IN THE SUPREME COURT OF FLORIDA

CASE NO.:

IN RE: AMENDMENTS TO THE
FLORIDA RULES OF EVIDENCE
_____/

REPORT OF THE FLORIDA BAR
CODE AND RULES OF EVIDENCE COMMITTEE

Ronald Rosengarten, Chair of the Code and Rules of Evidence Committee, and John F. Harkness, Jr., Executive Director of The Florida Bar, file this four-year-cycle report with the court under the direction and approval (by vote of 33-0-0) of The Florida Bar Board of Governors. This matter is within the exclusive jurisdiction of the Supreme Court of Florida under Article V, Section 2(a), Florida Constitution.

The Supreme Court of Florida adopted the Florida Evidence Code as its rules of evidence insofar as it deals with procedural matters in *In re Florida Evidence Code*, 372 So. 2d 1369 (Fla. 1979), as clarified by *In re Florida Evidence Code*, 376 So. 2d 1161 (Fla. 1979). Thereafter, in 1981, the Florida Legislature amended certain statutory provisions of the Code. These statutory amendments were adopted as amended rules of evidence by the Supreme Court of Florida in *The Florida Bar Re: Amendment of Florida Evidence Code*, 404 So. 2d 743 (Fla. 1981). In 1985, the Florida Legislature again amended the Code and the Court adopted the amendment in *In re Amendment of Florida Evidence Code*, 497 So. 2d 239 (Fla. 1986). In 1993, the Court adopted various other statutory amendments passed by the Florida Legislature between 1981 and 1993 in *In re: Florida Evidence Code*, 638 So. 2d 920 (Fla. 1993). In 1996, the Court again adopted various statutory amendments passed by the Florida Legislature between 1994 and 1995 in *In re: Florida Evidence Code*, 675 So. 2d 584 (Fla. 1996).

The Florida Legislature since has further amended the Code of Evidence in bills identified as Chapters 96-215, §8; 96-330, §2; 96-409, §2; 98-2, §1; 98-48, §1; 98-403, §127; 99-2 §§27–29; 99-8, §§5–6; and 99-225, §13, Laws of Florida. The Florida Supreme Court, however, has not adopted these Evidence Code amendments to the extent that they are procedural in nature.

The Code and Rules of Evidence Committee has met on a regularly scheduled basis during the past four years and, through the work of the full committee, has approved and made recommendations for adoption of certain of these provisions of the Evidence Code as Florida Rules of Evidence as shown below. The committee recommends that:

1. Chapters 96-215, §8; 96-330, §2; 96-409, §2; 98-48, §1; 98-403, §127; 99-2, §§27–29; 99-8, §§5–6; and 99-225, §13, Laws of Florida, be adopted as Florida Rules of Evidence.

2. Chapter 98-2, §1, Laws of Florida (*F.S.* 90.803(22) of the Evidence Code) not be adopted for the following reasons:

a) Until recently, *Fla.R.Civ.P.* 1.330 provided safeguards against *F.S.* 90.803(22). However, the latest amendment to *Fla. R. Civ. P.* 1.330, coupled with the enactment of an amended *F.S.* 90.803(22), overriding the Governor's veto, has eviscerated the protection and limitations previously governing *F.S.* 90.803(22).

b) This novel hearsay exception precludes a fact finder from evaluating a witness's demeanor and thereby hampers a comprehensive evaluation of the witness's 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).

c) The new amendment 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 because there is no case law or other guidepost that articulates with any specificity the circumstances under which a non-party may meet the "person with similar interests" standard.

d) The amendment is little more than a transparent effort to transpose *F.S.* 90.804(2)(a) to *F.S.* 90.803, while stripping it of the "unavailability" requirement.

e) The legislation will measurably shift current expense burdens relating to the introduction of evidence. Presently, a proponent seeking to admit evidence assumes the expense associated with that effort. Under the new amendment, however, that expense will 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 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 whom the testimony is offered will probably have to call the actual witness adverse in order to challenge the prior testimony. In this connection, the amendment will tend to increase litigation costs.

f) The new provision inevitably will add to the length of trial proceedings. The amendment will 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. (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.)

The Code and Rules of Evidence Committee and The Florida Bar thus respectfully request that the court adopt the amendments in the listed bills (with the above-noted exception) as amendments to the Supreme Court's Rules of Evidence to the extent that they concern court procedure, and to declare the adoption of the amendments retroactively effective to the dates when the bills took effect as law. Adoption of these amendments will bring the statutory code and court rules into agreement as to these provisions. Doing so will avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive.

Respectfully submitted,

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