submits that this Court should determine that the amendment to Section 90.803(22), Florida Statutes, is procedural and violative of Art. V, §1 and 2 of the Florida Constitution. For the reasons well stated in the report of the Code and Rules of Evidence Committee of the Florida Bar, such amendment should not be adopted by this Court.

Respectfully submitted,

LAW OFFICES OF W.C. GENTRY

By: _____

William C. Gentry, Esquire
Law Office of W. C. Gentry, P.A.
One Independent Drive, Suite 1701
Jacksonville, FL 32202
(904) 356-4100

Wayne Hogan, Esquire
Brown, Terrell, Hogan, Ellis,
McClamma & Yegelwel, P.A.
233 East Bay Street, 8th Floor
Jacksonville, FL 32202
(904) 632-2424

Counsel for The Academy of
Florida Trial Lawyers

Lawrence J. Block, Jr., Esquire
Searcy, Denney, Scarola, et al.
P. O. Box 3626
West Palm Beach, FL 33402
(561) 686-6300

President, The Academy of
Florida Trial Lawyers

REQUEST FOR ORAL ARGUMENT

Pursuant to this Court's Order of July 13, 2000, the Academy of Florida Trial Lawyers requests permission to participate in the oral argument on the above matter.

Respectfully submitted,

LAW OFFICES OF W.C. GENTRY

By: _____

William C. Gentry, Esquire
Law Office of W. C. Gentry, P.A.
One Independent Drive, Suite 1701
Jacksonville, FL 32202
(904) 356-4100

Wayne Hogan, Esquire
Brown, Terrell, Hogan, Ellis,
McClamma & Yegelwel, P.A.
233 East Bay Street, 8th Floor
Jacksonville, FL 32202
(904) 632-2424

Counsel for The Academy of
Florida Trial Lawyers

Lawrence J. Block, Jr., Esquire
Searcy, Denney, Scarola, et al.
P. O. Box 3626
West Palm Beach, FL 33402
(561) 686-6300

President, The Academy of
Florida Trial Lawyers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by US Mail to the following this 15th day of August, 2000.

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, Florida 32399-1100

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

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

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 Monore Street
Tallahassee, FL 32301

The Honorable C. Dennis Roberts
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 Street, 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 Street N.
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
P.O. Box 9000, Drawer PD
Bartow, FL 33831

The Honorable Bennett H. Brummer
Public Defender, Eleventh Judicial Circuit
1320 NW 14th Street
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 Jorandby
Public Defender, Fifteenth Judicial Circuit
Criminal Justice Building, 421 3rd St.
West Palm Beach, FL 33401

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

The Honorable Alan H. Schreiber
Public Defender, 17th 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 Litty
Public Defender, 19th Judicial Circuit
Ft. Pierce, FL 34950

The Honorable Robert R. Jacobs, II
Public Defender, 20th Judicial Circuit
P.O. Drawer 1980
Ft. Myers, FL 33902-1980

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

The Honorable William 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
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
1700 Monroe Street
Ft. Myers, FL 33902

Melanie Ann Hines
Statewide Prosecutor
400 S. 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 Drive, 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 32303

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 Street 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

William C. Gentry

Appendix

LAW OFFICES
RUMBERGER, KIRK & CALDWELL
PROFESSIONAL ASSOCIATION

SIGNATURE PLAZA, SUITE 300 (32801)
201 SOUTH ORANGE AVENUE
POST OFFICE BOX 1873
ORLANDO, FLORIDA 32802-1873
(407) 872-7300
TELECOPIER (407) 841-2133

100 NORTH TAMPA STREET (33602)
SUITE 2000
POST OFFICE BOX 3390
TAMPA, FLORIDA 33601-3390
(813) 223-4253
TELECOPIER (813) 221-4752

ONE BISCAYNE TOWER, SUITE 3100
2 SOUTH BISCAYNE BOULEVARD
MIAMI, FLORIDA 33131-1897
(305) 358-5577
TELECOPIER (305) 371-7580

108 EAST COLLEGE AVENUE, SUITE 700 (32301)
POST OFFICE BOX 10507
TALLAHASSEE, FLORIDA 32302-2507
(904) 222-6550
TELECOPIER (904) 222-6783

PLEASE REPLY TO: TALLAHASSEE

(9)

October 27, 1995

Mr. William C. Gentry
Chairman, Civil Procedure
Rules Committe
6 East Bay Street, Suite 400
Jacksonville, Florida 32201-0837

Re: Proposal for Amendment to Rule 1.330, Florida Rules of Civil Procedure

Dear W.C.:

Enclosed please find a proposed change to Rule of Civil Procedure 1.330, submitted on behalf of Owens-Corning. This is submitted to you in accordance with directions given to us by your office. We understand that the Rules Committee will consider this and other changes at a meeting later in November. We also understand from the Florida Bar that the Civil Rules Committee will present its proposed changes to the Florida Bar Board of Governors on January 26, 1996, in Tallahassee. We respectively request the opportunity to make an oral presentation both to the Civil Rules Committee and to the Board of Governors on this proposed rule change. We are confident that the Committee and the Board will recognize that this proposed change is fair, and will make litigation less costly and more efficient.

I am today sending a courtesy copy of this proposal to each of the members of the Civil Rules Committee. Please call or write at your earliest convenience to let me know the process you will employ in considering this proposed change. Should you need additional or supplemental information, please do not hesitate to let me know.

Respectfully submitted,

George N. Meros, Jr.

GNMjr/srh
Enclosure

P.5

PROPOSAL FOR AMENDMENT
TO RULE 1.330, FLORIDA RULES OF CIVIL PROCEDURE

Introduction

Florida Rule of Civil Procedure 1.330, entitled "Use of Depositions in Court Proceedings," restricts the use of depositions at trial to those depositions at which the adverse party was present, represented or of which it had notice. The Rule reads in relevant part;

> (a) At the trial or upon the hearing of a motion or in an interlocutory proceeding, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice of it..

Florida Rules of Civil Procedure 1.330

This submission respectfully proposes a rule change to expand the use of depositions at trial to include, in limited circumstances and with substantial procedural safeguards, depositions at which the adverse party was not present, represented, or noticed.

The Proposed Change

The following change is proposed to Florida Rules of Civil Procedure 1.330. A new section "b" should be inserted into Rule 1.330 reading as follows:

> (b) Additional Use of Depositions. At the trial or upon the hearing of a motion or in an interlocutory proceeding, any part or all of a deposition may be used against any party who was not present or represented at the taking of the deposition or who had did not have reasonable notice of it, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, in accordance with provisions (a)(1)-(6), provided that the court finds all of the following:
>
> (1) at least one participant in the deposition had opportunity and similar motive to develop the testimony by direct, cross or redirect examination;
>
> (2) the testimony is offered as evidence of material fact;

(3) the proponent of the testimony makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the testimony and the particulars of it, including the name and address of the deponent; and

(4) the interests of justice will best be served by the admission of the testimony into evidence.

[renumber subsequent sections]

Please see Attachment "A" hereto for a recital of the entire Rule 1.330 in its current form and Attachment "B" hereto for a recital of the entire Rule incorporating the proposed insertion.

The proposed change removes the blanket prohibition currently imposed by Rule 1.330 against the use of any deposition at which the adverse party was not present or represented. It would not, however, blindly permit the use of such a deposition. Instead, the change would provide a court discretion to permit the use of such depositions, consistent with the interests of justice, upon specific findings and with assurances of procedural safeguards to all parties.

Deleterious Impact of Current Rule to Be Remedied by Proposed Change

As presently constituted, Florida Rule of Civil Procedure 1.330 unnecessarily burdens both our state's private citizens and our governmental personnel, including law enforcement personnel, who by choice or duty participate as material fact witnesses in civil proceedings. With respect to private citizens, such burden discourages active and voluntary participation as witnesses in our judicial process, participation so vital to fair and complete fact-finding and adjudication. With respect to governmental personnel, such

burden wastes time and limited financial resources.

Further, section 1.330, as presently constituted, effects a disincentive to settlement, reduces settlement value, and prevents a fair adjudication of liabilities among responsible parties, in a broad variety of civil litigation contexts.

The proposed change would eliminate each of these deleterious effects of the rule, without impacting the rights of parties or the discretion already afforded our trial courts with respect to evidentiary determinations.

General Illustration of the Problem

Rule 1.330 restricts depositions that may be introduced in civil proceedings to those being used "against any party who was present or represented at the taking of the deposition or who had reasonable notice of it..." In the many civil litigation settings in which multiple lawsuits arise from a single event or course of conduct, this limitation has the undesirable and harmful impact cited above. While specific case scenarios are reviewed later in this submission, a brief general example here will illustrate the problem.

Hypothetically, a pedestrian witnesses a bus accident on a Florida street. The witness observes that the bus driver was forced to swerve off the road by a speeding unidentified vehicle, thereby indicating that the bus driver and bus company's negligence may be minimal or nil. The witness comes forth, provides his name and address and makes himself fully available to litigants when called upon. He is deposed as to his observations by parties to a lawsuit filed by one bus passenger against the bus company.

Under current Rule 1.330, in order for that pedestrian's observations to be

submitted to the finders of fact by the defendant bus company in each of the subsequent thirty lawsuits filed by passengers on the bus against the bus company, that individual must be fully examined a minimum of thirty times, at least once in the context of each of the thirty suits. Rule 1.330 effectively prohibits, even where justice and equity compel otherwise, the introduction of his deposition at any of the subsequent actions.

In this scenario, as in others to be covered later, there is no compelling reason why such witness' initial deposition should be prohibited from introduction in the subsequent actions, particularly if the adverse parties (in this case the plaintiff passengers) are assured the opportunity to notice his deposition prior to their respective trials, if they desire to do so.

Altering the scenario slightly, if the witness were a law enforcement investigator, the waste of resources caused by such repetitive testimony is apparent. Again altering the facts, if such witness were a defendant and potentially liable to the bus passenger plaintiff (for example the operator of an uninsured car that struck the bus) such person has little incentive to settle the cases since, regardless of such settlement, the bus company must still depose and subpoena him for trial to establish its appropriate share of liability in each of the thirty actions. Further, since such defendant will be forced to appear in every subsequent action irrespective of its settlement, the value to him of settling the actions is dramatically reduced. Finally, it is an unreasonable and undue burden upon the bus company to compel it to establish,and re-establish, the liability of the car operator simply to enable the bus company to obtain a just result at trial.

Advantages of the Change

The proposed change will:

- end abuse of material witnesses;
- eliminate the rule's disincentive to participation in our judicial system;
- curtail a significant waste of governmental resources;
- enhance the predictability of evidence prior to suit and in suit's early stages, leading to realistic early case evaluation and heightened early settlement likelihood;
- permit parties to effectively and cost efficiently prove liability shares of non-parties and settled parties consistent with Florida law;
    - terminate a single party's present ability, supported by rule 1.330, to abrogate an adverse party's ability to prove the liability of others by established testimony by eliminating those others from party status in a case via settlement or refusal to sue;
- increase the incentive to settle multiple suits arising from a single event or course of conduct;
- increase sums available for settlement which must now be reserved for repeated post settlement appearance and counsel fees;
- reduce cost of discovery and litigation for all parties, unless the

adversely affected party chooses to pursue new deposition and trial testimony from the deposed witness;

- assure non-prejudice by requiring that the court find similarity of motive to examine and notice sufficient to provide any party against whom the testimony is offered a fair opportunity to meet the evidence; and
- benefit plaintiffs and defendants in repetitive civil litigation contexts.

In contrast, no disadvantages are apparent. One potential argument is that introduction of such depositions is somehow contrary to a party's right to cross-examine and offer the live testimony of a witness to the finder of fact. That argument, however, would ignore the "similar motive" requirement and notice provisions, which ensure that following notice of another party's intention to offer the deposition, any party wishing to do so has an adequate opportunity to notice the deponent for deposition once again and to subpoena the witness for trial. The rule change simply means that repetitive live testimony is, under limited and specified circumstances, at the option of the court and the parties rather than at the compulsion of the Rule irrespective of applicable facts and circumstances.

The substantial procedural safeguards included in the proposed section "b" have not been newly crafted for purposes of this amendment. They are, instead, recitations directly from existing Florida and Federal evidence rules.

The requirement that the court find similar motive and opportunity between the

party against whom the testimony is offered and a party to the deposition, contained in proposal section (b)(1), incorporates language from Florida Evidence Rule 90.804 and Federal Evidence Rule 804. The requirement that the court find the evidence to be of material fact, and that its admission be in the interests of justice, contained in proposal sections (b)(2) and (b)(4) respectively, incorporate the language of Federal Evidence Rule 803(24). Finally, the requirement of adequate notice to the adverse party of the intention to use the deposition so as to enable the adverse party to meet it, contained in proposal section (b)(3), is likewise drawn directly from Federal Evidence Rule 803(24).

Spectrum of Litigation to Benefit from the Proposed Change

There are an unlimited number of case scenarios in which the proposed change would benefit litigants and the efficient administration of justice. In any instance in which multiple suits arise from a single event or single course of action, the potential benefit to both plaintiffs and defendants are apparent. The following are only some examples of the beneficial effect of the proposed change.

Groundwater Pollution Claims

Example 1: In a suit filed by a governmental agency for recovery of clean-up costs against a number of alleged polluters, the government's expert testifies at deposition as to his investigation of the history of the site and the open and notorious harmful behavior of its past occupants that contributed to the site's condition. With the proposed rule change, in a subsequent breach of contract suit by the current tenant against the current owner (not a party to the previous action) for failure to disclose the site's condition prior

to execution of the lease, the plaintiff tenant can offer the testimony of the investigator to attempt to establish knowledge of the contaminated conditions by the current owner. The defendant owner then has an opportunity, if he wishes to exercise it, in response to notice of the plaintiff's intention to offer the deposition, to notice such investigator for deposition and subpoena him for trial - an option the defendant may elect if he believes he can elicit different or more favorable testimony from the witness.

Example 2: Again in the environmental context, a homeowner files suit against a nearby supermarket, alleging that its underground storage tank has leaked and polluted the property on which the plaintiff's home is situated. Under the proposed rule change, either party would be able to offer at trial the deposition testimony elicited in a previous action, brought by the State against an industrial facility abutting the supermarket, as to the industrial facility's role in polluting the nearby property. If that testimony indicated the industrial facility to be the source of the same substance plaintiff now alleges has damaged his property, then the defendant supermarket may seek to offer the testimony. If, conversely, the prior testimony indicated the industrial facility to have been responsible for no pollution, or pollution of a type distinct from that which the homeowner is alleging, the plaintiff may seek to offer the testimony to establish that the supermarket, and not the nearby industrial site, is the source of the contamination. Again, whichever party chooses to offer the testimony, the adverse party is assured of the opportunity to meet it.

Motor Vehicle Negligence Claims

In addition to the "bus accident" scenario posited earlier, there are unlimited number of common motor vehicle accident fact patterns in which parties and the courts would benefit from the proposed rule change.

Example: Numerous suits arise from a four vehicle, chain reaction highway accident. In the accident, car 1 struck car 2, forcing car 2 into car 3, forcing car 3 into car 4.

The operator of car 4 sues the operator of the car 1, the operator she alleges is responsible for negligently and recklessly initiating the accident.

In the context of that suit, the police officer testifies that his investigation revealed that car 2 was operating at night without its lights and, as a result, could not be seen by the defendant. In subsequent actions, drivers and passengers in the cars allege negligence on the part of various drivers.

The proposed change to Rule 1.330 would provide that in the subsequent actions, parties could offer the deposition testimony of the police officer from the first action as evidence of the condition and role of car 2 in the accident, without repeatedly deposing the officer to elicit identical testimony. Again, under the proposed change, any adversely affected party may elect to depose and subpoena the officer, but there will no longer be the wasteful compulsion on all parties to do so.

Commercial Claims (Such As Failure to Timely Deliver Goods)

Example: A large number of individual retailers enter into contracts with a manufacturer of a particular item the retailers wish to offer for sale. The contracts call

for delivery to the retailer on or before a specified date, via a specified railroad, F.O.B. the manufacturer's factory. In anticipation of the shipments, the retailers spend significant sums on advertising and promotion timed to coincide with the delivery date. The goods are not delivered to the retailers on time, but are in fact delivered some two weeks later.

One of the retailers files suit against the manufacturer alleging breach of contract seeking advertising costs and lost revenue. In the action, the railroad used to transport the goods from manufacturers to retailers testifies at deposition that the manufacturer in fact delivered the goods to the railroad one month prior to the contract delivery date and that the delays were incurred thereafter and were due to unusual and unexpected weather over which the manufacturer had no control.

Under the proposed rule change, in each of the subsequent suits brought by other retailers, the manufacturer may offer the deposition testimony of the railroad to establish its own compliance with contract terms. Again, as always, introduction of such evidence is contingent upon specific findings by the court and the specified procedural safeguards.

Product Liability Claims - Mass Tort Context

Mass tort actions grounded in product liability are, by their very definition, a keen example of repetitive litigation arising from a limited course of conduct. In this setting, where as many as a hundred or more suits may be so intimately related, all the advantages of the rule change outlined above will be dramatically realized.

Example: Four companies manufactured allegedly harmful pesticides used in the state's citrus groves during a one year period. One hundred agricultural workers from a

number of different groves bring individual suits naming as defendants between one and four of those manufacturers which they believe manufactured the product to which they were exposed. The claims allege that the manufacturers affixed inadequate use directions to the pesticide resulting in harm to the plaintiffs.

In conjunction with the first suit by one worker against Manufacturer A, B and C, a pesticide wholesaler testifies at deposition that products of manufacturer A, B and D, but not those manufactured by C, were used at the White Grove. In another deposition, a corporate designee of Manufacturer A admits that its pesticides were used at the White Grove during the time in question.

In a subsequent suit filed by another worker from the White Grove against Manufacturers C and D, under the current rule, Defendant C may not introduce the testimony of the wholesaler as to the non-use of C's product at the grove. Under the proposed change, the Defendant could offer such testimony subject, of course, to the current plaintiff's right to notice the wholesaler's deposition. Also in that subsequent action, under the current rule, the plaintiff may not seek to introduce the testimony of the wholesaler in which he identified manufacturer D's pesticide as having been used at the grove. Under the proposed change, the plaintiff would be able to offer such previous testimony identifying manufacturer D's product subject, of course, to manufacturer D's right and opportunity to take the wholesaler's deposition anew.

Carrying this fact pattern a bit farther, in a subsequent (third) action, suit is filed by a third worker at the White Grove against only Manufacturers B and D. Under the current rule, in order for defendant D to prove that a share of responsibility is attributable

to manufacturer A, Defendant D is compelled to redepose A's corporate designee to elicit testimony identical to that already elicited in the first action. If one hundred - or one thousand - actions are filed against various manufacturers in relation to this pesticide use, in every single case involving the White Grove to which A is not a party at the time of trial (whether that be because A was not sued, was bankrupt and therefore no longer capable of being sued, or was sued but settled with the plaintiff prior to trial) all other defendants would be compelled to redepose A's corporate designee in each case to evidence the presence of A's pesticide and obtain a just result at trial.

In any mass tort context, whether it be asbestos or environmental pollution litigation, that is an untenable compulsion which, as a practical matter, materially interferes with a party's ability to evidence the fault or responsibility of non-parties for plaintiff's injuries. Under the proposed change, where A is not a party to the specific action, the defendants could offer the previously elicited testimony of A's designee subject, of course, to plaintiff's right to depose A anew for purposes of his or her specific trial.

Conclusion

The proposed rule change would make litigation more efficient and lessen its cost. It preserves the trial court's important role in ensuring that deposition testimony is used fairly. We respectfully urge prompt adoption of the proposed change to Rule 1.330.

Respectfully submitted,

ALAN BLOCK
DUNCAN MAIO
TUCKER, BIEGEL & GOLDSTEIN
150 Federal Street
Boston, Massachusetts 02110
(617) 951-0050

and

GEORGE N. MEROS, JR.
RUMBERGER, KIRK & CALDWELL, P.A.
106 East College Avenue, S-700
Tallahassee, Florida 32302
(904) 222-6550

Appendix

LAW OFFICES
DAN CYTRYN, P.A.
8100 NORTH UNIVERSITY DRIVE
SUITE 202
TAMARAC, FLORIDA 33321

DAN CYTRYN
Board Certified Civil Trial Lawyer
Trial Practice-Personal Injury
& Wrongful Death

TELEPHONE (954) 724-2000

BETH-HELEN WOLFE
JOHN C. CURRAN
BERNADENE A. RODRIGUEZ

August 27, 1996

John Wayne Hogan, Esquire
Chairman Civil Procedure Rules Committee
Blackstone Building
233 East Bay Street
Jacksonville, FL 32202

RE: George Meros' Proposal for Amendment to Rule 1.330
Florida Rules of Civil Procedure

Dear Wayne:

The subcommittee, with regard to the above proposed amendment, met on August 26, 1996. Present were myself, Robert H. Pritchard, Esquire, and C. Gerald Felder, Esquire.

The subcommittee decided, unanimously, to disapprove in concept the proposed amendment to Rule 1.330 set forth by George Meros, Jr. The subcommittee felt that, *inter alia*, the proposed rule would pose significant due process problems.

Should you have any further questions, please feel free to contact me.

Very truly yours,

Dan Cytryn, Esquire

DC:am

cc: Robert H. Pritchard, Esquire
C. Gerald Felder, Esquire
Ervin A. Gonzalez, Esquire
Tyrie Boyer, Esquire
John Romano, Esquire
The Honorable Murray Goldman
William C. Vam, Esquire

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Appendix

MINUTES OF THE CIVIL PROCEDURE

RULES COMMITTEE MEETING OF JUNE 27, 1997

The Civil Procedure Rules Committee of The Florida Bar held its meeting on June 27, 1997, at the Walt Disney World Dolphin, Orlando, Florida. Chairman Wayne Hogan called the meeting to order at 9:05 a.m.

Agenda Item I. - APPROVAL OF MINUTES. The minutes of the January 22, 1997, meeting of the Civil Procedure Rules Committee were approved without objection.

OLD BUSINESS

Agenda Item II. - B. - Drafting Subcommittee Report. Lori Terens, chairperson of the Drafting Subcommittee, reported the Drafting Subcommittee had considered three matters, the amendments to Rule 1.330(a), the Final Judgment of Replevin forms, and the Guidelines for Taxation With Costs.

At this time Ms. Terens moved for a final approval of Rule 1.330(a), as set forth below:

> [Proposed Amendment to Rule 1.330(a), Florida Rules of Civil Procedure:]
>
> Rule 1.330 - USE OF DEPOSITIONS IN COURT PROCEEDINGS
>
> (a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition may be used against any party who 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 were then present and testifying in accordance with any of the following provisions:
>
> (1) Any deposition may be used by any party 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.
>
> (2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent or a person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a public or private corporation, a partnership or association, or a governmental agency that is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that 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 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 witnesses orally in open court, to allow the deposition to be used; or (F) the witness is an expert or skilled witness.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the party to introduce any other part that in fairness ought to be considered with the part introduced, and any party may introduce any other parts.

(5) Substitution of parties pursuant to rule 1.260 does not affect the right to use depositions previously taken and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken for it.

(6) If a civil action is afterward brought, all depositions lawfully taken in a medical liability mediation proceeding may be used in the civil action as if originally taken for it.

(b) Objections to Admissibility. [No change]

(c) Effect of Taking or Using Depositions. [No change]

(d) Effect of Errors and Irregularities. [No change]

[Proposed Committee Note For Amendment to Rule 1.330(a):]

19 Amendment. The language added to (a)(1) is included in accordance with the 1980 amendment to Rule 32 of the Federal Rules of Civil Procedure. § 90.801(2)(a), Florida Statutes permits a prior inconsistent statement of a witness in a deposition to be used as substantive evidence. § 90.803(18), Florida Statutes makes the statement of an agent or servant admissible against the principal under the circumstances described in the statute. This language was added to clarify (a)(1).

[Rationale - Rule 1.330(a), Florida Rules of Civil Procedure]

Given the text of the Florida Evidence Code, § 90.803(18), it is clearly the intent that a prior statement of an agent under the

circumstances set forth in (18) should be treated as an admission, allowing the use at trial of a deposition or any portion thereof constituting an admission within the meaning of § 90-803(18), Florida Statutes.

The motion was seconded and carried twenty-eight in favor, zero opposed.

Next Ms. Terens moved for final approval of Form 1.995, Final Judgment of Replevin, as set forth below.

FORM 1.995. FINAL JUDGMENT OF REPLEVIN

(a) **Judgment in Favor of Plaintiff when Plaintiff Has Possession.**

FINAL JUDGMENT OF REPLEVIN

This matter was heard on plaintiff's complaint. On the evidence presented

IT IS ADJUDGED that:

1. Plaintiff has the right against defendant to retain possession of the following described property:

[list the property and include a value for each item]

2. Plaintiff shall recover from defendant the sum of $____ as damages for the detention of the property and the sum of $_____ as costs, making a total of $_____, which shall bear interest at the rate of ___% a year, for which let execution issue.

ORDERED at _____, Florida, on ___(date)___

_____
Judge

NOTE: This form applies when the plaintiff has recovered possession under a writ of replevin and prevailed on the merits. Pursuant to section 78.18, Florida Statutes (1995), paragraph 2 of the form provides that the plaintiff can also recover damages for the wrongful taking and detention of the property, together with costs. Generally these damages are awarded in the form of interest unless loss of use can be proven. Ocala Foundry & Machine Works v. Lester, 49 Fla. 199, 38 So. 51 (1905).

If the defendant has possession of part of the property, see form 1.995(b).

(b) **Judgment in Favor of Plaintiff when Defendant Has Possession.**

FINAL JUDGMENT OF REPLEVIN

This matter was heard on plaintiff's complaint. On the evidence presented

IT IS ADJUDGED that:

1. Plaintiff has the right against defendant to possession of the following described property:

[list the property and include a value for each item]

for which the clerk of the court shall issue a writ of possession; or

2. Plaintiff shall recover from defendant [if applicable add "and surety on the forthcoming bond"] the sum of $_____ for the value of the property, which shall bear interest at the rate of ___% per year, for which let execution issue.

3. Plaintiff shall recover from defendant the sum of $_____ as damages for the detention of the property and the sum of $_____ as costs, making a total of $_____, which shall bear interest at the rate of ___% a year, for which let execution issue.

ORDERED at _____, Florida, on ___(date)____.

_____
Judge

NOTE: This form applies when the plaintiff prevails on the merits and the defendant retains possession of the property. Section 78.19, Florida Statutes (1995), allows the plaintiff to recover the property or its value or the value of the plaintiff's lien or special interest. The value for purposes of paragraph 2 is either the value of the property or the value of the plaintiff's lien or special interest.

Paragraph 3 of the form provides for damages for detention only against the defendant because the defendant's surety obligates itself only to ensure forthcoming of the property, not damages for its detention.

Pursuant to section 78.19(2), Florida Statutes, paragraphs 1 and 2 of the form provide the plaintiff the option of obtaining either a writ of possession or execution against the defendant and defendant's surety on a money judgment for property not recovered. Demetree v. Stramondo, 621 So. 2d 740 (Fla. 5th DCA 1993). If the plaintiff elects the writ of possession for the property and the sheriff is unable to find it or part of it, the Plaintiff may immediately have execution against the

defendant for the whole amount recovered or the amount less the value of the property found by the sheriff. If the plaintiff elects execution for the whole amount, the officer shall release all property taken under the writ.

If the plaintiff has possession of part of the property, see form 1.995(a).

(c) **Judgment in Favor of Defendant when Defendant Has Possession under Forthcoming Bond.**

FINAL JUDGMENT OF REPLEVIN

This matter was heard on plaintiff's complaint. On the evidence presented

IT IS ADJUDGED that:

1. Defendant has the right against plaintiff to possession of the following described property:

[list the property and include a value for each item]

2. Defendant retook possession of all or part of the property under a forthcoming bond, and defendant's attorney has reasonably expended ___ hours in representing defendant in this action and $___ is a reasonable hourly rate for the services.

3. Defendant shall recover from plaintiff the sum of $_____ for the wrongful taking of the property, costs in the sum of $_____, and attorneys' fees in the sum of $_____, making a total of $_____, which shall bear interest at the rate of _____% a year, for which let execution issue.

ORDERED at _____, Florida, ____(date)____

_____
Judge

NOTE: This form applies when the defendant prevails and the property was retained by or redelivered to the defendant. Section 78.20, Florida Statutes (1995), provides for an award of attorneys' fees. The prevailing defendant may be awarded possession, damages, if any, for the taking of the property, costs, and attorneys' fees.

If the plaintiff has possession of part of the property, see form 1.995(d).

(d) **Judgment in Favor of Defendant When Plaintiff Has Possession.**

FINAL JUDGMENT OF REPLEVIN

This matter was heard on plaintiff's complaint. On the evidence presented

IT IS ADJUDGED that:

1. Defendant has the right against plaintiff to recover possession of the following described property:

[list the property and include a value for each item]

for which the clerk of the court shall issue a writ of possession; or

2. Defendant shall recover from plaintiff [if applicable add "and surety on plaintiff's bond"] the sum of $_____ for the value of the property, which shall bear interest at the rate of __% a year, for which let execution issue.

3. Defendant shall recover from plaintiff the sum of $___ as damages for detention of the property and the sum of $_____ as costs, making a total of $_____, which shall bear interest at the rate of ___% a year, for which let execution issue.

ORDERED at _____, Florida, on ___(date)___

_____
Judge

NOTE: This form should be used when the defendant prevails but the plaintiff has possession of the property. Section 78.21, Florida Statutes (1995), does not provide for an award of attorneys' fees when the defendant prevails and possession had been temporarily retaken by the plaintiff. Sections 78.21 and 78.19 allow the defendant to recover the property or its value or the value of the defendant's special interest.

Paragraphs 1 and 2 of the form provide to the defendant the option of obtaining either a writ of possession or execution against the plaintiff and plaintiff's surety on a money judgment for property not recovered and costs. Demetree v. Stramondo, 621 So. 2d 740 (Fla. 5th DCA 1993). If the defendant elects the writ of possession for the property and the sheriff is unable to find it or part of it, the defendant may immediately have execution against the plaintiff and surety for the whole amount recovered or the amount less the value of the property found by the sheriff. If the defendant elects execution for the whole amount, the officer shall release all property taken under the writ.

If the defendant has possession of part of the property, see form 1.995(c).

The motion was seconded and the vote to approve in final form carried twenty-seven in favor, zero against. Ms. Terens at this point advised the chair the Rules of Civil Procedure Committee should consider whether to address the need for a form concerning interest on judgments.

Finally, concerning the Guidelines for Taxation of Costs, the Drafting Subcommittee reported they had no final product and suggested the subcommittee on the Taxation of Costs re-examine this matter. W. C. Gentry moved to remand this issue to the subcommittee on Taxation of Costs and let the subcommittee act as a Drafting Committee for the final product for the Guidelines for Taxation of Costs. The motion was seconded and carried twenty-eight in favor, one opposed.

Agenda Item II. - C. - Rule 1.061 - Choice of Forum. This matter was continued until the next committee meeting.

Agenda Item II. - D. - Mediation Issues. This matter was continued until the next meeting of the Rules of Civil Procedure Committee.

Agenda Item II. - E. - Expert Witness Disclosure (Rule 1.220). This matter was continued until the next meeting of the Rules of Civil Procedure Committee.

Agenda Item II. - F. - Amendment of 120-day Service Rule (Rule 1.070(j)). Marjorie Gadarian Graham reported the subcommittee had voted five to three in favor of changing Rule 1.070(1). Marjorie Gadarian Graham moved in concept to make a change to Rule 1.070 concerning whether matters should be dismissed when service has not been had within 120 days. Bob Gaines was opposed to any change of the rule and believed the present rule provided for an extension of the 120 days for good cause shown. W. C. Gentry suggested the rule be changed to permit good cause or excusable neglect. At this time a vote was taken on the motion by Ms. Gadarian Graham and the motion carried twenty-seven in favor, eighteen against. The

subcommittee was instructed to consider putting together a rule and presenting it to the committee.

Agenda Item II. - G. - Testimony of Children or Persons with Disabilities. Samuel G. Crosby, chairman of the subcommittee on this matter, reported he does not believe there needs to be any amendment since no real problem actually exists in this matter and, therefore, there is nothing to be addressed. There was no motion to adopt anything in concept and this issue has been rejected.

Agenda Item II. - H. - Rule 1.330. This matter was before the committee as a result of a letter received from George Meros, Jr. Mr. Dan Cytryn moved to reject in concept any change to Rule 1.330, which would permit additional use of depositions in matters in which that deposition was not taken. A motion was made to table this matter until the next meeting which motion was seconded. The motion to table failed thirty-five against, seven in favor. At this time a second was made to the motion to reject in concept. A vote was had on the same with forty-four voting in the affirmative, zero voting in the negative, and one abstaining.

Barry Richards made a motion to appoint a committee to review our internal rules so as to permit non-committee members to appear before the committee and to submit proposals before the committee. Mr. Richards' motion was seconded, and carried thirty-four in favor, zero against. A subcommittee is to be appointed by the incoming chairperson.

NEW BUSINESS

Agenda Item III. - I. - Post-Judgment Motions for Attorney's Fees. Mr. Gaines stated a subcommittee should be appointed to address the rules setting forth a time to file a motion for attorney's fees and court costs after the entry of a final judgment. Mr. Gaines' motion was seconded and carried thirty in favor, four against. Incoming chairperson Jessie Faerber is to appoint the subcommittee.

Agenda Item III. - J. - Rule 1.070. This matter was before the committee as a result of a letter from Karla T. Torpy. The committee felt the rule already addressed this issue and, therefore, no motion was made to consider the same and the same was rejected.

Agenda Item III. - K. - Rule 1.140(b). This matter is before the committee pursuant to a letter from Paul M. Bunge. It was the committee's consensus that no problem was detected as a result of this inquiry and, therefore, this matter was rejected.

Agenda Item III. - L. - Proposed Rules for Certification and Regulation of Court Reporters. Bruce Berman reported the Honorable Peter Webster had requested the Rules of Civil Procedure Committee to review the Rules for Certification and Regulation of Court Reporters to determine whether anything in our rules would need to be altered or changed as a result of the proposed Rules for Certification and Regulation of Court Reporters. It was the committee's consensus that Rule 1.330(d)(2) may be the only rule that could possibly come into play with regard to the proposed Rules for Certification and Regulation of Court Reporters. It was decided the incoming chair would appoint a subcommittee to consider the use of qualified court reporters in conjunction with our Rules of Civil Procedure and to address the Rules for Certification and Regulation of Court Reporters.

Agenda Item III. - M. - 4-Year Cycle Report/Proposed Rule Change Not Adopted by the Supreme Court (Rule 1.280 - Protective Orders). This matter was before the committee pursuant to the request of Sandy Solomon concerning our purported change in Rule 1.280(d) as it pertains to protective orders and whether or not this had been considered in the 4-year cycle. Mr. Gentry indicated we were unable to get the purported change to 1.280(d) out of the Drafting Committee and into the 4-year cycle. Mr. Gaines made a motion to table this matter until the next

meeting. The motion was seconded and carried twenty-seven in favor, eight opposed.

Agenda Item III. - N. - Adaptation of Rule 7.221, Hearing in Aid of Execution (a) Use of Form 7.343. Judge Karl Grube presented to the committee a proposed Form 7.343 to be used concerning hearings in aid of execution. A motion was made to take this matter up in concept. The motion was seconded and passed unanimously and Judge Grube is to chair the same.

Agenda Item III. - O. - Post-Trial Motions Attacking Jurors. It was decided by the chairman to appoint a subcommittee to consider the same and Stuart Singer was appointed as chairman of that subcommittee.

There being no further business to come before the committee, the meeting was adjourned.

Respectfully submitted,

Phillip J. Jones

Appendix

EXHIBIT 16

Pedro J. Martinez-Fraga
379-0595

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.

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(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

STATE OF FLORIDA

Office of the Governor

THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

LAWTON CHILES
GOVERNOR

May 29, 1997

97 MAY 29 PM 5:53
[illegible]
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