

IN THE SUPREME COURT OF FLORIDA

CASE NO.:

IN RE: AMENDMENTS TO THE  
FLORIDA RULES OF EVIDENCE

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**REPORT OF THE FLORIDA BAR  
CODE AND RULES OF EVIDENCE COMMITTEE**

Vincent W. Howard, Jr., Chair of the Code and Rules of Evidence Committee, and John F. Harkness, Jr., Executive Director of The Florida Bar, file this two-year-cycle report with the court under the direction and approval (37-0) 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 In 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). In 2000, the court adopted certain statutory amendments passed by the Florida Legislature between 1996 and 1999 in *In re Amendments to the Florida Evidence Code*, 782 So. 2d 339 (Fla. 2000).

The Florida Legislature since has further amended the Code of Evidence in bills identified as Chapters 2000-316, §§1–2; 2001-132, §1; and 2001-221, §1, 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 two 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 2000-316, §1 and 2001-132, §1, Laws of Florida, be adopted as Florida Rules of Evidence. (The committee vote on whether to recommend adoption of 2000-316, §1 as a rule was 26 in favor, 0 against; the vote on 2001-132, §1 was 25-1.)

2. Chapter 2000-316, §2, Laws of Florida, be adopted as a Florida Rule of Evidence, although the Code and Rules of Evidence Committee opposed this legislation, feeling that it was redundant to the existing requirements of section 90.612(1)(c), Florida Statutes. (The committee vote on whether to recommend adoption of 2000-316, §2 as a rule was 26 in favor, 0 against; the vote on whether to add the above comment regarding the committee’s opposition to the legislation was 15 in favor, 10 against.)

3. Chapter 2001-221, §1, Laws of Florida (*F.S.* 90.404(2) of the Evidence Code) not be adopted for the following reasons:

- a) The proposed legislation would allow (and apparently mandate) admission of prior acts of “child molestation” in criminal cases in which the defendant is charged with an act of “child molestation.” This is a general order to the trial judges to admit what, in many cases, will be propensity evidence (that is, if a person did it before, he or she must have done it this time). The preamble to the legislation asserts that such testimony or evidence is necessary to corroborate the victim’s testimony, but unless the facts are similar or the victim is the same, the effect

of such evidence would be to show propensity rather than to “corroborate” any testimony of another witness. This use of similar fact evidence to show propensity is specifically forbidden by section 90.404(2)(a), Florida Statutes. Therefore, the proposed legislation creates an implicit exception to, and is in conflict with, established statutory and case authority regarding use of propensity evidence for a specific class of offense.

- b) The preamble to the proposed legislation includes findings that concern relevance, probative value, and prejudicial effect, which are not historically or realistically within the legislative purview. These areas are within the judicial realm, and a trial judge should not be ordered by legislative *fiat* to admit evidence that may not be relevant, or that may be overly prejudicial. The proposed legislation violates the historic and constitutionally mandated separation of legislative and judicial power. The finding that the evidence that an accused has molested children at other times may be relevant to corroborate the victim’s testimony cannot be logically read or interpreted in any manner except to show propensity of the accused to commit the offense.
- c) The staff analysis states that it is “very difficult” for prosecutors to “prove” cases of child sexual abuse, due to the lack of physical evidence, and that “evidence that a defendant has also sexually abused other children at other times can be a powerful tool to assist juries in weighing the credibility of child victims.” (March 16, 2001 staff analysis, Committee on Judicial Oversight, Section II B) (e.s). The staff analysis admits that “knowledge that a defendant has sexually assaulted other children can be a deciding factor in the mind of a juror.” *Id.* The trial of a criminal case, especially one involving a felony charge, is not a game where the legislature or the court should try to make it more (or less) difficult for the prosecutor to carry out his or her constitutionally and ethically mandated duty of proving, if they can, the guilt of the accused for the crime with which the accused stands charged, or to intrude upon the

constitutional presumption of innocence and the necessity of proof beyond a reasonable doubt, both of which protect the defendant. Many false accusations can be made, and this is the type of offense that is also “very difficult” to defend. The difficulty of the prosecution or defense of a case is not a valid, proper, or constitutionally sound reason to attempt to tilt the balance in favor of one side or the other.

- d) The proposed legislation apparently mandates admissibility of such evidence, and then says that such evidence “may be considered for its bearing on any matter to which it is relevant.” This effectively places the evidence before the trier of fact and then requires a trial judge to fashion and deliver a curative instruction if the evidence is not relevant. Any attorney or judge, speaking with candor, will acknowledge that such instructions are generally ineffective. *F.S.* 90.104(2) requires that “[i]n cases tried before a jury, a court shall conduct proceedings, to the maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means.” The proposed legislation is in direct conflict with this longstanding mandate of judicial function and responsibility. While the staff analysis of the Committee on Judicial Oversight cites commentary dicta from the First District Court of Appeals to the effect that a determination of sufficient similarity is a difficult and unenviable task, trial judges are called upon to make such determinations in all manner of cases, both civil and criminal. This is the reason for educated and circumspect judges. (As a note, in the case cited in the staff analysis, *Rowland v. State*, 680 So. 2d 502, 504 (Fla. 1st DCA 1996), the trial court determined the evidence to be admissible after a consideration of the similarity, and “made the required determination in this case. He found the required similarity necessary to admit the evidence.” The defendant’s conviction was affirmed.)

- e) The Code and Rules of Evidence Committee initially opposed this legislation, feeling that it created internal conflicts and was clearly designed to introduce propensity evidence before the trier of fact. Later, when the committee debated what recommendation to make to the court regarding adoption of this statute as a rule, a few committee members voiced concern that despite the committee's objection to the law, 1) there is a federal law similar to the legislation as passed, and 2) the law is more substantive in nature than procedural, providing insufficient ground for the court to decline to adopt it, especially in light of the court's power to adopt only "to the extent the law is deemed procedural." Yet, this was a minority of the committee. The majority of the committee believes that the inherent conflicts created between the proposed legislation and sections 90.104(2), 90.404(1), and 90.404(2)(a), Florida Statutes, are sound and sufficient reason for this court to decline adoption of Chapter 2000-221, Laws of Florida as a rule of court. The committee vote was 16 for opposing adoption of the law as a rule, 7 in favor of adoption, and 2 abstaining.

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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## SUMMARY OF BILLS CONTAINED IN REPORT

<u>SESSION LAW</u>	<u>STATUTE</u>	<u>SUMMARY OF CHANGE</u>
<b>2000-316, §1</b>	<b>§90.502(6)</b>	Created a law providing that a discussion or activity that is not a meeting for the purposes of <i>F.S.</i> 286.011 is not to be construed to waive the attorney-client privilege established under <i>F.S.</i> 90.502, but providing that the provision is not to be construed to constitute an exemption to either <i>F.S.</i> 119.07 or <i>F.S.</i> 286.011. ( <i>F.S.</i> 286.011 generally provides that meetings of a state, county, municipal corporation, or political subdivision at which official acts are to be taken are public meetings open to the public at all times. <i>F.S.</i> 119.07 generally provides for inspection, examination, and duplication of public records.)
<b>2000-316, §2</b>	<b>§90.612</b>	Amended law to instruct the judge to take “special care” to protect a witness under age 14 from questions that are in a form that cannot reasonably be understood by a person of the age and understanding of the witness, and to restrict the unnecessary repetition of questions.
<b>2001-132, §1</b>	<b>§90.4026</b>	Created a law providing that portions of statements, writings, or “benevolent gestures” expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to the person or to the person’s family will not be admissible as evidence in a civil action, but providing that a statement of fault made as a part of or in addition to such statements, writings, or benevolent gestures will be admissible.
<b>2001-221, §1</b>	<b>§90.404(2)</b>	Amended provision to allow admission of evidence of other crimes, wrongs, or acts of “child molestation” when a defendant is charged with a crime involving “child molestation.”